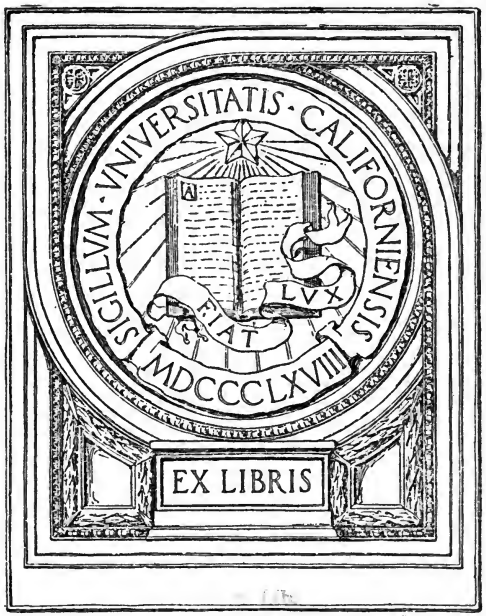
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OUTLINE OF THE LAW OF LANDLORD AND TENANT

OUTLINE OF THE LAW OF LANDLORD AND TENANT

SIX LECTURES

DELIVERED AT THE REQUEST OF THE COUNCIL OF LEGAL EDUCATION

BY

EDGAR FOA

OF THE INNER TEMPLE, BARRISTER-AT-LAW

THIRD EDITION

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PREFACE TO THE THIRD EDITION

Another edition of this little work having been called for, I have again taken the opportunity of making a few slight emendations which have been suggested by further experience.

I have endeavoured to bring the book down to date by including the most important of the recent statutes and decisions; and some of them have necessitated considerable changes in the text. But, as I need scarcely say, there is no room, in a mere outline such as this, for any reference to Emergency Legislation.

I may repeat here, *mutatis mutandis*, what I said in the Preface to the last edition, that to avoid the separation of the added from the original matter, and to preserve continuity in the narrative, I have permitted myself the fiction that the delivery of the lectures took place in the present year instead of fourteen years ago.

E. F.

Temple,
Christmas, 1920.

PREFACE

THE following lectures, delivered at the instance of the Council of Legal Education in Hilary Term of the present year, are now published at the request of various persons, including some of those who attended them, and others who were unable to do so. I hold strongly the opinion that lectures, in order to be in any degree efficacious, should be spoken and not read to their hearers. Accordingly those making the present little book were delivered from notes only, and are now published from the transcript of a shorthand writer, with such an amount of general revision and correction as is necessary before work of the kind can ever deserve preservation in a more permanent form. It is hoped that their publication may be of some slight use, if only to those who lack the opportunity of making a more detailed study of the subject to which they relate.

E. F.

TEMPLE,
May, 1906.

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OUTLINE OF THE LAW OF

LANDLORD AND TENANT.

LECTURE I

GENTLEMEN,—The law of landlord and tenant covers, as I need hardly remind you, a very wide field. Like other branches of the law of real property, it belongs to the oldest part of our legal system, and its beginnings may fairly be said to have been lost in the mists of antiquity. On the other hand, of course, it has had to keep pace with modern requirements. Everybody, or nearly everybody, is either a landlord or a tenant, and sometimes both: and scarcely a day passes in which some fresh addition is not made to this portion of our legal fabric. Under these circumstances, the scope of the subject is necessarily an extensive one, and you will not be surprised when I say that within the compass of a few short lectures it will be a matter of impossibility for me to travel over the whole ground. All I can do is to try and expound to you a few of the leading principles of the subject. I can offer you but a sketch in the merest outline, and I must leave it to you to fill in the details of the picture afterwards.

With regard to the statutory law relating to the matter, there is one point of historic interest which suggests itself at the outset to the most casual observer,

If you take the whole field of our legal narrative, say from the days of Magna Charta down to our own times, it divides itself as regards this matter into two periods, which are in striking contrast with one another. During the first and by far the longest of these periods, the marked characteristic is that almost every Act of Parliament on the subject we have in hand is an Act passed for the benefit of landlords. I am not saying that you will never find a statute which does not in some sense benefit the tenant. Even as far back, for instance, as the statute of Marlebridge in the thirteenth century, we find it solemnly declared that distresses for rent are not to be excessive in amount. But Acts of this kind, almost uniformly, are only declaratory of the common law. Whenever any alteration is made in the existing law, you will almost invariably find that it is one enuring to the advantage of the landlord. But when this country became a democracy for the first time by the passing of the great Reform Bill, a complete change came over the scene, and from about the middle of the last century it would, I think, be difficult to place one's finger upon an Act, the immediate object and operation of which have not been to benefit the tenant.

Now, it is always best to try and see, at the outset of a discussion like this, that we have an exact notion of what it is that we are going to talk about. You are, of course, all familiar with the distinction between real and personal property, and you probably also know this, that while you can have absolute property in a horse or a picture—while you can have it, as the children say, "for your very own,"—the same thing does not apply to land. When the land in the kingdom was parcelled out after the Norman Conquest, the

arrangement was made that all of it should be held, mediately or immediately, of the Crown; and the result of that is that actual ownership of the land is not in point of law admitted at all. The most you can have in it is what is called a tenancy. But I am going to use the word in these lectures in a much more restricted sense than that. There are, as you know, freehold tenancies and leasehold tenancies, and as you also know, the disposition of the interest in land on the death of the owner (using the word in the popular sense) is, or until quite lately was, altogether different in the two cases. The executors of the deceased owner—at least before the passing of the Land Transfer Act of 1897—had nothing to do with his freehold interests at all. These include tenancies in fee simple, tenancies in tail, and tenancies for life, and of them I do not propose to speak here. I am only going to deal with the interests of the other kind,—those known as leasehold or chattel interests, that is to say, terms of years; and whenever a person having some interest in land—I don't care what interest *he* possesses, it may be either freehold or leasehold—parts with a portion of it for a chattel interest, reserving to himself something which the law calls a reversion, then the relation of landlord and tenant, which I propose to treat of in these lectures, comes into existence.

These chattel interests or tenancies for years are of two principal kinds. There are, first of all, those which endure for a fixed period and come to an end when that period has run out, though they may be defeated earlier by force of what is called a "limitation," that is to say, by the happening of some stipulated event. In either case (as I will explain more fully hereafter), they end automatically and of their own

accord: there is no act to be done by either of the parties to make them terminate. Contrast with this the other kind of tenancy,—generally known as a "periodic" tenancy. The commonest instance of this is the tenancy from year to year, though there are others, like quarterly and weekly tenancies. The tenancy here goes on,—it is not a fresh letting at the end of each period, but it goes on from period to period, until some act is done by one party or the other, or both, to end it.

Now a word about two kinds of tenancy of less frequency. The first is the tenancy at will. Express tenancies at will are not often created in our days, but implied ones are still of some importance. For whenever a person occupies the land of another with his permission, and nothing more appears, the law presumes that the holding is a tenancy at will. But that tenancy readily gives way, on the payment of rent, as I shall explain to you presently, to a tenancy of another kind,—one from year to year. A tenancy at will is a tenancy which ends at once by the mere will of either party: and if nothing more is said in the contract than that the letting is to be at the will of one party, the law implies that it is at the will of both. But that is not the case where some other term or period is mentioned. A tenancy from A to B for a given number of years, for instance, determinable at the will of A, is not determinable at the will of B, and is therefore not a tenancy at will. Secondly, as to so-called tenancies at sufferance. Suppose you hold land on a lease and the lease expires, and you do not go out of possession, circumstances may then arise of three different kinds. The landlord may dissent from your remaining in possession, in which case you become

a trespasser. Or he may assent, in which case, as I have already said, you become (without more) a tenant at will. But there may be a third case, where there is neither assent nor dissent; and this is called a tenancy at sufferance. Every tenancy, of course, is founded upon contract; and every contract is necessarily founded on consent. But immediately the parties consent, you get here, as I have just said, a tenancy at will. You thus see that a tenancy at sufferance cannot be founded on contract, and is therefore not a real tenancy at all, but is a mere legal fiction, designed to prevent an act from being called a trespass until the person against whom it is committed has chosen to signify his displeasure.

The next point to consider is, what are the characteristics of a tenancy. How do you know a tenancy when you find one? How do you distinguish it from something that resembles it without amounting to a tenancy? The characteristics of a tenancy are two. In the first place, you must have legal possession of the land which is the subject of the contract, and in the next, that possession must be one of an "exclusive" nature. First of all as to the legal possession. You know very well you may have the physical possession or custody of a chattel without having what the law calls possession at all. If, for instance, I give my watch to a servant to take to a jeweller's for the purpose of being repaired, of course he gets the physical possession of it, but during the whole time it is entrusted to him I still retain its legal possession. So if I have an estate and employ a person as my gamekeeper, and require him for the better performance of his duties to reside in a cottage on it, he

does not get the legal possession of the cottage. That possession remains in me. In other words there is no tenancy of the cottage in the proper sense at all. The point is an important one in more respects than one. Among the results that follow from it is this,—that no title can be gained against me under the Statute of Limitations, even if the cottage should be held for a great number of years without any payment of rent. Legal possession is, therefore, the first characteristic of all real tenancies. Further, the possession granted must be an exclusive possession, there must be a power and an intention to hold the premises which are the subject of the grant to the exclusion of the person from whom they are held; otherwise the holding is what the law terms only a licence, by which you get no estate or interest in the land at all. It is often very difficult to distinguish a holding of this kind from a real tenancy. The decisive test always is this,—Does the owner retain control over the premises or not? But the difficulty arises in its application to particular circumstances. Only a few years ago there was a case on the subject which was taken right up to the House of Lords. It related to the letting of the refreshment bars of a theatre, and it was decided that such letting amounted to a licence only (though the instrument by which it was effected bore the closest resemblance to an ordinary lease), because it sufficiently appeared that the control in question was reserved by that instrument to the owners of the property.

Another relation that has given rise to much difficulty of the same kind is that of landlord and lodger, and here again I can refer you to a recent authority (*Kent* v. *Fittall*, [1906] 1 K. B.). You will find a very lucid exposition, which you ought to study, of the principles

of the subject, in the judgments of the Court of Appeal. In that case there were some tenement houses all the occupiers of which had keys of the outer door of the building, so that they had full and unrestricted power of ingress and egress; and that was naturally deemed an important factor in the case. The matter came first before a Divisional Court, which was unanimously of opinion that the letting amounted to no more than a licence. A week or two later it came before the Court of Appeal, all the members of which took exactly the opposite view. You will, therefore, be disposed to agree with me when I said just now that the question is one of some difficulty.

One word more with regard to the letting of lodgings in the most ordinary manner, that is to say, where a person lives in the house of another, and with him, and has "attendance" provided from his servants. Now, in this case, he may or may not have a key of the outer door—in most instances, probably, he has one,—but the fact of the servants going in and out of the rooms which are let to him, for the purpose of cleaning them and rendering such other services as may be required, gives the landlord such a general control over them as is sufficient, agreeably to the principle I have already stated, to prevent the contract from giving rise to a real tenancy. An important consequence of that, as I shall explain to you in my next lecture, would be that the landlord would have no right of distress for any rent that may be due. It is true that in most text-books you will find the contrary laid down. You will find it stated that there is the same right of distress in the case of the letting of lodgings as in other lettings. But if you examine the authorities cited in support of that proposition, you will not, I think, find

a single case where the circumstances showed that the letting was one of lodgings with "attendance" provided,—a circumstance which, if I am right, makes all the difference. You will, on the other hand, find a string of authorities—mostly, it is true, in what are called "rating" cases—laying down the principle for which I am contending. There is, however, so far as I am aware, no "clean" decision to the effect that the rent of lodgings of the kind spoken of cannot be distrained for, and in its absence you must not take what I have suggested to you as settled law. I recollect when I was a student that I was much struck by a passage in Mr. Joshua Williams's book on real property, in which he says that by the very side of the common highway of legal knowledge there is much ground which is uncertain and unexplored. The ground on which I have just been treading is ground of this kind. But one thing at least seems clear. There can be no lien (apart from distress) on a lodger's goods for any rent that may be owing from him. You occasionally read in the newspapers of claims of this nature asserted against lodgers by their landladies, and made the subject of investigation in police-court proceedings. Such a claim can have no foundation. An *innkeeper* has a lien, but he has this right because of his obligation to accept all persons—speaking generally—who come to him as guests. It seems clear that the landlord of lodgings has no such privilege.

Now I pass from that, and I come to the consideration of the question of how tenancies are created; and I have rather a curious story to tell you about it. At common law tenancies can be created in any manner you please. I am speaking here generally, and not of

exceptional cases such as the leases of corporations. It is a general rule, as you probably know, that no corporation can validly contract at all except under its common seal, for that is the only mode in which its assent to the transaction can be signified. But, apart from such exceptional cases, there is nothing to prevent a tenancy from being entered into by writing under seal, or by mere written agreement, or even without writing at all. By the Statute of Frauds, however, it is specially provided that all leases, except those which do not exceed three years from their making, shall have the force both in law and equity of estates at will only, unless they are in writing and duly signed by the parties making them. But you will see at once that if this enactment were construed strictly it would give rise to great hardship. I let to you (let us say) by word of mouth a farm for five years; you go into possession; you cultivate the land and spend money on it; two or three years pass; you pay rent all that time; and then suddenly I say, "You are only a tenant at will, and you must give up the farm at once." Of course such a state of things would be intolerable, and the Courts had to get out of the difficulty as best they could. They did it in this way. They said that no doubt the statute did provide that under the circumstances only a tenancy at will should result, but that that only meant a tenancy at will *in the first instance*, *i.e.* on the mere taking of possession, and that when you had once begun to pay rent, that tenancy gave way to a tenancy presumed to be one from year to year. Whether that was a correct way of construing the statute we need not stop to inquire. I will only say that those of you who come hereafter to address arguments to his Majesty's judges will, as a rule, find it

difficult to induce them to hold that a statute should be construed by adding words which are not to be found within it. At the same time I would not advise you at the present day, when that view of the statute has prevailed for so long, to employ your energies, if the occasion should arise, in trying to convince them that it was erroneous.

The Courts of law moreover held, not merely that the result of taking possession and paying rent was a tenancy from year to year, but that that tenancy was upon this footing,—that all the terms of the invalid demise should be incorporated into it which from their nature were capable of being applied to a yearly tenancy. Now there are some obligations which are not properly applicable to such a holding at all. A contract, for example, to erect buildings of a substantial character belongs to this class, for its performance is referable to what may be called capital expenditure. But laying aside these exceptional obligations, one may say fairly enough that all the ordinary stipulations contained in leases are imported into the yearly tenancy. The result of this was that, except as regards the length of the holding, the parties were in much the same position as if the statute had not been passed at all.

The same doctrine, too, was applied by the Courts of law to leases void, not under the Statute of Frauds, but on other grounds altogether. Take for instance the case of the corporation I spoke of just now. A person entering into possession of land on a demise from a corporation not under its common seal became, on payment of rent, a tenant to the corporation from year to year on all the terms of the instrument capable of being applied to that tenancy. So, again, where a lease was void by reason of not complying with the

terms of a power under which it was made, or of not satisfying the requirements of a statute (like the Mortmain Act), a tenant who entered and paid rent was always regarded by the Courts as a tenant from year to year on the footing I have already described.

Passing now from actual lettings to mere agreements for a letting to be afterwards made, the result is still exactly the same. I will explain to you presently what the difference between the two classes of instrument is. All I need say now is that an agreement of the kind of which I am speaking does not, like an actual letting, pass any estate or interest in land, but is contract and contract only. If, however, the intending tenant was admitted into possession and paid rent, he was immediately regarded by the Courts as a tenant from year to year. Nor did it make any difference if the contract was one which offended against another section of the Statute of Frauds (sect 4), by which contracts relating to an interest in land are required for their validity to be in writing and signed by the party to be charged. And although in the year 1845 a statute known as the Real Property Amendment Act (8 & 9 Vict. c. 106) was passed, which for the purposes we have now in hand may be regarded as merely supplementary to the Statute of Frauds, and which in terms provided that a lease required by law to be in writing should be void at law unless made by deed, the construction placed upon it by the Courts of common law was that the leases struck at were only void *as leases*, but that they might be perfectly good as agreements, and so the matter was carried no further.

You see from all this that the Courts of law did what they could to relieve the tenant, under the circumstances of which I am speaking, by placing him

in the position of a tenant from year to year. But a tenant from year to year, as I shall explain to you more in detail in a later lecture, can always be dispossessed on a six months' notice. Accordingly, if a six months' notice was given, and upon his refusal to give up the premises an action of ejectment (as it is called) was brought against him in one of the Courts of law, he could have no answer in those Courts. So far as they were concerned, they had done all they could for him.

But Courts of equity could, and did, do a great deal more, and they did it in rather an ingenious manner. That the statute, as you have seen, in terms directs that the force of the contracts struck at should be that of estates at will only in equity as well as at law, does not appear ever to have been regarded as material. The way in which they worked out the matter was by reference to their power to grant the relief of specific performance. You have all heard, no doubt, of that doctrine. You know that the only remedy—speaking generally—for a breach of contract which you can obtain in a Court exercising common law jurisdiction is in damages. But that remedy is often quite inadequate, and Courts of equity from early times—I am afraid that, interesting as it is, I cannot go into the history of the matter here—assumed and exercised the power of compelling a man who had entered into a contract to perform it, not by merely awarding pecuniary compensation against him if he failed to do so, but by a personal order against him which they enforced, in case of disobedience, by attachment or imprisonment. Now obviously one of the cases, in which such a remedy as that is particularly desirable, is where the contract has been partly performed by one at least of the parties. The case I am now putting is a case of this

kind, because I am assuming that possession of the land which is the subject of the contract has been given to the tenant.

In the case of part performance, Courts of equity from early days constantly refused to allow a technical defence like that given by the Statute of Frauds to be set up at all. It is rather a curious circumstance that for something like two centuries during which this doctrine was applied, it was put almost uniformly on what is now admitted to be a wrong ground. If you examine the reported decisions on the subject, you will find it nearly always stated that to allow the statute to be set up in such a case would be to sanction a greater and more oppressive fraud than the statute was designed to prevent. That this cannot be the true reason a simple illustration will sufficiently show. I contract verbally, let us say, to grant you a certain lease on your paying me the sum of £500, and you pay the money. That is not part performance, and if you tried to enforce the contract against me by specific performance, a Court of equity would not be able to prevent me from successfully setting up the statute in answer, though under the circumstances it would be difficult to imagine a defence of a more fraudulent kind. The true reason, which was, I believe, first given by that great master of equity, Lord Selborne, is that when a contract has been partly performed, the matter is no longer in the stage which alone the statute has in view: that the defendant is not consequently being "charged" (to use the word employed in the fourth section of the Statute) on the contract at all, but on the equities resulting from its part performance: and that the contract must of necessity be regarded in order that those equities may be given effect to. Let me put

the matter in another way. When possession has been given, as I have assumed, to the intending tenant under the contract, his position of course has been changed, and it is this change of position which constitutes part performance. It is not, you will observe, the acts of "the party to be charged" which are of importance in this connection, except so far as they have caused the change of position of the other party. The real part performance at the root of the matter is the change of position or circumstances by the party who seeks to enforce the contract. So that you see that the doctrine is founded on a principle closely analogous to estoppel.

What then did the equity Courts do? The tenant, after being let into possession, might have disentitled himself to specific performance, for instance by a disregard on his own part of the obligations into which he had entered. But if he could make out his claim to that relief, he was treated by those Courts as tenant under the lease from the moment he went into possession. And they even went the length of restraining any proceedings in ejectment which the landlord, treating him as a yearly tenant only, might have taken against him in the Courts of law. What happened then was this. In a Court of law, as I have already explained, the tenant, if he had received six months' notice to quit, had no answer at all. But he then came here to Lincoln's Inn, filed a bill for specific performance, and applied for and usually obtained an injunction to restrain the landlord from continuing or enforcing the proceedings at law until his claim for that relief could be entertained. I may, however, mention as a matter of singular historic interest, that there is one case reported in the books—you will find

it in the second volume of Cowper's reports—in which Lord Mansfield took upon himself to dismiss a landlord's claim in ejectment on the ground that the tenant had so clear a right to relief in equity that a judgment in the landlord's favour at law would be useless. That decision, which appears to stand entirely by itself, was subsequently disapproved of, but in view of what I am coming to next, it looks as if Lord Mansfield had completely bridged over the century's interval which almost exactly separated it from the passing of the Judicature Acts.

The effect of the Judicature Acts, as you know, was to vest in the Courts of law the power of giving equitable relief and of administering equitable remedies to the same extent as was previously possessed by those of equity. A little while after they came into force a case of great importance came up for decision, which almost looks as if it had been brought for the very purpose of clearing the ground, and explaining what changes had been brought about in the matter I am speaking of by the new dispensation. The case I refer to is that of *Walsh* v. *Lonsdale*, in the Court of Appeal. It is in all respects entitled to the dignity of a "leading case." You will find a full report of it in the 21st volume of the Chancery Division reports, and, as I need scarcely say, it deserves your most careful study. An agreement had been entered into for the demise of a mill, and the rent was not a fixed rent, but one made to depend, as frequently happens in such demises, on the number of looms that should be "run" in the course of the year. There was a further provision that a whole year's rent should be payable in advance on demand at any time by the landlord. The tenant had entered into occupation, and paid rent in the usual

manner, and then the landlord exercised the power conferred upon him by the agreement, demanded a year's rent in advance, and, on the refusal of the tenant to pay it, levied a distress on his goods. The tenant complained of this distress as illegal, and brought an action. Now consider the position.

At law the tenant, having paid rent, was, as I have explained, a tenant from year to year on all the terms of the agreement which were applicable to that tenancy. The question therefore was,—Was the provision for the payment of the year's rent in advance, in respect of which the distress had been levied, applicable to that tenancy or not? As regards this, there were two formidable difficulties in the way of the landlord. The first was that a distress, as I shall explain to you in my next lecture, can only be levied in respect of a fixed and ascertained rent; and in this case the rent was clearly not one of such a character. It so happened, however, that the agreement provided for the payment of a minimum rent, by means of a stipulation binding the tenant to "run" at least a specified number of looms in each year; and it is possible that that difficulty might have been got over by regard to this provision. But the other obstacle was more serious still. A tenant from year to year, as I have already told you, can always be got rid of by a six months' notice to quit. Consequently, if he could be called upon to pay a whole year's rent in advance, he might be deprived during half that period of an enjoyment for which he had already actually paid in money. It seems therefore inevitably to follow that the provision in question was quite inapplicable to the yearly tenancy implied at law. The Court, however, laid this consideration entirely aside. They said that there were no

longer two different estates as there were formerly,—one at law from year to year by the payment of rent, and one in equity under the agreement. By force of the Judicature Acts the tenant—always assuming that the case is one where he is entitled to specific performance—holds under the agreement, and under the agreement only, and on the same terms as if the agreement had been enforced and the lease granted. But if the lease had been granted, there could be no question that a distress—at all events for the amount of the year's minimum rent—would have been valid. It therefore followed that the tenant had no cause of complaint, though relief was granted to him—as is usual in such cases—on his paying such year's rent into Court.

A few years later there came another decision of the Court of Appeal, which laid down the important limitation to the above principle, that it only applies where the Court before which the matter is brought has got competent jurisdiction both in law and equity. The case I refer to is that of *Foster* v. *Reeves*, and you will find it in the 2nd Q. B. volume for the year 1892. In this case an agreement in writing had been entered into which was "void at law" for not being by deed, because it exceeded the period of three years from its "making." The tenant took possession and paid rent, and was therefore at law in the position of a tenant from year to year, and as such a few months later gave notice to quit, and did quit, at the end of the first year. The landlord refused to accept the notice, and sued him in the County Court for the instalment of rent due at the end of the first quarter after he had given up possession. The sum claimed was, if I recollect right, under £20,—in any case it was one within the jurisdiction of the County Court. But the

County Courts Act provides, as perhaps you know, that the jurisdiction of those Courts to grant specific performance of an agreement for a lease is confined to cases where the value of the property does not exceed £500, and the value of the premises in this case exceeded that amount. The Court of Appeal, on the ground I have already stated, held that this was a fatal objection to the application of the doctrine of *Walsh* v. *Lonsdale*.

It is a singular thing that one of the provisions of the Judicature Act, which would appear very germane to the matter, does not seem to have been referred to during the hearing at all. The provision of which I am speaking is contained in sect. 89 of the Act of 1873. I have not got the Act before me, but if you will refer to it by and by, you will see that what it says is that every inferior Court possessing equitable jurisdiction, as regards all causes of action within its jurisdiction for the time being, shall have the right to grant, and shall grant, every kind of relief in as ample a manner as a superior Court would be able to do. The *cause of action* here, as I have already pointed out, was clearly one within the jurisdiction of the County Court. And if so it is difficult to see why the equitable relief of specific performance—though no doubt no *action* to obtain it could have been brought—should not have been granted, when it was required only as incidental to the establishment of a cause of action clearly within its jurisdiction. However that may be—and the criticism I have ventured to offer is one which has been made more than once,—you must, of course, accept the limitation of the doctrine of *Walsh* v. *Lonsdale*, which has been established by the decision I have just been speaking about.

The doctrine in question has not perhaps yet been finally worked out by the Courts, and how far it applies as against third persons cannot be regarded as altogether certain. You will find some useful observations upon it in the judgment of Mr. Justice Farwell, in a case called *Manchester Brewery Co.* v. *Coombs*, reported in the 2nd Chancery volume for 1901. But what I wish to point out to you now is this. It does not follow that, because the tenancy from year to year implied from the payment of rent in the case of agreements which offend against the Statute of Frauds has, under the circumstances of which I have been speaking, now ceased to exist, the same thing applies to agreements or demises void on other grounds. Take the case of the corporation, for instance, which I have already referred to. There is an important difference between the two cases. The Statute of Frauds, it has often been said, does not, speaking strictly, invalidate contracts at all, but only affects evidence. The agreement itself remains perfectly good, though the statutory provisions have not been complied with. It is only the evidence by which you may seek to establish it which is struck at. And that is the reason why the Court can, and—where the contract has been partly performed—does, allow the evidence to be given in spite of such non-compliance. But, in the case of the agreement by the corporation not under seal, the agreement itself is altogether invalid. And, if that be so, it would seem that the remedy of specific performance is inapplicable to such a case, and that the tenancy from year to year established by entry and payment of rent would still hold good.

But I am afraid that we are here again on rather uncertain ground. Lord Justice Fry, than whom, of

course, there is no higher authority in such a matter, does not appear, in his book on specific performance, to distinguish between the two cases at all. On the other hand, if you read the judgments of the Court of Appeal in the case of *Hunt* v. *Wimbledon Local Board* in the 4th volume of the C. P. D. reports—the case itself has nothing to do with the law of landlord and tenant,—you will, I think, arrive at the conclusion that the distinction I have endeavoured to draw is well founded. But if, in the instance I have put, the possession taken by the tenant under the corporation is followed by expenditure of money by him on the premises, he would then become entitled to specific performance, for in such a case an equity would be raised of a different kind, and one which is entirely independent of contract. All these are no doubt matters of difficulty, and the important point for you to remember in connection with this part of the subject is that at the present day, in whatever manner a tenancy may have been created, if possession has been given and a claim to specific performance so founded, the tenant, speaking generally, no longer holds in any Court otherwise than under the contract, and in accordance with its terms.

The equivalence, so far as it goes, between agreements for leases and actual leases, applies, as you will have noticed, only to agreements under which possession has been taken. Before entry there is an important difference between them. I have already explained to you that a lease, besides being a contract, conveys an estate or interest in the land. This is generally called an *interesse termini*, and it gives something more than a bare right of action on the contract. A contract, as you know, gives no rights enforceable either by or

against those who are not parties to it. But the *interesse termini* is a right of property, and gives a cause of action against persons not parties to the contract, if their acts should prevent entry or possession under the lease from taking place. This is an important right, because, according to a well-established rule, no action of trespass (for which possession is always necessary) would, under the circumstances, be maintainable by the tenant. A good instance of an *interesse termini* is furnished by what is called a lease "in reversion," *i.e.* a lease to commence only upon the determination of an existing lease; and, until that event happens, the reversion expectant on the latter continues in the lessor.

I want now to say just a few words to you about the constituent elements of a lease. These are respectively the *parties*, the *operative words of demise*, the *parcels*, the *habendum*, the *reddendum*, the *covenants*, and the *clause of re-entry*.

It would be obviously impossible for me, within the limits of time at my disposal, to enter into the subject of parties. Speaking generally, all persons may both make and take leases. But there are a great number of instances in which that power is fettered by various restrictions, some imposed by statute and some by the common law, and with none of those instances can I attempt to deal here. I regret this the less because you will be able to find all the information you require in treatises on the special subjects to which I am referring. The leasing powers of mortgagors and mortgagees, for instance, you will find dealt with in books relating to the law of mortgage; those of tenants for

life and other limited owners in books on the Settled Land Act, and so on.

With regard to the operative words, a few observations will suffice. The question here is whether the transaction amounts to an actual letting, or only to an agreement for a letting in the future. This was formerly a question of great importance, because in the latter case, as you have already seen, the tenant who had entered and paid rent was nothing more, at least in Courts of common law, than a tenant from year to year. Accordingly, in the older books—like "Platt on Leases"—you will find many pages entirely devoted to an examination of the decisions on the subject. From them you may gather that the question is one of intention,—the presumption, if the instrument of demise contained all the material terms, and one party was to give and the other to take possession under it, being one in favour of an actual letting; whilst if it appeared, on the other hand, that the parties had in view that something ulterior was to be done before the relation of landlord and tenant was actually created between them, the instrument could not operate as more than an agreement. Having regard, however, to the doctrine of *Walsh* v. *Lonsdale*, the importance of the distinction has now greatly diminished, though it must be obvious to you that the limitations to which that doctrine is subject prevent one from being able to get rid of it altogether. Moreover, before entry the matter stands in the same position as it did before the Judicature Acts, and the *interesse termini* or interest in the land, with the consequences I have already pointed out, is given by the actual letting and by that alone. So, again, an actual letting for a period not exceeding three years, if made

by parol, would be perfectly good, whilst a mere agreement to the same effect would be invalid under the 4th section of the Statute of Frauds; and other instances might easily be given. I will only add here that, even in the case of an actual letting, a distinction of some importance is to be observed between the use of the word "let" and that of the word "demise." To this I shall direct your attention when I come to speak of implied covenants.

The "parcels" are that portion of the lease which contains a description of the property demised. They almost invariably commence with the words "All that" or "All those," and should properly describe the premises with certainty. Anything which is obviously necessary for the enjoyment of the thing granted will pass by the demise; for instance, the fixtures in the lease of a house. But this is only a presumption which may be displaced. If, for example, in the case I have just put, certain fixtures were specially named, the intention to pass all of them could not be inferred.

A few words now about exceptions and reservations. An "exception" in a lease is a description or enumeration of things expressly excluded from the grant; it must be of a defined part of the parcels themselves, and it must be of something which would otherwise pass. To a valid exception there are three requisites: First, it must not be essential to the enjoyment of what is granted. Secondly, it must not be repugnant to the demise, so as to render any part of the thing granted nugatory. And thirdly, its operation must be immediate, so that the thing excepted never vests in the lessee at all. The general rule in construing an exception is, that what passes by words in a grant is

excepted by the same words in an exception, the leaning, where the words of an exception are doubtful, being (just as in the case of a grant) always against the lessor. The most usual exceptions in leases are those of trees and minerals. The word "reservation," on the other hand, refers to something not part of the parcels at all, and not actually existing, but brought into being by the demise and issuing out of the parcels. The commonest reservation, of course, is that of rent; but the word is often loosely applied to almost any right over or relating to the demised lands which the lessor wishes to retain to himself. It is constantly (though improperly) used of minerals, as well as of game and sporting rights. In this last-mentioned case its true operation is by way of re-grant from the tenant to his landlord.

Of the *habendum* I shall speak quite shortly. It is the part of the lease—beginning always with the expression "to hold"—which marks its commencement and duration. Both of these must be certain or capable of being rendered so. The commencement of the lease is not always expressed in terms. Where a lease is silent in this respect, if the letting is by deed it commences from the date of the delivery, whilst if it be by agreement not under seal it commences from the date of the agreement, provided it amount to an actual letting. But a mere executory agreement for a lease to be afterwards made, would, under such circumstances, be altogether void; though, if possession were taken, the lease would be deemed to commence at that time. Here, therefore, you have another instance in which leases are different from agreements in their operation. The requisite certainty as to the commencement of a lease need not exist at the time

the lease is made: it is sufficient if it be supplied at the time it takes effect. The lease in reversion of which I have already spoken, where it is made to take effect after the expiration or sooner determination of an existing lease, furnishes an example of this, for at the time it is made it is quite uncertain when the existing lease will determine. And, in exactly the same way, the duration of the lease must either be certain or capable of being ascertained when the lease becomes operative. A lease, for instance, to last for as many years as a given person shall name, is perfectly good so long as he names the term before that time. But a lease for as many years as a named person shall continue parson of Dale would be invalid, though the same object can be attained by making the lease to endure for a fixed number of years, but determinable on the named person ceasing to occupy his spiritual post. A defeasance of this kind, as I think I have already told you, is called a limitation. I shall speak of this matter in a little more detail on a later occasion, when I come to deal with the determination of tenancies.

I will treat of the *reddendum* in my next lecture, of covenants in the one following, and of the clause of re-entry when I come to the determination of the tenancy by forfeiture.

LECTURE II

GENTLEMEN,—In the rapid review of the constituent elements of a lease which I gave you in my last lecture, the exigencies of time caused me to break off at the *reddendum*,—that is, the rent-reserving clause of the instrument. I regretted this the less because, as I need hardly point out, a short account of the essential characteristics of rent comes in naturally and appropriately by way of preface to what I have to tell you about distress, the main subject of to-night's discussion. The remaining topics—covenants, and the clause of re-entry—I hope, as I have already said, to deal with at a later stage.

The definition of rent given by Lord Coke is, that it is "a certain profit reserved or arising out of lands and tenements whereunto the lessor may have recourse to distrain." It consists, as you see, of three parts. The first is, that it must be a certain profit,—with the emphasis on the word "certain." It need not consist of money, though at the present day, as I need hardly say, it almost invariably does. It comes from the Latin word *redditus*,—a render or return, and carries us back to the days when the tenant, in return for the lands which he held of his lord, had to render him certain services, such as the equipment and maintenance of a given number of men in the field. It must be certain both in amount and in the time or times at which it becomes due. But, just as in the

case of the *habendum*, the certainty in amount need not necessarily exist at the time the lease is made: it may be supplied by the acts of the parties at any time before it becomes due. Nor does the fact that the rent may fluctuate in amount at different times offend against the rule. In the case which I referred to at such length last time—that of *Walsh* v. *Lonsdale*—you will remember that the rent depended on the number of looms that were "run" by the tenant; and directly the looms were "run" it became certain. Rent must also, as I have just said, be certain as regards the time of its payment, and it may be made payable in advance. You will recollect that this also was a feature of the tenancy in *Walsh* v. *Lonsdale*, where the contract between the parties empowered the lessor at any time to demand such payment in respect of a whole year's rent. I may mention here, parenthetically, that unless rent is made payable in advance by the terms of the demise, it is as well not to pay it in advance, and I will tell you why. Suppose after the rent has been so paid the landlord parts with his reversion, as he is of course entitled to do. When the rent falls due you may be called upon by the new landlord to pay it over again to him. The law treats the transaction as a mere advance of the money to the old landlord, coupled with a contract that when the rent becomes due it shall be considered as a discharge of the obligation *to him*. So that as against his successor you would have no answer.

The second element of Lord Coke's definition of rent is that it must be reserved out of lands and tenements. You are all, no doubt, aware of the difference between corporeal and incorporeal hereditaments. Rights of shooting and sporting, for instance, belong to

the latter class, and though nothing is commoner than a demise of such rights, the money payments reserved periodically in respect of them, though analogous to rent, are not rent. A furnished house or apartments form, perhaps, an exception to the rule, but that is only by virtue of a legal fiction. Everybody knows that of the rent a person pays who takes a furnished house, a portion is attributable to the furniture. If the house were unfurnished, he would pay considerably less for it. But the legal fiction is well established that the whole rent issues out of the realty alone. It is therefore, in point of law, strictly a rent. You should further take note that rent is always deemed to issue out of each and every portion of the land demised. But, of course, the parcels may be divided into distinct parts and different rents reserved in respect of each part; and when this is the case, the effect as regards the rent is the same as if there were separate demises.

The third and last feature of rent is that it connotes the right of distress, and in strictness no payment is rent which does not carry that right with it for its recovery. There is, however, one exception to this which I ought to bring under your notice. I told you in my last lecture that for a tenancy to be created, a person must part with a less interest than his own. The case, however, is not infrequently met with where a person makes what looks just like a demise, with all the constituent features of which I have already spoken, and with a reservation of periodical payments, but at the same time parts with his whole interest in the premises. This amounts to what is called an assignment,—a matter of which I shall treat in a later lecture. But though, as I shall explain to you presently, no distress could be levied to recover any

such payments, because the lessor has retained no reversion, yet these payments are, at least for certain purposes, deemed to be rent and not merely sums in gross. This must be regarded to a certain extent as an anomaly. But the general principle is, nevertheless, clear,—that no payment is rent which cannot be enforced by the remedy of distress.

No special form of words is necessary for the *reddendum:* any expressions showing that something, which was not in the lessor before, is to be given to him by way of return for the lands demised amount to a reservation. The *reddendum*, moreover, frequently performs, in the absence of a *habendum*, the office of defining the amount of the interest conveyed, which strictly belongs to the latter. When this happens, and the *reddendum* (as is usually the case) expresses that the demise is to be at a specified yearly rent, the presumption is that the tenancy is a yearly one, however the rent be made payable, whether quarterly, monthly, or weekly; and if it be not made payable at any stated intervals, it would also be *payable* only yearly. If there should be—as occasionally happens—a conflict between the *habendum* and the *reddendum*, the general rule is that the former prevails over the latter in defining the length of the term, because, as I have just said, that is its direct object; but this is not an absolute rule. There is a case in the books where the term limited in the *habendum* of a lease was one of ninety-four years, whilst the *reddendum* provided for the reservation of the rent during every year of the term of ninety-one years. There was obviously a mistake somewhere, and the Court held that the matter might be cleared up by looking at the counterpart of the lease, which, as you know, is the duplicate

of the instrument for the use of the lessor. It so happened that in that document both the *habendum* and the *reddendum* spoke of the term, in agreement with the *reddendum* of the lease, as one of ninety-one years only; and the Court thereupon rejected the *habendum* of the lease as containing a clerical error, and (contrary to the usual rule) followed the *reddendum*.

Whilst on the subject of rent, I ought perhaps to mention that cases often occur where possession of land is taken either under instruments wholly informal in character, or under some verbal arrangement, and sometimes without any agreement at all.

Where permission by the owner for such occupation is given, either expressly or impliedly, the law makes a presumption that a fair and reasonable payment shall be made to him for it. Such payment is usually referred to as rent for "use and occupation," and though an action for it could be maintained at common law, its payment is expressly sanctioned and to some extent regulated by one of the later sections of the Distress for Rent Act, 1737, to which I must refer you.

I pass now to the subject of distress. Distress is the taking by the landlord of personal chattels on the demised premises as a satisfaction for rent that may be due to him. No legal process is necessary, nor is the landlord even obliged to demand the rent before he distrains. Moreover, under the common law he may take any goods he finds on the premises, quite irrespective of the consideration whether they belong to his tenant or not. It is an anomalous proceeding, and one which has been thought not altogether in keeping with the spirit of our democratic times. When

it was first introduced, in the early Middle Ages, and for many centuries after, the goods thus seized were only a pledge in the hands of the landlord. Distress was therefore only a means, if I may use the expression, of " putting the screw " on the tenant. In the year 1689, however—the second year of William and Mary,—a statute of far-reaching import was passed by which, subject to certain conditions to which I shall presently refer, the right of selling the goods seized was for the first time given to the landlord. Before this enactment was added to the Statute-book it did not benefit the landlord, as a rule, to seize the goods of third persons, because doing that would not, in general, operate to induce the tenant to discharge his obligation for rent at all. Moreover, the chattels the landlord had seized could not be used by him for his own purposes, and if they were cattle, he incurred, under certain circumstances at all events, an obligation to maintain them. But, of course, immediately the right of sale was introduced these considerations were no longer of much force; and the injustice of allowing one man's goods to be taken for another man's debt appears in this way to have crept in almost unperceived.

Protests, however, against this injustice were often heard when the above principle came to be applied in practice, though it was submitted to by the people of this country for more than two centuries; and at length, in the year 1907, a case arose in which the dissatisfaction that was felt with the existing law was brought to a head. This was *Challoner* v. *Robinson*, which you will find reported in vol. 1 of the Chancery Reports for 1908, and in which certain pictures whilst on exhibition at a club were seized—and were held by the Court of Appeal to have been rightfully seized—

for rent for which their owners were in no sense responsible.

This case led at once to the passing of a statute—known as the Law of Distress Amendment Act, 1908—under which any person whatsoever, not being a tenant of the demised premises or any part of the same, and not having any beneficial interest in any tenancy of them, can, by taking certain steps to which I will refer presently, protect his goods from being seized as a distress for rent due in respect of the premises where they may happen to be. There are, however, certain classes of goods specified in the Act to which it does not apply, and for which I must refer you to the Act itself.

How the right of distress for rent arose is uncertain. It is impossible, when one is considering the matter from the historical standpoint, not to set alongside it the analogous right—a right obviously adapted to a rude civilization—belonging to the owner of lands to seize any cattle that he may find committing damage upon them. The two rights in question—those of distress for rent and of distress (as it is called) *damage feasant*—have grown up side by side, and both are in force at the present day. In very early times there are traces that some judicial process was necessary before a distress for rent could be levied. How or why that process came to be dispensed with, it is not easy to say. The feudal lords of those days were probably somewhat arbitrary gentlemen, and possibly it was deemed by them to be unnecessary and unjust:

> "The good old rule
> Sufficeth them; the simple plan,
> That they should take who have the power,
> And they should keep who can."

On the other hand, it would appear that in some

respects the severity of the feudal laws and customs with regard to this matter was gradually relaxed. The absolute forfeiture of his lands, for instance, incurred by a tenant in early times from the failure to fulfil his obligations to his lord seems to have given way to one of a modified kind, in which the lands were only withheld from him until those obligations had been performed. But inasmuch as the tenant by being deprived of his land was deprived of almost the only mode in which this could be achieved, he was in reality but little better off than before; and it has been suggested—though the matter cannot by any means be regarded as clear—that the seizure of chattels as a distress was given to the lord as a substitute for the forfeiture of the lands, and was, therefore, in a way, a proceeding designed to benefit the tenant. However this may be, there can be little doubt that, as early at least as the middle of the thirteenth century, the right of distress on chattels existed in the same form as it is known to us at the present day, for the Statute of Marlebridge, which was passed in the year 1268, deals with the matter on that footing.

Distress is a remedy given by the common law, and it arises out of the mere relation of landlord and tenant, and quite irrespective of any agreement between them. It may, however, always be made subject to agreement, and regulated by the parties in any manner they choose. *Modus et conventio vincunt legem.* But in order that a particular arrangement should displace the absolute common law remedy, the *conventio* must be clear. Thus, where a demise specially provided that the lessor should have the right to distrain for rent after the lapse of a certain time from its becoming due,

it was held that the common law remedy to distrain for it immediately was not displaced. Moreover, in this case, the right of distress conferred by the agreement was in one respect more extensive than that at common law, because it provided that certain goods should be subject to it which, as I shall presently explain, are generally held to be privileged; so that you see that the decision is what is called a strong one, inasmuch as there seems much force in the contention that the landlord had bartered away his common law right for the right given by the agreement. So a mere custom, in indulgence of the tenant, to allow payment of the rent to be postponed for a certain time after it falls due does not render an immediate distress unlawful. You should also carefully notice that the right of distress is not necessarily suspended, if the tenant gives a bill or note for the rent, whilst the security is running; though such a transaction affords evidence of an agreement between the parties to that effect. A mere right of set-off, too, or a cross-debt due from the landlord to the tenant, does not prevent a distress for the whole amount of rent that may be due; though the Agricultural Holdings Act prevents this result in one particular case, by providing that where the compensation payable in respect of improvements—I shall refer to this matter in a later lecture—has been ascertained before the distress is levied, it shall be deducted from the rent and only the balance distrained for. And there is another important exception to the rule, in the case where the tenant has been compelled to make certain payments in order to retain the full enjoyment of the demised premises. If such payments are of this nature—that, as between the parties, the real burden of them (as in the case, for instance, of land tax) should

fall on the landlord, the latter is held to have impliedly authorised him to apply to that purpose any rent that may be due or accruing. You see that the lands themselves in such a case could be seized and sold if the payment were not made. The payments made under those circumstances by the tenant are considered payments *pro tanto* of the rent itself, and consequently no distress for anything beyond the balance can be justified.

The conditions that must be fulfilled before the right of distress can be exercised may be summarised as follows: First, there must be a demise express or implied. Secondly, it must be a living demise when the rent distrained for falls due. Thirdly, the rent distrained for must be a real rent. Fourthly, the distrainor must have the reversion vested in him. In the first place, there must be an actual tenancy; that is to say, exclusive legal possession of the premises, as I explained to you in my last lecture, must have been given. Formerly, in the case of agreements, as distinguished from actual lettings, there was no right of distress until the relation of landlord and tenant between the parties actually arose; but now, as you heard last time, that relation arises at once on the entry of the lessee.

From the second condition it follows that where a demise has come to an end and the tenant continues in possession (without more), no distress can be levied for any subsequently accruing rent. It makes no difference in what manner the demise has been determined, whether by surrender, or by the expiration of a notice to quit, or by the issue of a writ in ejectment to enforce a forfeiture. I shall have to refer to these

matters more in detail hereafter, when I come to speak of the determination of tenancies, and so I say no more of them now. But you must try to distinguish the condition of which I am now speaking from another which resembles it, and which, as I shall tell you presently, has not always (though it has generally) to be observed, that a distress itself must not be made after the tenancy has come to an end.

Of the third condition I have already spoken to-night; and you will have noticed that it is only a short way of expressing three things,—that the letting must be one of corporeal hereditaments, that the amount of rent must be certain or capable of being rendered so, and that the time of its becoming due must also be certain.

The fourth and last condition is that the distrainor must have a reversion; and such reversion must be vested in him, both at the time at which the rent distrained for falls due and at the time of the distress itself. From this it follows that if a reversion is sold or assigned, no arrears already accrued can be distrained for at all: not by the assignor, because he has no longer got the reversion at the time of the distress, and not by the assignee, because the reversion was not vested in him at the time the rent became due. And let me just add this. Distress is a legal right: hence a mere agreement to assign the reversion to another person, although it confers upon the latter the right to call for a legal assignment, does not carry with it the right of distress, because he has only got an equitable interest; and the Judicature Acts, though they give full recognition to such an interest, have not made any difference in this respect.

I come next to the doctrine of privilege. It has two branches—in respect of persons and in respect of goods. In respect of *persons* the privilege is in some cases absolute, whilst in others the right of distress is limited only in the amount of rent for which the distress may be rendered productive in satisfaction. The principal cases where there is an absolute privilege are those of the Crown, of ambassadors and their servants, and of under-tenants and lodgers.

The Crown is privileged by the common law, whether it is tenant, or whether it merely has goods on demised premises where a distress is levied. A remarkable illustration of that may be found in a decision pronounced a short time ago. Some horses belonging to the War Office and used for the service of the yeomanry were placed in a stable on a farm, where there was owing from the tenant some rent for which they were seized as a distress, and it was held that the distress was illegal. The matter at the present day would further be within the protection of the statute already mentioned.

In the next place, the goods of ambassadors and ministers of foreign states, as well as of their servants, have by what is called the comity of nations always enjoyed immunity from distress, as well as from legal process of any kind. This privilege existed at common law from early times, and legislative sanction was given to it by a statute passed in the reign of Queen Anne.

The last instance of what I have called absolute privilege—that of under-tenants and lodgers—is wholly statutory, and is very important. The immunity here was first given to lodgers only by an Act of the year 1871, and extended to under-tenants (as well as lodgers) by the Act of 1908 to which I have already referred;

and, unlike that of the two other cases, the privilege—though absolute in its effect—depends upon the performance by the person who claims it of certain acts. The case contemplated is the one where a distress is levied for the rent of the premises which, or part of which, are in his occupation. The Act of 1908, which, so far as it applies, has repealed the Act of 1871, includes all lodgers, but only those under-tenants who pay a rent not less than the full annual value of the premises, and not at more distant than quarterly intervals; nor does it apply to any under-tenant whose tenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant.

What the under-tenant or lodger has to do is this. He has to serve the distrainor with a written declaration, stating that his own landlord has no property in the goods, and stating also what rent, if any, is due from him, and the times at which future instalments will become payable and their amount. If any rent is due from him he must pay it to the superior landlord, and the declaration must state it, and must also contain an undertaking to pay such future rent to the superior landlord until the rent for which the distress has been levied is satisfied. To such declaration, moreover, he must annex a true inventory of his own goods vouched by his signature. The statute then goes on to say that if the landlord or his bailiff, after this has been done, levies or goes on with the distress, he shall be deemed guilty of an illegal distress; that the under-tenant or lodger may apply to a magistrate or to justices of the peace for an order for the restoration of his goods; and that the superior landlord shall further be liable to an action at law. These last words have given rise to

some trouble, because the view has been taken that the special mention of the superior landlord excludes any remedy against the bailiff, even though the statute may have expressly declared in an earlier clause that both of them should under the circumstances be deemed guilty of an illegal distress. In a case, however, decided in the year 1906 (*Lowe* v. *Dorling*, vol. 2, K.B.), this construction of the statute was overruled, and an action was held to be maintainable against the bailiff.

What the precise force of the last clause may be is not very clear. It was said by the judges in the case to which I am referring that its object was to make the landlord liable for acts of the bailiff which he had not expressly authorised. But another view may be suggested, namely, that as the proceedings for the restoration order would usually be brought against the landlord, the object was to ensure that, in addition to those proceedings, he should be liable to an action for damages. The Act, as I have already said, excludes certain kinds of goods from its scope, and the declaration must state expressly that the things it is desired to protect are not goods of those excepted kinds. You must look at the Act to see the nature of the exceptions, which are too detailed for me to attempt to deal with.

The question as to who is a lodger within the Act of 1871 was found one of much difficulty. I spoke at some little length of lodgers in my last lecture, and I told you that the test to be applied was, whether the landlord retained control over the premises he lets or not. But now that nearly all under-tenants are also protected, and most occupiers must belong to one class or the other, that question has, for present purposes, lost its chief importance.

I come now to the cases where the goods of certain

classes of tenants enjoy a privilege from distress, subject, however, to their liability to satisfy rent due for a specified time. These cases are wholly statutory, and fall into three classes.

First, under the Agricultural Holdings Act, no rent may be distrained for which is more than one year in arrear; though the Act contains a special provision that if the payment of rent has customarily been allowed to be deferred for a quarter or a half-year, it shall be deemed to be due at the expiration of that interval, and not at the date at which it became legally due. There has been a decision on this enactment to the effect that if the distress is levied during the period of "grace," more than a year's rent is recoverable under it. The name of the case is *Ex parte Bull*, and you will find it in the 18th volume of the Q.B.D. reports. The result of the decision is somewhat curious. Suppose, to take a simple example, that rent is due once a year, we will say at Christmas, and that by custom its payment is allowed to be deferred to Lady Day. Let us assume that two or three years' rent is owing, and that a distress is levied to-day (January 25). Under the decision both the rent due at Christmas before last and the rent due last Christmas are recoverable, the former because by the custom it is only payable at Lady Day following (and therefore within a year of the distress), and the latter because, notwithstanding the custom, the rent, according to the general principle to which I have already referred, has become legally due. If, however, you will refer to the Act itself, you will see that it provides in terms, not merely that the rent shall be deemed to be due at the end of the quarter or half-year allowed by the custom, but that it shall be deemed not to be due at the date

at which it became due legally. So that it looks at first sight as if the latter of the two rents could not properly be distrained for. The justification of the decision is, I suppose, to be found in the fact that the hypothesis as to the time at which the rent accrues due is only "for the purpose of this section," and that purpose being solely to forbid a distress for rent more than a year overdue, the latter of the two rents in question is not affected.

The second of the three cases of which I am now speaking is concerned with the property of bankrupts. By the Bankruptcy Act it is provided that a distress may be levied upon the goods of a bankrupt, either before or after the commencement of the bankruptcy—and to ascertain this you must look back to the doing of the act upon which the adjudication follows—for six months' rent accrued due prior to the order of adjudication. The fact that the rent distrained for has only accrued due after the commencement of the bankruptcy is immaterial. But the statute only deals with rent that may be due before the adjudication. If the trustee continues in possession and rent afterwards accrues due, a distress may be levied for that quite independently of the statute, and without any leave of the Court being necessary. Nor is leave required for the distress for the six months' rent which is sanctioned by the Act. The statute, you will notice, applies only to goods of the bankrupt, and does not protect a mortgagee, for instance, who may have taken possession of them under the powers conferred upon him by his security.

The third and last case is that of companies, and it is a somewhat singular one, because it is founded on a construction of a statute which may now be said to

be admittedly erroneous. One of the sections of the Companies Act, 1908, in terms provides that (amongst other things) a distress upon the effects of a company in liquidation shall be void. But because another section enacts that no action " or other proceeding " shall be commenced or proceeded with in such a case without the leave of the Court, it was held that the acts struck at by the former provision were only those which were done without such leave, and that consequently they might still be done if that leave were obtained. It does not appear to have been noticed that the effect of this is to repeal the former section altogether, by placing the matter on exactly the same footing as if it had never been enacted. This has often been pointed out, but the law is now nevertheless quite settled, that if the leave of the Court is obtained, a distress may be levied on the goods of a company in liquidation. You should, however, observe that just as the Bankruptcy Act protects only goods of the bankrupt, so the Companies Act protects only those of the company which is being wound up: so that goods, for instance, which, though primarily belonging to the company, have been made subject to a charge in favour of debenture-holders exhausting their value, can be distrained upon without any leave being obtained. Where such leave is necessary, you must distinguish between the case where the landlord has, and the case where he has not, a right of proof for his rent. In the latter case—where, for instance, the company are merely his under-tenants, or where they are not parties to a tenancy at all, but merely have goods on the demised premises—leave to distrain (though these cases now fall within the Act of 1908) will be given. But in the former case leave will not be given for rent due before the commence-

ment of the winding-up, even if the liquidator retain possession subsequently; but any rent due after that is regarded as part of the expenses of the winding-up, and a distress for that will in general be sanctioned.

The privilege of *goods* from distress is in some cases absolute, and in others merely qualified,—that is to say, they are immune so long, and so long only, as a sufficient distress can be found without having recourse to them. The privilege is sometimes given by the common law, and sometimes the creation of statute. The matter is one obviously involving much detail, and I fear that my time limits forbid my entering upon it altogether. I regret this the less because if you refer to the notes to *Simpson* v. *Hartopp* in the 1st volume of "Smith's Leading Cases," you will find all the information you can reasonably require on the subject.

I pass on from that to deal quite shortly with the time and place of a distress. With regard to time, the rent must be not only due, but overdue, *i.e.* in arrear, before a distress is permissible. Rent is due throughout the whole of the day when it becomes payable, but is only in arrear after midnight. And inasmuch as you cannot distrain except during the day-time (that is to say, between sunrise and sunset), it follows that a distress cannot be levied until the next day. At common law, too, it could only be levied whilst the demise was subsisting, so that a tenant who held over was not liable to that danger. But by a statute of the reign of Queen Anne the time was extended for six months, and a distress during that period was allowed, provided it was made whilst the landlord's interest continued, and during the possession of the

tenant from whom the rent was due. It is well settled that for the statute to apply the tenancy must have come to an end either by time running out or by notice to quit having been given, and not by means of forfeiture. The result is, that once the landlord has chosen to put an end to a tenancy liable to forfeiture by issuing a writ in ejectment—as I shall explain to you on a future occasion,—a distress for rent previously due is necessarily illegal.

Some difficulties have arisen on that part of the statute which confines the distress to the case where the tenant from whom the arrears are owing has remained in possession. It is settled that the holding over need not be of a wrongful character, and that the statute applies though it has taken place with the landlord's assent. But there must be *some* holding over, and if the tenant continue in possession under an agreement for a new tenancy the landlord's right of distress for any arrears is gone. The test, as it has been laid down, seems to be whether a new title has, by the acts of the parties, been created in the tenant. The possession retained by the tenant, too, though it need not extend to the whole of the premises, must (for the statute to apply) be exclusive: merely leaving goods behind him on the premises, for instance, would not be sufficient. How far the statute extends to the executor or administrator of a deceased tenant is not altogether clear.

With regard to the place of distress, you must always bear in mind (speaking generally) that it can only be levied on the demised premises themselves. But the parties to a tenancy may, and occasionally do, enter into a special bargain as regards this point, and such bargain will be perfectly good, at all events as between

themselves. There is, besides, an important statutory exception in the case where goods have been fraudulently removed in order to avoid distress. It is furnished by the Distress Act of 1737, which provides that when the conditions it lays down are fulfilled, the landlord may follow the goods and seize them wherever they may be within thirty days of their removal, so long as they have not got into the hands of a *bonâ fide* purchaser for value. These conditions are four in number. First, the goods must have been distrainable if they had been on the demised premises. Secondly, the goods followed must belong to the tenant; so that those, for instance, which he has granted to mortgagees by a bill of sale would not be within the statute. Thirdly, the removal must have been fraudulent *or* clandestine (not therefore *necessarily* secret), and with a view of preventing a distress. Lastly, the removal must have been after the rent became due, so that the tenant can steer clear of this enactment if he removes his goods at any time before the rent-day itself.

At the proceedings in a distress I must, I fear, content myself with a mere glance. There are five successive steps to be taken,—the appointment of a bailiff, entry, seizure, impounding, and sale. The appointment of a bailiff is now wholly regulated by a statute of the year 1888, under which only a person can act who is duly certificated by the County Court. He must be furnished either with a special certificate applying to a particular distress only, or with a general certificate authorising him to levy anywhere during a period of not less than twelve months, though it may be cancelled at any time for misconduct. The statute expressly declares that a distress levied contrary to its

provisions by an uncertificated bailiff is illegal: a provision which in a recent case of some importance (*Perring* v. *Emerson*—you will find it in the Law Reports for 1906, K.B.D., vol. 1) has been held to afford protection, not merely to the tenant, but to a third person whose goods have been taken on the premises. The bailiff is usually appointed by a distress-warrant, which is his authority to act on behalf of the landlord.

The entry must be effected without using force. You may not break open an outer door,—either of a house, or even of a disconnected building, whether within the curtilage of the house or not. But getting over a fence or a wall is not forbidden. Nor is it wrong to lift the latch of a door, because this is the usual way of entering. But as people do not usually enter through a window, not only may you not break the latter, but you may not, if it be closed, even open it in order to enter. If, however, you should find a window partly open, you may enter by it, even though you cannot squeeze yourself through without opening it further. And force may be properly used in two cases. One is when the bailiff has himself been forcibly expelled, or has absented himself temporarily without intending to abandon the distress, and is subsequently denied readmission. The other is in the case of fraudulent removal. In that case a police constable must be called in, and if the goods have been removed to a dwelling-house, oath must be first made before a justice of the peace that they are believed on reasonable grounds to be within it.

The seizure may be either actual or constructive. It is usually made of some goods in the name of all, and it is sufficient if the removal of the goods is prevented

on the ground that rent is owing. But inner doors in a house may always be broken if necessary in order to seize particular goods.

Impounding the goods is the act of placing them in legal custody. The distrainor obtains neither property in, nor (in the legal sense) possession of, the goods distrained, so that, as I have already said, he may not make use of them, except so far as such user may be of benefit to their owner. Formerly he was obliged to distrain them in a pound,—either overt (as in a seizure of cattle) or covert (as in a seizure of furniture); and he had to take care that the pound was in a proper condition, for otherwise he was always answerable. By the Distress Act of 1737, however, the impounding may, and now in nearly all cases does, take place on the premises themselves. No special act beyond the seizure is then necessary, except that after the distress has been secured a notice is given, accompanied by an inventory of the goods taken. In no case may the premises be locked up so as to exclude the tenant.

The last step in the proceedings is the sale. This, as I have already told you, was introduced by an Act of the year 1689; but, speaking generally, it is not compulsory. The distrainor may, if he please, retain the goods in his hands as a pledge; but at the present day this is seldom done. For a sale to be valid a notice in writing of the distress must be given, specifying the goods seized with sufficient precision; this is usually done by supplying an inventory, to the goods mentioned in which the seizure should be confined. It is also usual to state by the notice what is the amount of rent that may be owing, but this is unnecessary, as the tenant is supposed to know it. The giving of the notice was formerly followed by an appraisement of the goods

by two appraisers; but this (by the Act of 1888) is no longer required, except on the written request—and at the cost—of the tenant or owner of the goods. The sale may take place not less than five clear days after the delivery of the notice of distress, though such five days may now (by the same Act) be extended to fifteen on the written request of the tenant or owner. This interval is given for the purpose of enabling the tenant or owner, if so minded, to replevy his goods in the manner I shall presently explain. After such five or fifteen days the distrainor has an undefined time given to him for the sale, but its length must not be unreasonable, so as unduly to disturb the tenant in his enjoyment of the premises. The Act of 1689 says nothing about the place of sale, but the Act of 1737 provides that, if the goods have been impounded on the premises, the sale may take place there: though the tenant or owner of the goods may now, by written request, have them removed (under the Act of 1888) at his own risk and expense to a public auction-room. The best price for them must be obtained at the sale, otherwise the landlord will be liable to an action. In no case—even at an auction—may he purchase the goods himself. The effect of the sale is to transfer the property in them in the ordinary way to the purchaser.

Let me say a few words in conclusion on the remedies available to the landlord and the tenant respectively for wrongful acts committed during the course of a distress. Those available to the landlord may be grouped under three heads. First, on his deprivation of the fruits of distress by the tenant's default. The proper remedy here is that of a second distress. In general a second distress for rent already distrained for is illegal. You cannot, let me point out, split your claim for rent

and distrain for it on separate occasions, for that would be oppressive. But a second distress is only unlawful so long as you might have satisfied your claim but for your own default. It is not a default, for instance, if you make a mistake—on reasonable grounds—as to the value of the goods you take. Nor is it a default if you are unable to satisfy your demand on account of the insufficiency of goods which are available for that purpose. *A fortiori* if there is default on the part of the tenant is a second distress justifiable: as, for instance, where he prevents the removal of distrained goods which have been sold to a purchaser, or where he gets the landlord to withdraw by promises which he fails to perform.

The second remedy is in fraudulent removal. In addition to what I have already mentioned in connection with this matter, the Distress Act of 1737 gives to the landlord a special remedy, available both against the tenant and against other persons abetting him in the removal,—that of an action in which double the value of the goods may be recovered as damages. If the goods do not exceed £50 in value, summary proceedings for the recovery of such damages may be taken before justices of the peace.

Lastly, on rescue and poundbreach,—that is to say, on the taking back of distrained goods by the tenant or owner into his possession before and after the impounding respectively. The remedy of the distrainor here is twofold. If the goods can be recaptured without breach of the peace and without delay—"on fresh pursuit," as it is termed,—he may avail himself of this summary process. It is called technically recaption. But the remedy to which recourse under the circumstances is most often had is that of an action for treble

damages—under the Act of 1689—against the offender, or against the owner of the goods distrained if they are afterwards found in his possession. I may mention that rescue of the goods by the tenant is justifiable if the distress was wholly illegal, but the same thing does not apply to poundbreach, because the goods have then got into the custody of the law.

The remedies available to the tenant against the landlord where a distress is wrongful can be divided into four principal classes. The first is by an action for damages. I ought to mention that a distress is altogether illegal if there is no right to distrain at all, or if a wrongful act has been committed at some stage of the levy not later than the seizure; whilst if the act complained of has been committed during the proceedings between seizure and sale, or during the sale, it is termed irregular. But whether a distress be illegal or irregular, or whether it be only complained of as excessive—that is to say, where more goods are seized than are necessary,—the damages recoverable in the action (speaking quite generally) are the value of the goods if a sale has taken place, but, if not, only the actual loss sustained, which is often nothing more than nominal. In the particular case, however, where a distress has been levied when no rent is due to the distrainor at all, the owner of the goods which have been taken may, under the Act of 1689, sue for double their value.

The second kind of remedy available for the wrongful acts of a distrainor is by application to a Court of summary jurisdiction. This is given by three different statutes: (*a*) the Agricultural Holdings Act, which allows of application to a County Court as an alternative remedy; (*b*) the Distress Amendment Act, 1888,

in the special case where certain articles are taken which it declares shall be free from seizure; (*c*) the Metropolitan Police Courts Act, 1839, when wrongful acts are committed in the Metropolis during a distress, in the case of tenancies which are either weekly or monthly, or (if not) where the annual rent payable does not exceed £15.

The third remedy is by injunction, which will, in a proper case, be granted when a landlord threatens, or is in the act of levying, a wrongful distress. This remedy, which is one in the discretion of the Court, is, however, somewhat sparingly given, and it is a very common rule for its application to require the payment of the rent into Court, so that the landlord may not be prejudiced if he turns out to be in the right after all. You will remember that in *Walsh* v. *Lonsdale* these terms were imposed on the tenant.

The last remedy of which I shall speak is that of what is called *replevin*. It is only applicable when the distress is altogether illegal, and is the name given to the process by which the tenant or owner of goods seized obtains their redelivery to him on giving security to try the validity of the distress in a subsequent action, and to restore them if it prove to be valid. It consists, as you see, of two different parts. The first is the process to obtain actual delivery of the goods themselves. This can be done in the County Court only, process being issued by the registrar of that Court, on security being given to his approval for a sum to cover the rent alleged to be due and the costs. The security, which is made either by a bond with sureties or by a deposit, is given to commence and prosecute the action successfully and without delay.

The second part of the replevin proceedings is the

action itself. This may be brought either in the County Court or in the High Court, and should always be brought in the former—and within one month of giving the security—unless the rent exceed £20, or the title to property of a greater annual value than that amount comes in question. The plaint is issued, with particulars, in the usual way, but no other cause of action may be joined with replevin in it. The damages recoverable are generally confined to the expenses which have been incurred in issuing the process, but if the plaintiff has been further damnified, *e.g.* by loss of credit or trade, he will be entitled to recover in respect of this, as well as damages for the illegal distress itself. The defendant may apply by what is called a *certiorari* to remove the proceedings into the High Court, on giving security to defend the action with effect, and further to prove that he had good reason for believing that the £20 limit to which I have just referred would be exceeded. If the plaintiff brings his action in the High Court, the time allowed for its commencement is only one week from the date when the security is given. In this case the joinder of other causes of action is not forbidden, and the proceedings follow the usual course of other actions.

LECTURE III

GENTLEMEN,—A covenant is a contract or promise made by one party to a tenancy with or to the other, that something shall or shall not be done. The term is one which is usually, but not necessarily, applied to leases under seal. The words made use of for the framing of a covenant are unimportant; the expression "yielding and paying," for instance, with which the *reddendum* usually opens, has always been considered as equivalent to a covenant. Nor does it matter in what portion of the lease the contract in question may be found. There is a case in the books where a covenant was spelt out from the recitals. But, of course, in most formal documents one finds these contracts contained in clauses all strung together and following one another in regular succession. Although, however, it does not matter what form of words may be employed for the purpose of making a promise, you must be quite sure that there *is* a promise; and it is often a matter of some little difficulty to say when that is the case.

We have a very good instance of this in most ordinary leases. The lessee, as I shall explain to you by and by, is, as a rule, made to undertake that he will not assign or under-let the premises without the consent, generally in writing, of the lessor being first obtained; and words are added to the effect that such consent shall not be withheld unreasonably. The way in which this is generally framed is this: "And the

lessee hereby covenants that he will not assign the premises without the lessor's consent in writing, such consent not being unreasonably withheld by the lessor." These latter words are a mere qualification of the lessee's covenant, and not a distinct promise or contract on the part of the lessor, upon which an action would lie for non-fulfilment. Another illustration is afforded by a clause, also frequently found in leases when agricultural property is demised, where the lessee covenants to repair, "provided that the lessor finds timber"; and this again does not amount to an absolute engagement to find timber, which can be enforced against the lessor. You will find a very recent and instructive decision on this point in the case of *Westacott* v. *Hahn*, in the 1st vol. of the 1917 reports (K. B.), and this decision was affirmed by the Court of Appeal, in the 1st vol. of those of the following year. The effect in both cases is merely that of preventing the tenant from being chargeable on his undertaking until the engagement by the lessor has been fulfilled.

In order that an action may be maintainable on the covenants of a lease, it is necessary at common law (apart from privity of contract) that there should be what is called privity of estate. Of course, as between the parties to the demise themselves, there is always privity of contract. But that kind of privity is not always necessary. I have told you already that a lease is something more than a contract, and that it confers what is called an estate on the lessee. If the whole of the estate is transferred by him to another person, between the lessor and that other person there exists what is known as privity of estate. The same thing applies also when the landlord's estate or interest,

which is called the reversion, is transferred by him. In this case too privity of estate exists between the new landlord and the tenant, or any other person to whom the tenant may have conveyed the whole of his estate. But suppose I, having a lease for twenty-one years, make a lease for twenty-one years wanting ten days, or three days, or one day. That is what is called an under-lease. Clearly no privity of contract exists between my lessor and the under-lessee, and neither is there any privity of estate, because between my lessor and him there intervenes a certain interest which, though only for a few days, is one recognised by the law. The result is that in this case no action is maintainable between my lessor and the under-lessee. The Law of Distress Amendment Act, however, of which I spoke to you in my last lecture, has made an exception to the above rule so far as the covenant to pay rent is concerned; for it provides that a landlord to whom rent is due, after serving written notice on an under-tenant, stating the amount of the arrears due, and requiring future payments to be made to him until such arrears have been wiped off, may recover such rent from him as if he were his immediate tenant, the under-tenant on paying it having the right of deduction from the rent due to his immediate landlord.

But I would not have you think that it follows from the general rule that the lessor, in cases other than that of rent, has no remedy against the under-lessee at all. If the latter, to begin with, has goods upon the premises, and rent is owing to the head landlord, the latter can—subject now to what I told you in my last lecture as to the Act of 1908—distrain on them merely because they are on the premises. So, again, if I were to forfeit my lease in the manner I shall explain here-

after, the under-lessee would lose his estate also. And there is another important qualification of the general principle, in the case where a covenant is of a negative or restrictive kind. With a covenant of this sort there is always an equitable remedy available—that of injunction—if there should be failure in its observance by the under-lessee. Take the covenant, for example, not to carry on trade in the head lease. If that covenant is broken by the under-lessee, although no action, as I have already said, can be maintained against him for damages at law by the head lessor, the latter has the right to go to a Court of equity and obtain an injunction against the under-lessee to prevent further breaches. I say that he has the right in the case of a negative covenant, because the Court, in issuing an injunction, does nothing more than give judicial sanction to the contract which has in fact been entered into. But I am far from saying, you must understand, that equitable considerations do not enter at all. On the contrary, if the lessor, for instance, has been guilty of long delay in enforcing the covenant, and *à fortiori* if he has been lying by and allowing expenditure to be incurred on the strength of his having acquiesced in the breach, the Court will refuse to interfere. An injunction is an equitable remedy, but agreeably to what I have already told you, it is a remedy which can now be given by every Court.

I now come to *implied covenants*. Covenants are implied both on the part of the lessor and on the part of the lessee. I will consider first those on the part of the lessor. Let me tell you what I mean by this expression. Perhaps there is hardly any word in legal phraseology more loosely used than the word "im-

plied." Suppose I am a lessee, and I have specially undertaken not to carry on certain named trades, *a*, *b*, or *c*. Everybody would agree that another trade, let us say the trade *d*, I was quite at liberty to exercise, and it would generally be said that there was an implied covenant to that effect in the lease. But that is not the sense in which I am using the word here. The implied covenants of which I am speaking are those which are implied by the law itself, and, of course, I need hardly say that the implied covenant that I may carry on the trade *d* is not a covenant of this kind.

There has been considerable difficulty on the question of implied covenants. In fact, within the last few years, a regular controversy may be said to have been waged in the Courts on the subject. In the case of *Budd-Scott* v. *Daniell*, which you will find in the 2nd K. B. volume for 1902, it was held by the Divisional Court that where an implied covenant exists, it is implied from the very relation of landlord and tenant; that it comes into being from the fact itself that one person is lessor and another is lessee. In a case, however, decided by the Court of Appeal a few years earlier, *Baynes* v. *Lloyd* (in the 2nd Q. B. volume for 1895), that Court expressed the opinion—it was not necessary for the actual decision of the case—in favour of a different view. That view was that a covenant was never implied from the mere relation of landlord and tenant, but that where it was implied it was implied only from the use of certain special words having a known legal operation. A year after the King's Bench Division had expressed disapproval of this statement of the law, the matter came again before the Court of Appeal, and this time it was again

unnecessary for the point to be actually decided. The case I am referring to is that of *Jones* v. *Lavington*, in the 1st King's Bench volume for 1903. The Court of Appeal, without overruling the decision of the King's Bench Division, went back to their original view, and again expressed their opinion that that view was correct. On the other hand, Mr. Justice Swinfen Eady in *Markham* v. *Paget* (Chancery Reports for 1908, vol. 1) has followed the view taken by the Divisional Court. At present, therefore, you see that the matter is in a very uncertain position.

One thing, however, is settled, and that is that the implied covenant, however it comes into being, does not extend beyond the interest possessed by the lessor himself. Take the case, for instance, where a tenant for life makes a lease for years. I am assuming that such lease is not made under the Settled Land Acts, and that it is one which therefore determines on his death. The lessee would have no remedy against the lessor's executors on the implied covenant, because on his death his interest has come to an end.

The principal implied covenant is the covenant for quiet enjoyment. In consequence of the controversy of which I have spoken, it is difficult to say whether for its existence the word "demise," as an operative word in the lease, is necessary or not. All that we can say is, that if the word "demise" has been used there is an implied covenant for quiet enjoyment. But one portion of the ground we are here treading on is at all events firm, and that is, that the implied covenant for quiet enjoyment does not apply, as regards the acts of strangers, to those which are wrongful, but only to those which are lawful.

With regard to the application of this obligation to

persons as distinguished from acts, the matter is less clear. That in the absence of the word " demise " it has no application except to persons who claim under the lessor is quite certain; for that is the exact scope of the decision of the Court of Appeal in the case of *Jones* v. *Lavington*, to which I have just referred. The doubt is whether if the word " demise " *has* been used, the implied covenant for quiet enjoyment applies to persons other than those who claim under the lessor. You will find decisions on this point, which go back to the days of Elizabeth, both ways. Most of them are referred to in the full discussion on this subject by Lord Justice Kay in *Baynes* v. *Lloyd*, which I mentioned just now.

Let me now say something on the implication of fitness of demised premises. One is reminded here of the chapter on the subject of snakes in the treatise on Iceland referred to by Dr. Johnson. Speaking generally, there is no covenant for fitness at all on the part of the lessor. The lessee takes the demised premises as he finds them, and at his own risk. There are, however, some observations which may be usefully made on the question. The first is, that though the lessor does not in general warrant that the premises are in proper condition, or fit to be used for any purpose, he must not—for instance, by the use of adjoining land in his possession—make them unfit for a purpose to which he knows the lessee intends to put them; because that would be acting in derogation, as the law calls it, of his own grant, and this is never allowed.

In the next place, the lessor, in his anxiety to obtain a tenant for his premises, may be induced to make statements or representations with regard to their con-

dition or fitness which may result in fixing him with liability. Of course, if he makes statements which he knows to be untrue, or which are so reckless that he could not possibly have believed them to be true, he is always liable when they turn out not to be true. And he may also be liable where he chooses to take the risk of their being true or not, by using expressions amounting to what the law terms a warranty. To distinguish between warranty and mere representation is by no means easy. What you have to look at is the intention with which the words were used, having regard to all the circumstances. If the statement is one on a matter as to which both parties may be expected to exercise their judgment, it will not in general amount to more than representation. But if the statement relates to a matter which is peculiarly within the knowledge of the lessor — like the condition, for example, of the drains of a house, or its water-supply, —and is one upon which the tenant would naturally rely for his information, then the representation amounts in general to a warranty. There is an important case on this subject in the reports, decided a few years ago by the Court of Appeal, and I should like you to refer to it: *De Lassalle* v. *Guildford* in the 2nd K. B. volume for 1901, where you will find the law laid down in the above sense. This decision, however, has been criticised in a later case before the House of Lords; and you must now take it that the test I have just referred to, however important for answering the question of warranty or no warranty, is not to be regarded as altogether decisive.

A further observation which has to be made on the subject of the fitness of premises and the lessor's liability is in connection with furnished houses and

apartments. The liability here arose in a curious way. The case in which it was first decided that there was an implied warranty on the letting of a furnished house is that of *Smith* v. *Marrable*, in the 11th volume of Meeson and Welsby's reports. The action was one which related to the letting of a furnished house at Brighton, and the judge who tried it, Lord Abinger, laid down broadly that the warranty should in this case be implied because the premises had been taken for immediate occupation. The matter was afterwards argued before the Court of Exchequer on a rule for a new trial, and Baron Parke, in delivering the principal judgment upholding the view expressed by Lord Abinger, again does not refer to the fact that the premises were furnished, but also deals with the matter solely on the ground that they had been taken for occupation at once, and points out two or three decisions, in Lord Chief Justice Tenterden's time, where that view had prevailed.

In the following year, however, the matter came up again for argument before the same Court in another case, *Hart* v. *Windsor*, in the 12th volume of the same reports. The question seems to have been more fully argued this time, and Baron Parke delivered the considered judgment of the Court. In this judgment he went back on his former decision, refused to recognise the earlier authorities upon which it had been founded as good law, and said that that decision could be supported, if at all, only on the ground of the house in question having been a furnished one. This is how the exception seems to have crept in, and the first decision has been followed by so many others that you may now take it as settled law that the lessor impliedly warrants, in the case of furnished houses and apart-

ments, that they are reasonably fit for habitation and use.

The warranty, however, only extends to their condition at the commencement of the tenancy, and if all that the tenant could show in a particular case was that the premises were unfit for occupation during the term, he would necessarily fail. But if he can show that the premises were unfit for occupation at the time of the letting, the fact that the lessor may have believed, even on the best grounds, that they were in proper condition would be quite immaterial, for to show that is no answer to a breach of warranty. The tenant, when the lessor's obligation is broken, may not only recover damages, but he may, if he choose to do so, repudiate the tenancy as soon as he finds out the state of the premises; so that you see that the obligation is something more than a warranty, and is treated by the law as a condition of the contract.

Another important exception to the general principle is provided by a statute of the year 1890, in the case of dwelling-houses or rooms taken by persons of the working classes and others, where the rent does not exceed a certain amount. In London that amount is £20, in the provinces it is somewhat less, and it varies in different places specified in another Act, to which the Act in question refers. A warranty of fitness at the commencement of the tenancy is implied on the part of the lessor in this case also, and by an amending statute of the year 1903 the parties are not allowed to contract themselves out of the Act of Parliament, in order that the landlord may get rid of his liability. The Housing and Town Planning Act of 1909 (9 Edw. VII. c. 44) has now extended these provisions in two important respects by making them apply, first,

throughout the tenancy and not merely at its commencement, and, next, to more highly rented houses —in London the limit of rent is now £40—than before. But it is settled that the effect of these enactments is only to introduce the warranty of fitness into the contract itself, so that they do not operate to give a right of action to a third person who may sustain injury or damage owing to the non-fulfilment of their requirements. This was established by the judgment of the Court of Appeal in *Ryall* v. *Kidwell* in vol. 3 of the 1914 (K. B.) reports. The " fitness " required is fitness for habitation, and the question whether it is complied with is no doubt one of fact. In a recent case it was held that the mere invasion of a house by rats in large numbers was not sufficient to bring the statute into operation, where it was not shown that they were bred in the house and so in a way formed part of it.

I now come to deal, quite shortly, with the implied covenant on the part of the lessee. It is usually expressed by saying that he must use the premises in a tenant-like manner. There are two branches of this obligation, according as the tenancy relates to buildings or to land; and you will find both of them dealt with in the judgments of the Court of Appeal in the very modern case of *Wedd* v. *Porter*, which you ought, I think, to consult, and which you will find reported in the 2nd K. B. volume for the year 1916. In the former case the tenant must do a certain amount of repairs, but what that amount is has never been exactly laid down. You all know, of course, what waste is, and you know that besides waste of an active kind—voluntary waste, as it is called,—if the premises are allowed to go into decay the tenant is guilty of what

is called permissive waste. A tenant for years has always been held liable for permissive as well as voluntary waste. Whether he has any further liability has, I think, never been decided in terms, for the reason that tenancies for years almost invariably put the lessee under an express obligation to repair. In the case of a tenancy from year to year, however, that does not always happen, and I think it is a fair thing to say that, although it is sometimes laid down that he is free from liability for permissive waste, yet it is his duty to do some repairs in order to prevent the fabric of the premises from going to decay. If he does that he fulfils his implied obligation.

With regard to lands, if they are of an agricultural nature, the lessee is under an implied obligation to cultivate them properly according to the custom of the country. Such a custom need not be a strict custom in point of law, that is to say, one which has subsisted for a time beyond the memory of man. If it has existed for a reasonable time it will be sufficient. But it must be one which prevails generally in a particular district, and not a mere usage which subsists only between the owner of a particular estate and those who occupy under him; and a person who became an occupier in ignorance of a usage of that kind would not be bound by it. As I shall have occasion to mention in a later lecture, custom is always displaced by express agreement.

Having dealt with implied covenants, I pass on to consider a few of the most ordinary covenants contained in leases, and I begin with one of the most important,—the *covenant to repair*. The covenant extends, with regard to time, over the whole of the

term, and a covenant to keep premises in repair is broken if at any time they are out of repair. It is what is called a continuing covenant. There is also usually added an express covenant by the lessee to deliver them up in repair at the end of the tenancy. With regard to place, the covenant, speaking generally, applies to all the premises included in the demise, so that if buildings are added during the term they also may be included within it; though a covenant expressed to repair " the demised buildings " will not cover those afterwards erected, unless they are erected so as actually to form part of the same buildings as those in the demise.

The covenant also extends to all fixtures, but not to articles which, as I shall explain to you in a later lecture, are not fixtures in the strict sense of the word, but merely chattels connected with the freehold by a slight or temporary attachment. All real fixtures, however, are included, even though, as you will hear by and by, they may primarily be within the tenant's privilege of removal, such as those which he has erected for the purposes of his trade. Consequently, where he covenants to deliver up the premises in repair together with fixtures he loses that right.

If you covenant to keep premises in repair, you must always remember that the covenant carries with it an obligation to put them into repair first. This does not mean that you are to substitute a new house for an old one, for the repairs which are required from a tenant are always repairs suitable for a house of the age, class, and condition to which the premises belong. So that while you are always allowed to give general evidence of the condition in which you had the premises, in order to show that they belong to a

certain class, you are not allowed to leave them in bad repair merely because you took them in bad repair. You are entitled to say that the house when you had it belonged to a certain class, and you are not bound to do more than those repairs which may be necessary to keep the house as a house of that class. A house has been likened in this respect to a ship, which belongs to a certain class according to its construction, and which descends in class by the effects of time and use.

There is a very important case on this point which is always referred to by legal practitioners, where certain principles were laid down by the Court of Appeal. The name of the case is *Proudfoot* v. *Hart*, and you will find it in the 25th volume of the Q. B. D. reports. The general doctrine is, that you are only liable, when your tenancy comes to an end, for those repairs which would be deemed necessary by a reasonably-minded person of that class of persons who would be likely to take the premises, and which would be sufficient to satisfy him. Repairs are of two principal kinds: either decorative, like painting and papering, or structural, that is, repairs to the fabric. With regard to decorative repairs, a tenant is not generally liable for them, unless they are necessary, either to preserve the fabric, or to satisfy the hypothetical tenant of whom I spoke just now; and if he does them he is not necessarily bound to use materials of the same value as had been used before. With regard to structural repairs also, he has to satisfy the requirements of the new tenant, and if he does that he need not necessarily replace those parts of the fabric which have fallen into disrepair by new materials. The covenant is, of course, expressed in a variety of

different ways, but whether the repair in which the premises have to be kept is described as good, or as substantial, or as tenantable, would not seem to be important.

If the subject of a demise owing to its age or defective construction is past all repair, and the only way of dealing with it is by rebuilding it, a lessee is not bound to do that merely because he has covenanted to keep it in repair. But if the decay is merely in subordinate parts, such as a floor or a wall, this will not apply; so that he is always exposed under the covenant to the risk of having to renew such subordinate parts. This was laid down by the Court of Appeal in the case of *Lurcott* v. *Wakely* in the 1st volume of the K. B. reports for 1911.

The measure of damages recoverable for the breach of the covenant to keep premises in repair during the term is the loss to the reversion. That loss is naturally far greater in a seven years' lease than in one for ninety-nine, and you will see that the longer a lease has to run the less that loss must be. You must carefully distinguish from this general case one where the lessor is himself holding under a lease, because you will at once see that the general rule cannot properly apply there. Suppose that I, having a lease for twenty-one years and bound under it to repair, make an underlease at the same rent for that term less three days, as is often done. In such a case as that, if my underlessee does not repair, the loss to my reversion would be virtually nothing, because the reversion itself is only nominal. But my own liability as lessee may be a serious thing for me, if the premises are not kept in repair. The real damage I sustain in such a case is the difference between the value of the reversion, if

the covenant is performed, and its value if the covenant is not performed: in other words, the actual cost of the repairs, less an allowance made for the time the under-lease may still have to run.

At the end of the term, the measure of damages for not delivering up the premises in repair is the cost of the repairs, together with some compensation for the inability to let or use the premsies during the time that the repairs may reasonably be expected to last. But the lessor cannot include in them—why, I never quite understood—the cost of a surveyor whom he has been obliged to employ in order to ascertain the extent of the dilapidations. The rule I have just given to you as regards the cost of repairs being the measure of damages at the end of the term is an absolute one, and will prevail none the less because the lessor may have made arrangements with some third person to pull down the premises altogether, or because during the running of the lease the neighbourhood in which the premises are situated may have so far diminished in value as to render those repairs altogether unsuitable. You will find the law laid down to this effect by the Court of Appeal in the case of *Joyner* v. *Weeks*, in vol. 2 (Q. B.) of the reports for 1891.

I will conclude what I have to say about the covenant to repair with a few words about what happens when the obligation is undertaken by the lessor, a condition of things occasionally met with, especially in tenancies of the humbler class. When this occurs, the lessor can only be "brought to book" if notice has been given to him of the want of repair. You see, of course, that his position and the position of the lessee with regard to knowledge are widely

different. The rule as to notice is a strict one, nor is it sufficient for this purpose to show that the lessor had full means of knowing that the premises were out of repair.

One rather curious result of the obligation being undertaken by the landlord is, that it may have the effect of rendering him liable to third parties for an accident or injury sustained in consequence of the defective state of the premises. For this liability, however, to arise two conditions must be fulfilled. First, the repairing covenant he has entered into must be sufficient to give him a degree of control over the premises, and secondly, the person who claims to recover damages from him must be one towards whom he has a certain duty. Suppose I am passing along a street, and a portion of the roof of a house falls on my head, if the control of the premises for the purpose of repairs is vested in the lessor he becomes liable to me, because he has a duty to see that persons passing along the highway are free from injury. But if I go into a tenant's house, and while there I am injured by the fall of a piece of the ceiling, the case is different, because although the landlord may have agreed with his tenant to repair he is under no duty towards me in the matter. I should like you to refer on this branch of the subject to a late decision of the Court of Appeal, *Cavalier* v. *Pope*, which you will find in the King's Bench reports (vol. 1) for the year 1905. That decision was affirmed by the House of Lords.

I may also add that there is another case in which a lessor may be liable to a third person without having entered into a covenant to repair at all, and that is where he has been guilty of some misfeasance, such as letting the premises in a ruinous condition. But

here, again, a third person is only entitled to make him liable if the wrong of which he complains is something in the nature of a public nuisance, for it is only then that the duty of which I have been speaking would arise. The presumption is made in such a case that the lessor has authorised the continuance of the nuisance: hence, although the premises may be ruinous when they are let, if he exacts from his tenant an undertaking to repair, the presumption will be displaced and the lessor will no longer be responsible.

The object of the *covenant to pay assessments* is to throw public burdens relating to the demised premises on the tenant. As regards some of them—such as the property tax and tithe rent-charge—this is expressly forbidden by the Acts of Parliament which regulate them; but with regard to the great majority the parties are left to settle their own bargain as to where the burden should ultimately fall. The covenant in question is a very troublesome one, and has given rise within the last few years to more litigation than perhaps any other in the lease. The reason is that several statutes, like the Public Health Acts, have been passed in modern times, creating, in the general interest of the community, burdens in respect of permanent improvements to property, such as drainage and paving; and the difficulty has chiefly arisen because the covenant has been diverted, in order to cover these cases, from an object which was altogether different. Its existence can be traced to quite early times, and you will find it dealt with in reported cases at least as far back as the seventeenth century. In those days, and for long afterwards,

enactments like those of the Public Health Acts, imposing a primary liability for improvements on the *owners* of premises, may be said not to have existed at all. What did exist, and what the covenant was designed to meet, were cases where there was imposed a primary liability on the tenant alone, followed by a provision that when he had discharged it he might deduct the amount he had paid from his rent, unless he had entered into a contract to the contrary with his landlord. Of this class of burden the land tax furnishes a very good example. The object of the covenant was simply to provide this contract "to the contrary," in order to prevent the deduction from being made.

These cases, as you will see at once, were quite different from those dealt with by the modern statutes; and some fifty years ago the Court of Common Pleas, in a very important case, decided that a covenant, expressed in the ordinary terms, did not cover the latter class, even though the statute in question might render the tenant directly liable as well as the landlord, when such liability was one imposed *merely for purposes of collection*. The name of the case I am referring to is *Tidswell* v. *Whitworth*, in the 2nd volume of the C. P. reports, and it was recognised and followed during a number of years. The result, however, was that conveyancers began at once to amplify the covenant by adding expressions to it not found in it before, so as if possible to bring the new class of burdens within it. This they chiefly did by providing that the tenant should pay, not merely all assessments, &c., payable in respect of the premises, but also those which might be payable *by the lessor* in respect of them; and there have been many

decisions to the effect that words of this kind were very important in rendering the tenant liable. At the same time, fresh words like "impositions," "outgoings," &c., began also to be commonly added to the words "rates, taxes, and assessments"; and though there was a long struggle in the Courts to construe those words, by what is called the *ejusdem generis* rule, as limited to burdens of the same class as rates and assessments—that is to say, as applying only to those of a recurring nature, and not to those imposed once for all in respect of permanent improvements to land,—these attempts were not, as a rule, successful.

It would be impossible for me here to go at greater length into the history of this matter, and I must content myself with giving you a few general results. The consequence of what I have said was to introduce great confusion into the subject, and the liability of the tenant was made to depend on minute and almost inappreciable distinctions. Of late years, however, the Courts have shown a strong disposition to put an end to them, and at the same time an unmistakable tendency in favour of the landlord, by holding that the object of the covenant, which was clearly that of enabling him to receive his rent clear of all deductions, should if possible be given effect to. The principle laid down in the case of *Tidswell* v. *Whitworth*, though the case itself has never been overruled, may, I think, now be said to have received its complete quietus.

The first point that may be made is, that a certain "magic" has come to be established in this connection by the use of four special words. These are the words "outgoings," "charges," "duties," and "impositions"; and whenever you find any one of

them in the covenant, the tenant *primâ facie* renders himself liable for the burdens in question without anything more being said. Whether the word "assessments" has of itself a similar effect cannot at present be regarded as altogether clear. The *decisions* are that it has not. But a distinction should perhaps be drawn here, between the case where the burden which has to be discharged is one that falls on the premises demised and on no others—as in that of sanitary repairs to a house,—and the case where that burden is shared by them with other premises,—as in that of paving a street. There are several *dicta* of authority —though, as I have said, there are one or two actual decisions to the contrary,—that payments levied in respect of the latter class of burden are really "assessments"; and indeed it seems difficult to see what they are if they are not.

The next point useful to notice is that the tenant's liability is one that may be displaced. Suppose, for instance, that the covenant, though it does contain one of the words I have mentioned, *e.g.* "impositions," deals only with those charged *on* the premises. This would apply only to those legally charged thereon, and not to those imposed on the landlord by a merely personal order. Moreover, you may be able to gather from other parts of the lease that the word in the covenant must be limited to payments of a recurring nature. A good instance of that is afforded by a case in which, besides the general covenant to pay impositions, the lease contained a clause that the lessee should pay a certain proportion of the expenses of works which might be required by an Act of Parliament to be executed on the premises.

The last point to which I shall direct your attention

was first formulated in an important case recently decided by the Court of Appeal: *Foulger* v. *Arding*, in the 1st K. B. volume for the year 1902. It is that the payments referred to in the covenant are only those within the reasonable contemplation of the parties when the demise is made. The Master of the Rolls gives there, as an example of what is meant, the case where a house is required to be pulled down and reconstructed because it projects beyond the building line of a street; and points out that the expense involved in carrying out such an order would probably be altogether beyond the scope of the covenant. How far in applying the principle you are entitled to take into account, not the nature of the work to be done, but the extent of the tenant's interest in the premises, seems at present a little doubtful. The Court of Appeal has decided that the covenant in a three years' agreement is in no sense to be construed differently from the covenant if contained in an ordinary repairing lease. The case I refer to is that of *Stockdale* v. *Ascherberg*, in vol. 1 (K. B.) of the reports of 1904. On the other hand, there are two modern decisions to the effect that this does not apply to a yearly tenancy. I think that the better opinion is, that it is only the nature of the work required that can properly be taken into account.

The *covenants relating to the user* of demised premises are, I fear, altogether too multifarious to allow me to do much more than merely mention their existence. They can be classed as affirmative, and negative or restrictive. Of the latter I have already spoken to-night, and I shall refer to them again when I deal with assignment on the next occasion, because,

as you will see, they stand on a special footing of their own with regard to what is called the doctrine of notice. Covenants restricting the carrying on of trade, or of certain trades, on the demised premises afford perhaps the commonest instance. Of affirmative covenants relating to user good examples may always be found in mining and agricultural leases. Both of them almost invariably contain covenants binding the lessee, in the former case to work the mine, and in the latter to cultivate the land in accordance with the custom of the country where it lies. I have already referred to the implied covenant for cultivation to the same effect. The important point to remember is, as I then mentioned, that the custom, in accordance with well-established rule, is always superseded by an express covenant, when it covers the same ground. I shall touch on this again when I come to speak of tenant-right.

The important *covenant not to assign* without licence I will deal with in my next lecture, which will treat, as you know, of assignment generally. To-night I will end with a few remarks on the *covenant for quiet enjoyment*.

This covenant is primarily an assurance against any disturbance from a defective title. It has, however, been extended by a long series of decisions to acts which have the effect of interfering with the enjoyment of the premises by the lessee. I want you to recollect this, that it does not enlarge any rights which have been granted by other parts of the lease; but if the lessee has been deprived of what has been granted to him by those other parts, then the object of

the covenant is to give him a special remedy. Hence it cannot be relied upon, for instance, as warranting that the premises may be used for any particular purpose which is not specified in the lease. Remember, too, that it only provides against acts which are lawful, and not those which are unlawful, except in the case of the lessor himself, and of any persons who may be actually named in it; but of course the covenant may be expressed, and occasionally is expressed, to cover acts of both kinds.

In the next place, the acts complained of must have been done by the authority of the lessor,—not necessarily the express authority, for the implied authority is sufficient. I can refer you on this matter to a very modern case, *Williams* v. *Gabriel*,—a decision of Mr. Justice Bray, reported in the 1st K. B. volume for 1906.

Moreover, the acts must, in order to give a right of action on the covenant, have been done by persons claiming under the lessor, in the *character* of persons claiming under the lessor, and not in the exercise of rights acquired after the demise under an independent title. There is an important case I should like you to refer to on this. It is called *Davis* v. *Town Properties Corporation*, and you will find it in the 1st Chancery volume for 1903. It is a decision of the Court of Appeal.

Where the interference consists rather in the consequences of an act than in the act itself, those consequences, for an action on the covenant to be maintainable, must be direct and capable of being foreseen; and the covenant, as it has been expressed in one case, gives only ordinary and not extraordinary protection to the lessee. Some physical interference,

too, seems to be necessary, and mere acts of annoyance from adjoining premises, like noise or vibration, though they may be independently actionable as a nuisance, do not amount to a breach of the covenant. But it is well established that a breach may be committed by legal proceedings, and probably such acts as giving notice to sub-tenants not to pay rent to the lessee would be sufficient.

The persons against whose acts the covenant is framed are almost invariably those only who claim through or under the landlord. A party, for instance, claiming under a settlement made by the lessor would be such a person, whilst in the ordinary case of a lease by a tenant for life, a person in the position of remainderman would not. Nor would a superior landlord, or a party claiming by title paramount, or any person claiming not from the lessor but against him.

LECTURE IV

GENTLEMEN,—Assignment is the transfer by either party to a tenancy of his interest therein to another person. There are thus two sorts of assignment,—assignment by the tenant, or (as it is called) assignment of the term; and assignment by the landlord, or assignment of the reversion. Moreover, either of them may be effected in two ways. It may be voluntary,—by the act of the parties; or it may be involuntary, that is to say, by the operation attached to certain events by the law. I propose to begin, and to occupy most of my time to-night, with voluntary assignment. What you have got to bear in mind in connection with the matter—it is, so to speak, the key of the situation—is that by an assignment privity of estate is always created. You must never lose sight of the circumstance to which I have referred more than once in these lectures, that in addition to the contract between landlord and tenant each of them obtains, relatively to the other, what is called an estate,—the reversion and the term respectively; and the transfer of this estate, to which, as I have already said, the name of assignment is given, in itself creates this privity between the transferee and the other party to the original contract. I want you to keep that clearly before your minds.

Now I am going to deal first with voluntary assignment on the part of the tenant. The earliest statute

that regulated it was the Statute of Frauds, which required that assignments of leases should be in writing or by deed: and it was decided that this applied to *all* assignments, even to those of leases which, if not exceeding three years, might under that statute be perfectly well created by parol. Afterwards the Real Property Act of 1845—an Act to be looked on, as I have already told you, as in some respects merely supplementary to the Statute of Frauds—laid down that all assignments, like leases for more than three years, should be "void at law" unless made by deed. I dwelt in my first lecture on the very liberal construction placed by the Courts on this statute,—so liberal indeed as to render it, when possession has been given, practically a dead letter. I explained to you at some length how successive inroads were made upon it, first by Courts of law and then by Courts of equity, and how the Judicature Acts finally gave it its *coup de grâce*. Pretty much the same thing applies in the case of assignments as in that of leases.

I want to explain to you this. A tenant can assign his term in either of two ways. He may, in the first place, convey it out and out. But he may, and frequently does, make another kind of assignment; and I have already referred to it. He makes what is to all appearances a lease. He reserves a rent payable periodically. He exacts the observance of covenants. He even reserves to himself the right—in case of their non-fulfilment—of putting an end to the relation existing between him and the other party. The only difference between the case and that of an ordinary lease is that he parts with his whole interest in the premises: a circumstance which, as I have

already told you, prevents him from exercising any right of distress. Suppose now that the arrangement is not entered into by deed, so that it falls within the statute. I think that in a case like this it has never been expressly decided that the doctrine of *Walsh* v. *Lonsdale* would apply; but one can see no valid reason why it should not, and if it does, the effect of the statute, at least as between the parties, would be entirely got rid of. Moreover, apart from this, it had frequently been held, even by Courts of law before the Judicature Act, that a transaction of this kind would enure—except always as to distress—as a valid letting, so as to permit of the rent reserved being recovered by action.

The tenant is frequently prevented by the terms of his holding from making an assignment at all without the landlord's consent. The obligation generally extends to under-letting also, but at present I am dealing only with assignment. The object of the covenant not to assign is, of course, to prevent the lessor from having foisted upon him as tenant a person with whom he may not desire to enter into legal relations. It is the one important covenant excepted from the scope of the Conveyancing Act, under which, as I shall hereafter explain to you, the lessee may become entitled to obtain relief from forfeiture. The covenant to pay rent is no doubt another exception; but that is because the lessee in this case was, and still is, entitled to relief from another source. Upon the breach of a covenant not to assign, on the other hand, no relief, speaking generally, will be given at all.

The covenant I am speaking of extends only to assignments of a voluntary character. If a tenant

die, or become bankrupt, his interest becomes vested, as I shall presently point out to you, in another person. But this is an assignment by operation of law, and would not be a breach of the covenant. Moreover, if the tenant devise his interest by his will, that again would not be a breach. And what you must understand is that, for this to happen, there must be a parting with the *legal* interest. A tenant bound by such a covenant cannot, for instance, mortgage his interest in the ordinary way. But he may validly enter into an agreement to do so, or he may deposit his lease with his banker and borrow money upon it, or he may make what is called a "declaration of trust" with regard to it, because in these cases he still retains the legal interest. A difficulty has occasionally arisen where a demise has been made to more than one person, and one of them (or more) assigns (or assign) to the other (or others). It has been decided by Mr. Justice Buckley, following an earlier decision of the Court of Common Pleas, that this is a breach of the covenant, on the ground that the estate conveyed by the lease is affected by the act in question. There is, however, the great authority of Sir George Jessel, in a case where it was not necessary to decide the point, that such an act is only what the law calls a release, and not properly an assignment at all.

It is quite settled, too, that the covenant not to assign the demised premises does not prevent your assigning a part of them only, unless this is forbidden by express words, as it sometimes is. Nor does it prevent your under-letting, unless it be made to apply to "any part" of the term as well as to the whole: for under-letting is nothing more than assignment

of part of the term demised. I ought also to mention that the covenant not to assign, though, as I have said, a very frequent covenant in leases, is not what is technically known as a "usual" covenant. If you enter into an agreement for a lease, and that agreement in terms provides—as often happens—that the lease shall contain usual covenants, or if it be altogether silent on the subject, in either case the lessor would not be able to insist on the lease containing a covenant not to assign. The covenant, however, not to assign without consent is one that "runs with the land," and what that is I am going to explain directly.

Let me, before I leave this covenant, say a few words as to the lessor's consent, which it makes necessary. You must always remember that the assignment itself is not invalid without that consent; in other words, the assignee could not set up the absence of such consent as an answer to the liability which, as I shall presently point out, he may incur as assignee. But he would run the risk of an injunction being applied for to restrain the assignment, as well as of a forfeiture, where there is a condition of re-entry on breach of covenant. Where consent is necessary, the rule is that the burden of procuring it lies on the assignor, and not on the assignee. In general a written consent from the lessor is required, but, if there have been acquiescence by him in the holding by the assignee, he would not be allowed to rely on the absence of writing to establish a breach of the covenant. I told you, I think, in my last lecture, that the covenant by the lessee is usually qualified by adding the words that the lessor's consent is not to be arbitrarily withheld, and that, as the matter was

usually expressed, you could not spell out an actual covenant by the lessor not to withhold it. The effect is this. The lessee must in every case ask for the consent. If he does not do so, he *ipso facto* commits a breach of the covenant. But, once he has asked for it, he may, should it be unreasonable to refuse it, forthwith assign without it, though, as I have mentioned, he cannot maintain an action against the lessor for refusing it, except so far as to obtain a declaration that he is entitled to assign. And the real object of the covenant, as I have already said, being merely to prevent an undesirable person from becoming tenant, the landlord cannot reasonably refuse his consent on the mere ground that he wishes to occupy the premises himself. This was decided by the Court of Appeal in the case of *Bates* v. *Donaldson*, in vol. 2 (Q. B.) of the reports for 1896.

Nor is he permitted—without an express arrangement to that effect in the lease—to exact a money payment from the tenant as the price of his consent, except for the expenses incurred in relation thereto: and this even if he has not bound himself not to refuse that consent unreasonably. This is a statutory provision; it is contained in the Conveyancing Act of 1892. But that will not prevent him from making his consent conditional on the lessee's giving security for the observance of the covenants by the proposed assignee, as in that case the lessee will get his money back again if the covenants are duly observed. This was held by the Court of Appeal in the case of *In re Cosh's Contract*, in vol. 1 (Ch.) of the Reports for 1897. A perusal of the judgments of the Court of Appeal in the case of *Waite* v. *Jennings*, in the 2nd volume of the K. B. reports for 1906, will show that

the exact scope of the statutory provision is by no means yet settled; but it has been decided by the same Court in *West* v. *Gwynne*, in vol. 2 (Ch.) 1911, that the statute applies irrespective altogether of the date when the lease was made.

Lastly, I suppose you are most of you familiar with the doctrine of *Dumpor's case*, which belongs to the days of Elizabeth, and which has found a place in all the successive editions of "Smith's Leading Cases." That doctrine was, that when a lease contained a clause of re-entry on breach of the covenant not to assign without licence, and licence was duly given on one occasion, the right of re-entry was gone, and further assignments might be made without danger of forfeiture. It was one which frequently called forth disapproval as being opposed to common sense; but it was so often followed that it became firmly ingrained in the law, until it was finally "knocked on the head" by Lord St. Leonards' Act in the year 1859.

I pass now from the covenant not to assign, and propose next to deal with the respective relations which arise upon assignment of the term between the lessor, the lessee, and the assignee. The question can obviously be approached from three different points of view: (1) as between the lessor and the assignee, (2) as between the lessor and the lessee, (3) as between the lessee and the assignee.

As between the lessor and the assignee, there must, in order to create a tenancy between them, have been an actual assignment. None of those acts to which I referred just now, by which the lessee transfers something less than his whole legal interest,

will suffice for this purpose. A mere agreement to assign, for instance, will not do, even if the assignee has taken possession and paid rent to the lessor. But if, on the other hand, the legal interest has been transferred, possession by the assignee is not necessary for his liability on the covenants of the lease to ensue. A mortgage, for example, will—where the whole term is conveyed—always entail such liability, and that is why mortgages are in nearly every case made by sub-demise, and not by assignment. In that case, as I have explained so often, there is no privity of estate between the lessor and the mortgagee, and so the latter escapes liability on the covenants of the lease.

We have next to consider what are the covenants in the lease upon which an assignee makes himself liable by the assignment. They are the covenants usually spoken of as those which "run with the land": those, as it is said, which affect the nature, value, or quality of the demised premises, or the mode of enjoying them, independently of collateral circumstances. This is, perhaps, a definition which may be a little difficult for you to follow, but one or two illustrations will, I think, render the matter clear. Suppose I enter into a covenant in a lease that I will not use the premises as a public-house. Clearly that directly affects them,—their nature, their quality, and their value. Suppose, on the other hand, I covenant that, in addition to the rent I have to pay my landlord, I will pay an annual sum to some third party. Or suppose, in the demise of trading premises, I engage with my lessor that I will only take into my employment persons belonging to a certain class. Both these covenants are of a personal kind: they

have no direct connection with the land itself: they are what the law terms "collateral." Covenants of the other kind alone "run with the land" and bind assignees. The doctrine, in its integrity, applies only to leases under seal; but you are not to infer from this that the assignee under a mere written agreement, or even a parol demise, would be altogether free from its obligations. Such an agreement or parol demise is met with most frequently in yearly or other "periodic" tenancies; and it is quite settled that a person taking possession and paying rent on an assignment of such a tenancy would be held to have undertaken all his assignor's obligations except those of a merely personal character, on the ground that from the lessor's abstaining from giving him notice to quit, an arrangement for holding on those terms might fairly be inferred.

The subject of covenants running with land was, as you probably know, much discussed in a case decided in the reign of Elizabeth, and known generally as *Spencer's case*. You will find it in the 1st volume of "Smith's Leading Cases." It is there laid down that all implied covenants—of which I spoke last time—run with the land; and that with regard to express covenants, those run which "touch" or "concern" the land, both if they relate to something which is *in esse* and if they do not, so long (in the latter case) as assigns are named in the covenant. How far, however, the naming of assigns, in a covenant relating to something not *in esse*, is necessary to make a covenant run with the land is a little doubtful, at all events where the covenant—*e.g.* to build—is absolute in its character; where it is merely conditional (*e.g.* to repair, &c., buildings if erected), it is now settled that

it is not. An instructive modern case on the whole subject of covenants running with the land will be found in *Dewar* v. *Goodman*, which went up to the House of Lords, whose decision on it is recorded in the Appeal Cases for the year 1909.

There is another point, too, which you ought to notice in connection with this matter, and it is rather a curious one: and that is, that a covenant, though it does not directly touch or concern the land at all, may run with it in consequence of the operation of some statute. A good instance of this is afforded by a very ordinary clause in leases,—the one permitting re-entry in the event of the tenant's bankruptcy. I ought to have said that the doctrine applies as much to rights of re-entry—the case of what are called "conditions"—as to covenants. The clause in question is clearly one of a personal character; but inasmuch as the Bankruptcy Act divests the estate from the tenant on his becoming bankrupt and vests it in his trustee, the result is to affect the land and make the clause one that runs with it, because (as you see) the stipulation resolves itself into one which directly affects the occupation of the land. And this has even been extended to the case of the liquidation of a company, though here there is no vesting of the property in the liquidator at all; for he has power by the Companies Act to deal with it, and as a general rule the liquidation does involve his dealing with it, and so the matter stands on the same footing as in bankruptcy. You will find this laid down in the judgment of the Court of Appeal in a case called *Horsey Estate* v. *Steiger*, which deserves your perusal: it is in the 2nd Q. B. volume for 1899.

I want next to call your attention to a very

important principle in connection with this branch of our subject. It is known as the equitable doctrine of notice, and it dates from the judgment of Lord Chancellor Cottenham, in the year 1848, in a well-known case called *Tulk* v. *Moxhay*, which you will find in the 2nd volume of Phillips's reports. That doctrine is, that where the owner of land has attached to it some equitable right, every one taking that land afterwards, whether by purchase or lease, with notice of the equity, stands in the same position as the person from whom he takes it. Its chief importance is derived from the fact that it applies not merely where he has actual notice, but where that notice is only what is called constructive, that is to say, where it is only imputed to him by law: and it *is* imputed to him in every case where if he had made—as he is bound to do—a proper and reasonable investigation of title he could have discovered it. You will find a very full account of the whole doctrine in a recent judgment of Mr. Justice Farwell's (which has been affirmed in the Court of Appeal), where it was held applicable even to the case of a mere "squatter." The name of the case is *In re Nisbet and Potts*, in the 1st Chancery volume of the reports for the year 1905.

The doctrine, however, has two well-established limitations. The first is that it only applies in the case of negative or restrictive covenants, and not to those to be performed by the mere expenditure of money. But perhaps this statement is a little too wide. Covenants can easily be suggested which both require expense for their performance, and at the same time possess a negative element. The ordinary covenant to purchase all liquors from the lessors, in the lease of a public-house "tied" to brewers, affords

a good example. This covenant clearly contains a negative element, viz. not to purchase the liquors elsewhere than from the lessors: and so far as that element is concerned the case falls within the general principle, and none the less because you cannot perform the covenant in its integrity without a money expenditure. The other limitation is, that the doctrine only applies where the person for whose benefit the covenant has been made enters into it with reference to some definite property (*e.g.* adjoining premises) which he retains in his own hands, or in which he has an interest: if he parts with all his property except that to which the equity in question is attached, the covenant is personal as well as collateral, and the principle does not apply. This was established by a recent decision of the Court of Appeal in a case called *Formby* v. *Barker*, reported in the 2nd Chancery volume for the year 1903. I will only add one thing more, and that is, that the tenant of a person bound in this way by a negative covenant is equally bound himself, even though the covenant is only expressed to extend to such person and his "assigns,"—a term which for most purposes does not include an under-tenant at all.

Before leaving the subject of the relations between lessor and assignee, let me say a word as to the duration of the latter's liability. That liability, as I have said, is founded entirely on privity of estate, and consequently when that privity is destroyed it comes to an end. Rent, for example, cannot be recovered by action from an assignee of the lease, if it only accrues due after he has re-assigned; and he may re-assign to anyone he likes, even to a "man of straw," and for the very purpose of ridding himself

of the burden. So with regard to other covenants. Take the covenant to repair, for instance. An assignee is not liable for breaches of the covenant which have taken place after he has re-assigned. But, unlike the covenant to pay rent, this is what is called a "continuing covenant," and for breaches committed before the term was vested in him by the assignment he might, I think, be held liable, if the premises were out of repair during his possession. The right of the assignee is limited in the same way as his liability, and he would not be entitled to sue the lessor for a breach of covenant, if that breach was complete before the assignment to him took place.

As between the lessor and the lessee, the latter remains liable on all express covenants in the lease notwithstanding any assignment of the term. And a recent decision of the Court of Appeal (*Stuart* v. *Joy,* in the 1st K. B. volume for 1904) establishes that exactly the same thing applies to the former upon an assignment by him of the reversion. With this latter kind of assignment I shall deal presently. It does not seem to be quite certain what are "express" covenants within the meaning of the rule. The better opinion, I think, is that the term is to be construed in a rather narrow sense, as being confined to those which are expressed in direct words, and to exclude those which, as I mentioned in my lecture on covenants, are only "implied" in the sense that they can be spelt out from the lease. From a real implied covenant, like the one to use the premises in a tenant-like manner, I think there can be no doubt that the lessee would escape by an assignment. The difficulty chiefly arises in a case where the string of covenants entered into by a lessee does

not comprise one to pay rent, but the obligation is spelt out from the words "yielding and paying" in the *reddendum*, which, as I have already told you, do amount to a covenant. I think it probable that from such an obligation also the lessee would be freed by assignment.

As between the lessee and the assignee, the position is, of course, altogether different. The former, as I have just pointed out, remains liable to the lessor. The assignee, on the other hand, while in possession, is the person who ought to perform the covenants of the lease. He has this duty imposed upon him whilst his estate lasts, and the same thing applies to every subsequent assignee. If, therefore, he fails to perform it, and the original lessee is called upon to do so by the lessor, the lessee is regarded naturally enough as being in the position of a mere surety; or, to put the matter in another way, a covenant will be implied on the part of each successive assignee to indemnify him in case he should be resorted to by the lessor. As a rule, in properly drawn assignments, the assignee is made to enter into an express covenant to that effect with his assignor, as well as into an obligation to observe the covenants of the lease.

There is an important modern decision on this latter obligation in the case of *Harris* v. *Boots Cash Chemists*, in the 2nd Chancery volume for the year 1904, where it was held that its object being merely to protect the assignor from the consequence of breaches of covenant in the lease, it did not entitle him to an injunction to restrain the assignee from breaches of restrictive covenants contemplated by him. Where a covenant of indemnity is entered into, it will cover any costs which may have been properly incurred by the

assignor as the direct result of breaches of covenant by the assignee. And the best course for the former to pursue against the latter, when "brought to book" by the lessor, is to avail himself of the third-party procedure now afforded by the rules of Court when an indemnity is claimed.

You should, however, carefully note that for an indemnity to be implied, upon a transfer of the lessee's interest in the premises, both parties must be under a common liability to fulfil the obligation discharged by one of them. Hence, if a lessee assigns, and the assignee afterwards mortgages his interest by sub-demise, the mortgagee is not liable, even if in possession, to indemnify the lessee for any rent he may have been called upon to pay, for the former is not liable to the landlord. This was established by the judgment of the Court of Appeal in *Bonner* v. *Tottenham Building Society*, in the 1st volume of the Q. B. reports for 1899. It is a case which I recommend you to study.

I have now said all that I have time to say with regard to assignment of the term. Before I leave the subject of voluntary assignment altogether, I have to deal shortly with its other branch, that of assignment of the reversion. At common law covenants did not run with the reversion, as they did with the land, at all; so that if the lessor transferred his interest during a demise, the new landlord was unable to enforce the covenants against the tenant. This state of things, however, was altered by an early statute of the reign of Henry VIII, which gave assignees of the reversion the same remedies against tenants, by action and re-entry, as their lessors had, and *vice versâ*. The statute is couched in very general terms, but as

early as *Spencer's case* it was settled that it does not extend to covenants which are merely collateral. It does not follow that all covenants which run with the land are necessarily within the statute, and so run with the reversion, though speaking generally this may be said to be the case. A recent decision on the statute—and one of considerable importance—is that of the Court of Appeal in *Woodall* v. *Clifton*, in the 2nd volume of the 1905 Chancery reports. It was there held that the statute deals only with the relation of landlord and tenant, and only with covenants which directly concern the tenancy. In that case there was a lease for a long term, with a covenant by the lessors to give the lessees an option of purchasing the freehold at a certain price, and there had been a change in the reversion. Whether the covenant ran with the land or not—that is to say, whether an assignee of the term could have enforced it against the original lessors—it was not necessary to decide. But it was held that it did not in any case run with the reversion; that its real object was to create the relation of vendor and purchaser between the parties; that its effect in bringing the tenancy which had been created to an end was merely incidental and indirect; and that it could not be enforced under the statute of Henry against assignees of the reversion. I ought perhaps to add that the Act I am now dealing with applies only to express covenants; and this is for the reason that, as regards the implied covenants of which I spoke in my last lecture, they always " ran with the reversion " at common law. You will find that this is so laid down by the Court of Appeal in *Wedd* v. *Porter*, a case which I then referred to.

For an assignee of the reversion to be able to take

advantage of the statute, no notice to the tenant of the assignment is in general necessary. But that is subject, in the special case of the obligation to pay rent, to this observation, that if a tenant pay rent to his landlord without having received such notice, he is not to be prejudiced, and cannot be called upon by the assignee to pay it over again to him. This is under a statutory provision of the reign of Queen Anne.

Covenants run with the reversion, as they run with the land, only in the case of demises under seal. In other demises, actions on covenants—except one on the covenant for payment of rent—by assignees of the reversion are generally brought in the name of the original lessor, though Mr. Justice Farwell has recently suggested—I referred to the case in my first lecture—that this need no longer be done, as the right of suing might be regarded as a chose in action assignable under the Judicature Acts.

An important extension of the Statute of Henry VIII., as regards leases made after the year 1881, was introduced by the Conveyancing Act of that year, which provides (sect. 10) that the rent reserved by a lease and the benefit of the lessee's covenants shall run with the reversion notwithstanding any severance of that reversionary estate, and shall enure to the advantage of the person from time to time entitled subject to the term, to the income of the whole or any part of the land demised. It is now settled that this enactment, though it does not apply to parol lettings, applies to all written ones, whether under seal or not; and that a covenant may be "contained" in such a letting though not set out in express terms: see the case of *Cole* v. *Kelly*, in vol. 2 of the 1920 reports

(K. B.), a decision of the Court of Appeal. The last words of the section are meant to apply to beneficial owners, even though not entitled to the legal reversion.

I would have you further observe that the equitable doctrine of notice applies equally on an assignment of the reversion as on one of the term. Suppose, after making a lease of premises for the exercise of a certain trade, I enter, for good consideration, into an undertaking that I will not carry on that trade myself within a certain distance of the premises. Anyone taking from me an assignment of my reversion with notice of the undertaking would be bound by it. Moreover, where an assignee of the reversion finds a tenant in possession, that possession, as between them, gives notice—constructive notice, you see—not only of the actual interest the tenant may have in the premises, but also of any equities he may be entitled to. If, for instance, his lease gives him, as leases often do, the right of renewal on certain conditions, he could enforce that right against the assignee of the reversion.

I ought to add this, that advantage can only be taken by an assignee of the reversion of such breaches as have occurred whilst the reversion is vested in him —" in his own time," as it is generally termed,—for beyond that time there is no privity of estate. If I become assignee of a reversion to-day (February 8), for instance, I cannot sue the tenant if he is in arrear with his Christmas rent; nor could my assignor sue for the rent due next Lady Day, for the same reason. And the same thing applies to other covenants, though, where they are of a continuing nature, like the covenant to repair, you must, as I have already said, apply the doctrine cautiously. Whether, for instance, a tenant, on being sued for non-repair by the assignee

of the reversion, would be allowed to say that a certain part of the dilapidations accrued before the assignment, and so could not be sued on, must, I think, be regarded as very doubtful.

I now come to assignment by operation of law, and I shall have to restrict what I have to say about that to a very few observations. I am only going to deal with two cases,—that of death, and that of bankruptcy.

On the death of any person entitled either to freeholds or to leaseholds, they now vest in his personal representatives, though, before the Land Transfer Act, these representatives had nothing to do with the former at all. Where a will has been made, such vesting takes place immediately on the testator's death; whilst in the case of intestacy it takes place only on the taking out of administration. If leaseholds be made the subject of devise, the assent of the executor must be obtained. This is usually signified by his proving the will in the ordinary way, and thereupon the devisee is in the position of a party taking by assignment.

Let me now say a few words on the liabilities of executors. An executor is liable for a breach of covenant in a lease committed either in the testator's time or in his own. And this in either of two ways: in his representative capacity, or as assignee. Like other assignees, he may discharge himself by a re-assignment; but, of course, if the testator was himself original lessee, even if he had assigned his interest during his own lifetime, the executor could not get rid in this way of the liability attaching to him as "standing in the shoes" of the testator. As regards

rent, the executor naturally has nothing to do personally with any arrears which may have accrued in the testator's lifetime; and for those he can only be sued in his representative capacity. But with regard to arrears in his own time, he can be made amenable either in his representative capacity or as assignee. The results in the two cases are a little different. In the former, no possession on the part of the executor is necessary; he may plead as an answer to the claim that he has fully administered the assets, though this will leave him still liable for any profits the lands may have yielded; and judgment, if given against him, is judgment *de bonis testatoris*. In the latter entry, or some act equivalent to entry, by the executor must be shown, and mere payment of rent by him is not sufficient for this purpose. Moreover, he cannot as before plead that he has fully administered, though his liability is limited to the real yearly value of the premises; and judgment in this case is judgment *de bonis propriis*.

In the case of the covenant to repair also, entry is necessary before the executor can be rendered personally liable; but the fact that the premises are incapable of yielding profit does not, as in the case of his personal liability for rent, provide him with an answer. This was decided as far back as the days of Chief Justice Tindal, and has been often thought to bear hardly on executors. But now, by Lord St. Leonards' Act (1859), all an executor has to do, where leaseholds of his testator devolve upon him, is to satisfy the liabilities which have accrued, and set apart a fund for meeting any specific outlay which the testator may have undertaken to make on the premises. Having done that, he may assign them to

a purchaser, and distribute the assets without making any further provision for future breaches of covenant, or incurring any liability himself.

On the bankruptcy of a person having leasehold interests in property, they vest, as you know, in his trustee as the result of the adjudication. The trustee is in the same position as an ordinary assignee, and becomes liable on the bankrupt's covenants, but from the date of his appointment only. He may get rid of his liability, in the same way as an ordinary assignee, by a further assignment. But the way in which he nearly always does it is by disclaimer. This is a special remedy given by the Bankruptcy Act, which provides that a trustee may, within twelve months from the time of his appointment, disclaim leaseholds and other property of an onerous nature by writing under his hand, and that notwithstanding acts of ownership he may have exercised over them. But though he has a year for the purpose, application may always be made to him to decide whether he intends to disclaim or not, and he will not be able to disclaim if he neglects to do so for the period of twenty-eight days afterwards. Ordinarily a disclaimer requires the leave of the Court, which may impose upon giving it such terms as it thinks fit. But no leave is necessary if the property be of small value—defined by the Bankruptcy rules,—or if, after the trustee has served the lessor with notice of his intention to disclaim, the latter does not within a certain limited time give him notice that he requires the matter to be brought before the Court.

The disclaimer operates—from the time of its being filed in Court by the trustee—to determine, as from

the date when it is made, the rights and liabilities of the bankrupt in the property disclaimed, and also to discharge the trustee from his personal liability from the time of his appointment; but it does not affect third persons, except so far as may be necessary to release the bankrupt and his trustee from liability. There has been an important decision of the Court of Appeal on this provision, that of *Stacey* v. *Hill*, in the 1st Q. B. volume for 1901. It was there held that a person, who had become surety for the rent payable by a tenant under a lease, was discharged from liability on the bankruptcy of the tenant and the disclaimer of the lease by the trustee. This was on the ground that if the surety were held liable, he would have a right of recourse against the bankrupt, and that his exoneration was therefore necessary for the purpose of releasing the latter. But any person who is injured by the operation of a disclaimer is deemed to be a creditor of the bankrupt to the extent of the injury he has sustained, and may prove accordingly in the bankruptcy.

Finally, the Act empowers the Court, on the application of any person—for instance, the lessor—claiming an interest in the property disclaimed, or under some liability in respect of the property which is not discharged by the bankruptcy, to make what is called a vesting order, transferring the property either to him or to some other person who may be entitled to it. It is, however, provided that, in the case of leaseholds, where an under-lease—whether by way of mortgage or not—has been created, the vesting order shall only be made on the terms of making the under-lessee or mortgagee subject to the same liabilities as the bankrupt was subject to when his petition was

filed, though the Court may, in its discretion, make the under-lessee subject only to the same liabilities as if the lease had been *assigned* to him at that date. The difference is twofold: first, he would not be liable, as I have already explained, for breaches of covenant committed before the filing of the petition; and, secondly, he could free himself from further liability by a re-assignment. There has been lately pronounced an important decision of the Court of Appeal —it is in the 1st K. B. volume for the year 1905, *In re Carter and Ellis*,—laying down that the above discretion ought, in general, to be exercised, where it will place the sub-lessee in no better position and the lessor in no worse position, than if there had been no disclaimer at all. If there is no person in the position of a sub-lessee willing to take a vesting order, the Court may vest the property in any person liable to perform the lessee's covenants, discharged from all interests which the bankrupt may have created therein.

LECTURE V

GENTLEMEN,—The subject of to-night's lecture is the determination of the tenancy. Speaking generally, there are two distinct ways in which a tenancy determines. It may determine automatically, or it may require some act to be done by either or both of the parties. Of tenancies which determine automatically it is not necessary to speak at all. If a lease is made for a fixed period, it determines of itself when that period has run out, and if it determines on the happening of a given event, it also comes to an end when that event happens. But with regard to determination of the other kind, when some act of the parties is required, you must distinguish between the cases where that act is founded on contract or consent, and those where it is the act of one party without the consent of the other. A determination of the first kind is what the law calls a *surrender*. The two principal instances of the latter are *notice to quit* and *forfeiture*.

Surrender, according to the definition of Lord Coke, is a yielding up of an estate to a person who has an immediate estate in reversion or remainder, in which the former estate may merge by mutual agreement. You see at once from this definition that, as I said just now, a determination of this kind is founded on contract. It is necessary that the tenant should yield up the whole of his estate or interest. If he retain

any portion of it, it is not a surrender. On the other hand, it need not be a yielding up of the whole of the *premises*, and it may quite validly relate to a part of them only. If you have six houses included in one demise, you may perfectly well surrender five of them. The distinction, you perceive, is one between time and place.

Surrenders are of two kinds, express and by operation of law. I will deal with the former kind of surrender first.

No special words are necessary to make an express surrender. Any transaction amounts to a surrender where the lessee in effect transfers the whole of his estate to the lessor. It may, for instance, be done by way of assignment. It must be a yielding up of the tenant's interest to the person who has the immediate reversion, and it is consequently a somewhat dangerous operation for the tenant, because he has to find out, at his peril, the person who has got that reversion. If he purports to surrender to a person who turns out not to have it, the result cannot be a surrender; the lease is consequently still on foot; and he may be called upon to pay the rent or perform the covenants under it as if nothing had been done. Suppose you have a lease, and your landlord, whilst it is running, mortgages his reversion. You may not know of the mortgage, and you may and probably will continue to pay rent to your lessor. By that mortgage, however, he has parted with his reversion, and you could not validly surrender to him.

A good instance is furnished by a recent case which has been a good deal talked about: *Robbins* v. *Whyte*. It is in the 1st volume of the King's Bench reports for 1906. In that case a lease had been made under

the Conveyancing Act. I ought to explain that at common law a person who had made a mortgage of his lands could not afterwards make a lease of them at all: that is to say, he could only make a lease good as against himself, but it was wholly invalid as against the mortgagee, who was at liberty to treat the tenant simply as a trespasser. But no tenancy was created between the mortgagee and the tenant, unless some further act was done between them, like attornment or the acceptance of rent, in recognition of such a tenancy. The mortgagee, without such an act having been done, could not sue the mortgagor's tenant for rent or distrain upon him by reason of its non-payment. This state of things, however, was altered by sect. 18 of the Conveyancing Act of 1881, and now a mortgagor in possession has the right, under certain restrictions, to make a lease which is binding on the mortgagee.

In the case I am speaking of he had done this, but the tenant apparently knew nothing about the mortgage, and he had always paid his rent to the mortgagor. Afterwards he wished to put an end to the lease, and he accordingly surrendered it to the latter. The mortgagee subsequently gave him notice of the mortgage, and sued him for rent; and it was held that the effect of the Conveyancing Act was to enable the mortgagor only to carve an interest out of the estate of the mortgagee, that the immediate reversion expectant on the lease was still vested in the latter, that the purported surrender to the mortgagor was consequently invalid, and that the tenant was therefore liable for rent to the mortgagee which had accrued afterwards.

The decision has been thought to be a rather hard

one for the tenant, and no doubt to some extent it was so, as he might have had a difficulty in obtaining his lease if he had insisted on an investigation of his lessor's title. The case, however, is perhaps not so hard as it looks—assuming that the lessor remained solvent,—because the transaction, if invalid as a surrender, would appear to have been good as an assignment. It was a parting by the tenant with his whole interest in the premises to a person other than the immediate legal reversioner; and if it was a valid assignment, that person would, as I told you in my last lecture, be under an implied covenant to indemnify the tenant when the latter was called upon to fulfil the terms of the lease. Consequently it would appear that the lessee, who had been called upon successfully to pay the rent to the mortgagee, had the right to look for repayment to the mortgagor. And now by the Conveyancing Act of 1911, *for the special purpose of making a lease authorised under sect.* 18 *of the Act of* 1881 *or by the mortgage deed to be granted*, a mortgagor in possession has been given power, as against any incumbrancer, to accept a surrender of any lease of the mortgaged land or any part of it.

The next point about a surrender is that there must be privity of estate between the contracting parties. An under-lessee, for example, cannot surrender directly to the head lessor. But his lessor must first surrender to the latter, and the latter, who has thus acquired the immediate reversion of the under-lease, may then accept a surrender of it; or the three parties may join together in the surrender. Another thing is that possession is necessary for a surrender, so that a lessee cannot surrender his interest before entry; but if he has entered and afterwards made an assignment,

the assignee, if legally entitled to the term, may surrender it before he has taken possession.

An express surrender must at common law operate immediately. It cannot be made to operate *in futuro*. Difficulties have often arisen in consequence of this principle. A tenant, let us say, gives an invalid notice to quit, which is accepted by the other party. If it is not acted upon by possession being given up and accepted, it cannot, for the reason I have just given, operate as a surrender. But now that all Courts have got equitable jurisdiction, it would appear that the transaction would, under our present procedure, be perfectly valid as an agreement to surrender. It might be enforced, I think, in any Court by the aid of specific performance, and by the powers now vested in it to order that the surrender be duly executed. The matter, however, is clearly one which falls within the fourth section of the Statute of Frauds, under which there must be some memorandum of the transaction in writing, signed by the party to be charged.

By another section of the same statute, express surrenders must be by deed or in writing,—a rule which applies to the surrender of a lease which, by reason of its not exceeding three years, may properly be made by parol. Moreover, by the Real Property Act of 1845, the surrender of interests exceeding that time is void at law unless made by deed. The result is that, if a letting does not exceed three years, it may be surrendered in writing, but otherwise a deed is necessary; though in its absence the transaction might enure as a valid agreement to surrender.

I pass now to surrender by operation of law. There are two principal ways in which a surrender of this kind is effected. The first is by the lessee accepting

a new interest in the demised premises from the lessor. If that new interest relates only to a part of them, the transaction amounts to a surrender of that part only. It must be an acceptance by the lessee himself, for the grant of a new lease to a third party, even with the tenant's assent, is no surrender. The reason for the rule is that the tenant, by accepting a new lease, has become party to an act of which he is estopped by law from disputing the validity, and which could only be valid if the first lease was at an end. The length of the new lease as compared with the old is immaterial, and so is the fact that its commencement is only to be at a future date. Nor does it make any difference—if it is one not exceeding three years—that it is created by parol whilst the former one was created by deed. An agreement for a lease, if specific performance of it is obtainable, would now operate for the purpose of this rule in the same way as an actual letting. But the agreement must be one between the lessor and the lessee themselves, for an agreement by the lessor with some third party that a new lease shall be granted to the lessee would not be sufficient.

The second mode of surrender by operation of law is where the lessee gives up possession. In this case acceptance of the possession by the landlord is always necessary. Whether there has been such acceptance or not is, of course, a question of fact; and acts of ownership exercised over the premises by the landlord after the relinquishment of possession by the tenant are naturally of importance. It has been held that mere attempts on his part to re-let the premises, or his temporary occupation of them to execute repairs, or by a caretaker to prevent their decay, are not suffi-

cient; but each case must be judged by its own circumstances. The mere acceptance by the landlord of the keys of the premises from the tenant does not necessarily entail a surrender of this kind, for he may accept them because he cannot very well do otherwise, as where the tenant, after sending them to him, goes away and leaves no address behind him. But, on the other hand, he may also accept them as the symbol of possession, intending thereby to accept that possession, and that would amount to a valid surrender. It is, as I have said, always a question of fact.

So again, the tenant may give up possession of part of the premises under an arrangement by which he is to pay a diminished rent. This in itself does not amount to a new demise, but is only evidence of it. Consequently it does not amount in itself to a surrender, but is evidence of one. Again, a question of fact. If a new tenant enters with the consent of both lessor and lessee, the lessee, on giving up possession, is deemed to have surrendered his tenancy by operation of law. Here also, as you see, the lessor could not create the new term at all unless the original term was put an end to. There must be an acceptance of the new tenant by the landlord. Receipts for rent given to him in his own name are always evidence of it. But the question is, as before, always one of fact and of intention to be gathered from all the circumstances.

Let me now say a few words about the *effect* of surrender. It puts an end, as I have said, to the tenancy, and all obligations which have to be performed after the date when it is accepted are also at an end. There is one rather curious case in the books, where the

landlord, upon assigning his reversion, gave notice to the tenant that he and his assignee had arranged that the rent should continue to be paid to himself, and it was held that by surrender of the lease to the new landlord all obligations to pay that rent to the old one were at an end. But the surrender, of course, does not put an end to liabilities which have already accrued, and the lessor is entitled to sue for rent or enforce those obligations by action, in spite of such surrender having taken place.

The rights of third persons are in general unaffected by a surrender. I want you to see the difference between this case and that of notice to quit or forfeiture. If I take a sub-lease from a person, and that person forfeits his interest, or loses it in consequence of notice to quit, my rights come to an end. I have been holding under an infirm title, and I cannot complain. But in the case of a surrender it is very different. Two persons cannot by their contract injure the vested rights of another. Consequently, when a head lease is surrendered, the rights of under-lessees are preserved.

Their liabilities, on the other hand, were formerly at an end, as the immediate reversion was gone. This, however, has now been altered, and the Real Property Act of 1845 creates privity in such a case between the head lessor and the under-lessee, for the purpose of preserving the latter's rights and obligations.

I am now going to deal shortly with that mode of determination of tenancies which is known as *notice to quit*. The tenancies to which it is applicable are in general those I spoke of in the first lecture as "periodic." You should first notice that, strictly, it

is only necessary where the relation of landlord and tenant exists, though, of course, it does not follow that a holding by mere licence, as in the case I spoke of in that lecture of furnished lodgings with attendance, can be put an end to without notice at all. On the contrary, it is well established that a doctrine analogous to that of notice to quit would apply in such cases. There are, however, other cases of holding by licence where the licence can be revoked without notice. You recollect that I gave you as an illustration the case of a gamekeeper who was required to occupy premises, for the performance of his duties, on his employer's estate. To determine a holding of that kind no notice would be necessary at all. And the same thing applies where a person claims by title paramount, as in the case I spoke of just now of a mortgagee before the Conveyancing Act, who could treat the mortgagor's tenant at any time as a trespasser. Nor is notice to quit necessary in tenancies at will, though, naturally enough, the will has to be determined, or a demand for possession made, before the tenant's possession can be disturbed.

As to the length of the notice, I need say very little as to how the matter stands when it is regulated by the agreement of the parties. Parties may agree to dispense with notice altogether, or that it should only be given subject to certain conditions being first fulfilled, or in general may make any other stipulation on the subject that they choose. In former times there was a great difficulty with regard to the case where the lessor bound himself to give a notice longer than the "period" of the tenancy, as a notice for two years in a yearly tenancy. Such a notice was decided more than once to be invalid, as being repug-

nant to the nature of the estate conveyed by the lease. But such difficulties, I think, are now at an end, by reason of all Courts being able to give effect to equitable doctrines, under which the tenant would be entitled to specific performance of the agreement, so far as it entitled him to retain his possession undisturbed for the period fixed by the notice.

In the absence of agreement, the length of the notice in "periodic" tenancies is regulated by the law, though the matter in the case of the shorter ones, like weekly and monthly tenancies, cannot even at the present day be said to be altogether settled. That a week's notice is sufficient to determine a weekly tenancy is certain; but whether a less notice than a week's could be sufficient has never formally been laid down, and the same thing *mutatis mutandis* applies to monthly tenancies. As regards yearly tenancies, however, the matter seems now quite clear. Half a year's notice expiring, as I shall presently explain to you, at the time of the year when the tenancy began, is necessary and sufficient to determine such a tenancy. Half a year in legal computation means 182 days, and if you allow that—not counting the day, remember, when the notice is given,—your notice will be of sufficient length.

This, however, only applies in the case where tenancies do not commence on one of the four usual quarter days. Where they do so commence, as now generally happens, the length of the notice is reckoned differently. What is then required is what is called a "customary" half-year's notice, irrespective of whether it amounts to 182 days or not. If you want to put an end to a yearly tenancy of this kind, you must give a notice, to expire on the quarter-day when it

commenced, not later than the quarter-day next but one before. A notice, for instance, given on Michaelmas Day for Lady Day would be perfectly good although, as you will find by reckoning, the number of days during which it runs is a good deal less than 182. The Agricultural Holdings Act contained a provision that in the holdings to which it applies a year's notice, unless the parties agree otherwise in writing, should be given when a half-year's notice was by law necessary and sufficient. But this is now replaced by a provision of the Agriculture Act, 1920, which makes *any* notice of less than a year invalid; though this is not to apply where bankruptcy supervenes on the part of the tenant.

The notice to quit must relate to the whole of the demised premises, if they are let at an entire rent. No special form of words is necessary for the purpose, but it must be unequivocal, and safe for the party to whom it is given to act upon. A notice to quit which is merely optional would not, of course, be good. If it be conditional, it will be invalid if the performance of the condition is to take place whilst it is running. For example, a notice from a tenant to his landlord that he will quit at Christmas unless the latter has put the premises into repair would be invalid. But if the condition is only to be performed after the expiration of the notice, the latter may be good, and the effect of the whole that of an offer of a fresh tenancy. A notice, for example, from a tenant, stating that he will not be able to stop after a specified day unless some reduction is made in his rent, has been held to be valid. And observe that a notice, though at first sight it may appear to be merely conditional, *may* be capable of an interpretation which makes it clear that the person

giving it made in reality no reservation of his rights: see the case of *Norfolk County Council* v. *Child*, in Vol. 2 of the 1918 Reports (K. B.), a judgment of the Court of Appeal.

The notice must, as I have already said, be expressed to expire with the end of the year or other "period" for which the tenancy endures. For the above reason, after specifying some particular day for the expiration of the tenancy, it usually contains general words of the following kind: "Or at the expiration of the current year of the tenancy which shall expire next after the end of half a year from the date hereof,"—so as to hit the case if the specified date should prove not to be that on which the tenancy really began. In this connection I may observe that the ordinary quarter day tenancies expire on those days themselves, whilst others expire on the day before the anniversary of their commencement, though notice for the day itself would also be valid. This was laid down in the Court of Appeal in a modern case which you might like to look at, *Sidebotham* v. *Holland*, in the 1st Q. B. volume for 1895. With regard to tenancies of this latter kind, the arrangement is often made for a proportionate rent to be paid for the broken period intervening before the first quarter-day, and afterwards on the usual quarter-days. The tenancy, then, for the purpose of notice to quit, is deemed to commence on that first quarter-day, unless the demise itself specifies that it commences at the date of letting. Tenancies at a yearly rent frequently provide for the giving of a shorter notice—usually three months'—than the half-year's notice required by law. The general rule in these cases is that only the length of the notice is shortened, and that notice must still be given for the

end of the year. This, however, is by no means always the case, and there have been several decisions of late years on the matter. The question is one of construction.

The service of a notice to quit need not be personal. Service on an agent or servant of the person to whom it is given will be sufficient if he be duly authorised. In the case where service is effected at the demised premises themselves on the wife or servant of the tenant, whilst it is now quite settled that the lessor is under no obligation to show that the notice actually reached the tenant, it does not seem altogether clear whether such service is conclusive of the matter, or whether the tenant may not show that the agency in such a case was not correctly implied. You will find the matter a good deal discussed in an Irish case in the House of Lords, called *Tanham* v. *Nicholson*, in the 5th volume of the Law Reports, English and Irish Appeals. If the notice is sent by post, the presumption is made that it has been delivered at the ordinary time and place in the regular course of things, but this presumption may always be displaced. Under the Agricultural Holdings Act the notice may be given by registered letter.

A few words in conclusion as to waiver. According to the doctrine of the English law, a notice to quit cannot be waived at all; but what you can do is to waive the right to enforce the actual quitting under it, by means of an agreement for a new tenancy on the same terms. This so-called waiver may take place either during the running of the notice, or after its expiration, if the tenant remains in possession and other acts are done from which it may be inferred. The question is one of intention, and depends on both

law and fact. The most usual act from which the intention is inferred is that of accepting rent.

For this to happen the rent which is accepted must be rent due after the expiration of the notice. If due on or before that time it will be no waiver, even though accepted afterwards; and just the same thing applies to a distress, so long as it is made within six months of the expiration of the notice. For, as I have already told you, the statute of Anne, permitting a distress to be made within that time, applies to the case where the tenancy has come to an end by notice to quit. You will presently see that in the case of forfeiture the result is different.

I now come to the determination of tenancies by *forfeiture*, but before I deal with the subject generally, I wish to explain to you shortly the nature of what are called "conditions" in a lease. A condition is a qualification annexed to an estate, whereby the estate becomes defeated on its performance or non-performance. You must distinguish it carefully from a limitation, which, as I have already said, acts automatically. When a lease is defeated by a limitation, such as the happening of a stipulated event, no other act has to be done at all. If the event happens, the lease ends. When, however, a lease is defeated by a condition, the party entitled to take advantage of it must avoid the estate by some act, and until he does it continues. The only party who can do this is the lessor. Such a right can never enure to the lessee, even if the lease is declared void when the condition is fulfilled. The word "void" here, as in many other cases in law, is regarded as merely equivalent to "voidable." The act, too, to be done by the lessor

must be of an unequivocal kind. Usually it is the service of a writ in ejectment.

Moreover, at common law, the only person entitled to enforce a condition was the lessor himself, or his executor or heir; but the statute of Henry VIII, of which I spoke last time, extended that right to all assignees of the reversion. And—subject to one exception—the right only belongs to owners of the immediate legal reversion. I have already dealt with that kind of assignment which takes the form of an under-lease for the whole term, and which resembles an under-lease in every particular, except that the whole term is conveyed by it instead of only a part. It has long been settled that the assignor in such a case, though he has no reversion, is entitled to enforce any clause of re-entry which the instrument may contain against the assignee.

It is an exception, as I have said, to the general principle, and the only one. Moreover, the person enforcing a condition must have the *legal* reversion. A mortgagor, for instance, cannot do so, even if the mortgagee has not interfered; and the Judicature Act, notwithstanding the special provision (sect. 25) which it contains in favour of mortgagors, has not made any difference in this respect. It has been decided, however, that the law as to this is now changed, in the case of leases made after the year 1881, by reason of the 10th section of the Conveyancing Act of that year. The decision is one of the Court of Appeal; the name of the case is *Turner* v. *Walsh*; and it is to be found in the 2nd volume of the K. B. reports for 1909.

You must carefully distinguish a condition from a mere covenant. If the word "condition" itself is

not used, there must be a clear intention apparent to defeat the estate by doing or abstaining from the stipulated act, otherwise the clause cannot amount to more than a covenant. The usual thing in leases is to find a string of covenants, followed by a general provision that the lessor shall have power to re-enter, and the lease become void, in the event of the non-observance of any of them. This clause is called the clause of re-entry, and its construction has always been held to be a matter of strictness, because, as I need hardly say, the leaning of the Courts has always been against forfeiture. This, however, is a point of less importance than was formerly the case, by reason of the provisions of the Conveyancing Act, of which I shall speak presently.

There has been a good deal of controversy on the question as to how far the failure to "perform" covenants provided for in a clause of re-entry applies to those of a negative character, like the covenant not to assign. In one sense, no doubt, you cannot "perform" a covenant of this nature. It is, however, now settled that negative covenants are included within the scope of such a clause, for if you covenant to refrain from something you perform the obligation by not doing it. This was the decision of the Court of Appeal in the case of *Harman* v. *Ainslie*, which is reported in the 1st volume of the K. B. reports for the year 1904.

Let me now say a few words on the subject of waiver of forfeiture. As I have already told you, the lessor has the option, when a breach of covenant giving rise to forfeiture has been committed, of taking advantage of it or not. He may, if he please, overlook the act, and affirm the lease; and if he does that,

he is said to waive the forfeiture. Any act recognising the continued existence of the tenancy, after he has obtained knowledge—full knowledge, mind, not merely means of knowledge—of the breach giving rise to forfeiture, affords a presumption from which the intention on his part to waive the forfeiture is to be inferred. The fact that he may reserve his right, or do the act expressly without prejudice to his claim, to enforce forfeiture is quite immaterial. He cannot "blow both hot and cold." The act once done, under the conditions I have stated, affirms the existence of the tenancy, and there is an end of the matter.

The most usual act relied upon for waiver is, as I told you in dealing with notice to quit, acceptance of rent; and to this I ought perhaps to add distress. In the former case the rent which he accepts must, for waiver to ensue, be rent due after the forfeiture; but in the latter it does not matter whether the rent distrained for is due before or after that time. The statute of Anne does not apply to the case of forfeiture, and consequently the distress affirms the existence of the tenancy at the time at which it is actually made. But these results may be of less importance in the case where a breach of covenant, like that of the covenant to repair, is of a continuing nature.

If, on the other hand, the lessor elects to enforce the forfeiture instead of waiving it, and serves a writ in ejectment, he makes his election accordingly, and that election is irrevocable. In these circumstances neither acceptance of rent nor distress could afford evidence of a waiver. But, as I have already told you, a distress in such a case would be clearly illegal, because by issuing his writ in ejectment he has

brought the tenancy to an end, and consequently no distress in such case can properly be made. If rent due after the issue of the writ is accepted by him, the former tenancy cannot be set up again, but such acceptance would be evidence of a new tenancy from year to year between the parties on the same terms.

I come now to the subject of relief from forfeiture. Courts of equity for a long time exercised jurisdiction to relieve in cases of fraud, accident, or mistake. You will find a full account of the matter in the judgments of the Court of Appeal in the case of *Barrow* v. *Isaacs* in the 1st Q. B. volume for 1891. Relief, too, in other cases was given by statute: in the case of non-insurance, for example, and in that of non-payment of rent. The provisions as to the latter contained in the Common Law Procedure Acts are still in force, and I will deal with them presently. The subject of relief was altogether revolutionised by the Conveyancing Act of 1881. The provisions relating to these matters are not happily worded and have given rise to much litigation; whilst an amending Act, which was passed in the year 1892, is, if possible, worse. The main features of the enactment are two. First, it suspends the right of forfeiture altogether until a certain notice has been given, during the running of which the lessee has a *locus penitentiæ* granted to him; and next, even after the notice has been given and has not been complied with, it affords him relief on terms. The leading idea is to treat the proviso for re-entry in the same way as Courts of equity formerly did, that is to say, primarily as a mere security for the payment of rent and the observance of the covenants of the lease.

No contracting out of the Act is allowed. I think I have already mentioned that there are certain cove-

nants (of which the covenant not to assign is the most important) to which the Act does not extend. A clause of re-entry is not to be enforceable at all until a written notice has been given to the lessee, which must specify the particular breach of covenant complained of, require remedy of it if it be capable of remedy, and compensation in money to be paid; and re-entry is only allowed if the lessee fails within a reasonable time to comply with those terms. But though the Act provides that in any case compensation in money is to be asked for by the notice, it has been decided by the Court of Appeal in the case of *Lock* v. *Pearce*, in the 2nd Chancery volume for 1893, that it need only be asked for if it is required. I would have you observe, however, that in this case the breach was one which was capable of remedy, and it would seem wrong to extend its principle to the case where it is not so capable, as the notice would then apparently be wholly useless. The notice must give precise information of what is required of the tenant.

With regard to relief, a very wide discretion is given by the Act as to the terms on which it is granted. A very important decision in relation to this matter is that of the House of Lords in *Hyman* v. *Rose*, in the reports for 1912, where it will be seen that the principles which had been laid down by the Court of Appeal were not altogether approved of. Application for relief may be made by the lessee, either in the lessor's action of ejectment for the forfeiture, or in a separate action to be brought by himself. In the former case it may be made by summons in either Division of the Court; in the latter the lessee must issue a writ and cannot proceed in any other manner, and that writ should be issued in the Chancery

Division. An action for relief could not be brought in the County Court, but if the lessor be proceeding with his action for ejectment in that Court, the lessee would probably be able to apply for relief in that action by virtue of the provisions contained in sects. 89 and 90 of the Judicature Act. You may perhaps remember that I referred to one of these provisions in my first lecture. If the lessee make the application after judgment has been signed against him in the action of ejectment, a new lease would have to be granted, as the former one is gone; whilst after actual re-entry by the lessor it cannot be made at all.

The Act extends to assigns of the lessee, but not to under-lessees, as privity of estate is necessary between the parties. But, by the Act of 1892, an under-lessee may apply for an order vesting the premises in him for any term not exceeding his own in length. This provision is one of general application, and extends even to cases like that of non-payment of rent which are otherwise outside the Acts. The discretion conferred by it on the Court is a wide one, but the under-lessee is not to get any advantage out of the forfeiture, and he must be able to show that he acted prudently, and that he has been involved in forfeiture by events for which he was not in any degree to blame. An instructive judgment on this subject will be found in the case of *Matthews* v. *Smallwood*, in vol. 1 of the Chancery Reports for 1910.

Now let me touch on the case of forfeiture for non-payment of rent, which, as I have already said, is outside the Conveyancing Act, and is still regulated by the Common Law Procedure Acts. At common law no forfeiture could be enforced on this ground without a formal demand of the rent having been first made.

This demand is usually dispensed with expressly by the terms of the lease, but, if not, certain conditions have to be fulfilled. They will sound to you no doubt as being a little quaint and out of date, but they have, nevertheless, still to be observed in the case I am putting. First, the demand must be precisely on the day when the rent is due, and at such convenient hour before sunset as will give time to count the money before sunset, the demand being continued until that hour. Next, it must be at the proper place,—at the place specified in the lease for payment, if there is one, and if not, at the most notorious place on the land, like the front door of a house; and it must be made even though there is nobody present of whom to make it. Lastly, it must be of the precise sum due, the amount of the rent which is demanded must be stated, and if more than one instalment be owing, it must relate to the last only.

But the demand may be dispensed with, even if it be expressly required by the lease, when the following conditions are fulfilled. The action of ejectment must be between landlord and tenant, including in the latter term an assignee or an under-lessee. Secondly, there must be a half-year's rent in arrear at the date of the writ. Thirdly, there must be an absence of sufficient distress on the premises to countervail all the arrears of rent due. Lastly, the lessor must have a right of re-entry reserved to him, and this right must have accrued before the issue of the writ. Provisions to this effect are contained in the Common Law Procedure Act, 1852.

I will just say one or two words in conclusion with regard to relief from forfeiture for non-payment of rent. In the action of ejectment to which I have

just referred, the tenant may obtain relief by payment of arrears and costs at any time down to the trial. Even after judgment, the tenant may apply to the Court within six months; but he is not to have any injunction against the ejectment proceedings, unless within forty days of the landlord's defence to his application, he pays into Court the arrears justly due together with the taxed costs of the ejectment. The tenant is thus barred after the lapse of six months; but you must not infer from this that he has necessarily got that period given to him to apply for relief, if he has been guilty of delay and the position of the parties has, in the meanwhile, altered. For example, if arrangements have been entered into by the lessor for a letting of the premises to another person, he would not, as a rule, be granted relief, even though his application for it were made during the prescribed time.

I might mention that, as probably you know, forfeiture for non-payment of rent has lately been added to the other causes of action, for which a specially indorsed writ may be resorted to. And it is expressly provided by the rule which deals with the matter that the tenant's right to obtain relief is not to be affected, but is to remain the same after summary judgment has been obtained, as if a regular trial had taken place.

LECTURE VI

GENTLEMEN,—To-night I propose to deal with the general rights which enure respectively to the parties to a tenancy when the tenancy comes to an end. I am not going to refer to the special obligations relating to that time which may be contained, and, indeed, which generally are contained, in leases or agreements. It is an ordinary thing, for instance, as I have already told you, for the lessor to exact from the lessee a covenant to leave the demised premises in repair at the determination of the term. On the other hand, there may be particular obligations binding the lessor to make payments to the lessee at that time in respect of certain stipulated matters. With these we have now nothing to do. The rights of which I am going to speak can be put within a very narrow compass. With regard, on the one hand, to the landlord, he is entitled to the possession of the premises. The principal rights of the tenant, on the other, are those which relate to the removal of fixtures, and, in agricultural tenancies, those which relate to his claims for compensation in respect of what is called his "tenant-right."

I will deal first with the landlord's right to possession. The duty of the tenant at the end of the term is to yield up complete possession of the demised premises to him; and for this purpose he must, if necessary, get all persons out of possession who may

be claiming an interest under him in the premises. If he does not yield up complete possession to the landlord, he acts at his own peril. The landlord may, if he likes, assent to his not doing so, and recognise the continuance of the relation which formerly existed between them. You remember that I spoke of this in my first lecture, and told you that before anything was done at all, the tenant was said to be a tenant at sufferance, but that after assent had been given to his retaining possession, he became tenant at will. I will now add that, when he once pays rent, he is presumed (just as in the case of an invalid agreement) to be on the footing of a tenant from year to year, on all the terms applicable to such a tenancy. On this point you should refer for further information to a modern case which I have already mentioned to you more than once—that of *Wedd* v. *Porter* in the 2nd vol. of the reports for 1916 (K. B.). But the landlord is not obliged to do or acquiesce in any of the things I have spoken of. He may dissent, and if he does that the tenant becomes a trespasser. The question then arises, how his right to possession may be enforced: what the courses are which are open to him in that event. Of these there are several.

First, he may bring an action against the tenant, and recover as damages not merely the actual loss he has sustained, which would in general be measured by his inability to let the premises, at all events during the ensuing quarter, but also anything in the nature of special damage. Suppose the tenant has made an under-lease, and the under-lessee refuses to give up possession; the costs of an action of ejectment against him, which may in this way become necessary, could be recovered from the tenant. Or suppose the

landlord has entered into an agreement with another person to take the tenant's place, and has been himself made amenable in damages to that other person in consequence of the tenant's failure to give possession, he could recover such damages from the latter for the breach of his obligation.

The next remedy to be spoken of is of rather a dangerous character. It is re-entry without legal process at all, and I will tell you why it is a little dangerous. There exists a very old statute in our parliamentary rolls, known as the Statute of Forcible Entry. It dates back to the days of Richard II, but is still in force, and it provides that entry into premises shall not be made with a strong hand or with a multitude of people, but in "a peaceable and easy manner." The only sanction, however, which the statute imposes is of a criminal nature, and there has been a great deal of controversy on the question as to how far a person who acts in contravention of it incurs a civil liability by doing so. I am speaking, you understand, of the case where force is used to compel a lessee to give up possession, when he wrongfully refuses to do so after the determination of his interest in the demised premises. It is, if I may so express myself, a sort of "middle case." On the one hand, it seems clear that if the premises are then unoccupied the lessor may properly use force in regaining possession, even though the tenant may have left furniture on the premises, so that an intention to return may reasonably be imputed to him. On the other hand, if the tenant is there, and force greatly exceeding the occasion is employed to get him out, the lessor would quite clearly be liable. Because your tenant refuses to go out you are not justified in breaking his head

open. But suppose no more force is used than may be necessary for the purpose of removing him from the premises, has the tenant, under those circumstances, any civil remedy? On this point there has been shown a remarkable divergence of judicial opinion ranging over the best part of a century. It would however, serve but little purpose now to refer—except as a matter of historical interest which I cannot here afford time to gratify—to the numerous conflicting decisions and *dicta* in regard to it: because the question has just been completely set at rest by the pronouncement of the Court of Appeal in *Hemmings* v. *Stoke Poges Golf Club*, in the 1st vol. of the reports for 1920 (K. B.). Singularly enough, you will see, on referring to the report, that the actual point did not really arise in the case at all, because there was apparently no real tenancy between the parties, but only a "servant's interest" in the premises, in accordance with the principles I explained in my first lecture. In a case of this kind it is difficult to see how the entry, though of a "forcible" nature, can be within the statute of Richard II., because, as I there pointed out, the legal possession remains all the time in the landlord himself. The latter, however, apparently consented at the hearing to the treatment of the case on the footing that there had been a forcible entry; and on that footing the matter was accordingly dealt with. You may therefore now consider it as settled law that, in the case I am putting, the landlord is not civilly liable, either for the tenant's eviction in itself, or for the acts accompanying it, such as assault—always of course within the limits above stated—or damage to his goods or furniture.

There is one other thing I ought to tell you about

re-entry without legal process. If the right to put an end to the tenancy is founded on forfeiture, the case falls just as much within the Conveyancing Act as if an action of ejectment were brought in the regular course. For that Act provides in terms that no right of entry shall be enforceable by action *or otherwise*, until the steps of which I spoke in my last lecture have been taken.

The third remedy for withholding possession is statutory, and may be described as a "double-barrelled" one. It is by obtaining what is called double value or double rent for the use of the premises. The former is given by an Act of the year 1731, and the latter by one of the year 1737. The former applies to a holding over after the determination of a tenancy either by the landlord or by the tenant. A demand in writing must first be made, and, if that be not complied with, compensation may be claimed at the rate of twice the real yearly value of the premises. The tenancies to which the Act applies are expressed to be those "for life, lives, or years," and a tenancy from year to year has more than once been assumed to fall within it. On no occasion, however, so far as I can make out, was the point ever raised or discussed, and there was, I think, a good deal, having regard to the penal character of the statute—though its "remedial" character is also often referred to,—to be said for the other view. At any rate, the statute would clearly not apply to the shorter "periodic" tenancies like those by the quarter or the week.

In the case of yearly tenancies the ordinary notice to quit, if in writing, has been held to be a sufficient demand within the statute, though the words of the enactment require both a demand and also a notice

in writing. In this case, of course, the necessary demand would be made before the determination of the tenancy. But in the case where the demise is for a fixed term and the tenant holds over, the demand may be made either before or after that time; though if made after, the claim for double value only begins to run from then, and no rent at all from the end of the term would be payable until it does. The holding over contemplated by the statute is one of a contumacious kind only. Retention of possession only by a sub-tenant, for instance, would not be sufficient to make a tenant liable for it; nor can this result happen if he retains it under a *bonâ fide* belief that he is entitled to do so. The claim, too, is one which can only be enforced by action; you cannot distrain for double value. But it may be maintained whether it be desired to acknowledge the relation of landlord and tenant as continuing or not. In the latter event, indeed, as you will see presently, the claim is one of the few which you are allowed to join with ejectment, without any leave being obtained for the purpose. Nor is the amount you are entitled to recover under it necessarily confined to twice the rent you were receiving under the lease. It may be that the premises have increased in value, and if so you would be able to recover double that value whatever it really is.

The double rent enactment differs from the earlier one in several particulars. In the first place, it applies to "periodic" tenancies alone, and to all of them, however short may be the period for which they are made. In the next place, it only applies where their determination has been brought about by a notice to quit given by the tenant himself. Such

notice may have been given in any manner, but it must have been a notice valid and effectual to determine the tenancy: one, for instance, ineffective by reason of its being conditional, as I explained last time, would not be enough to expose the tenant to a claim for double rent. And note that this enactment, unlike the other, necessarily contemplates the continuance of the tenancy. You could not treat the tenant as a trespasser, and at the same time call upon him to pay double rent. It follows that a claim for double rent can be enforced by distress as well as by action; and, indeed, the statute itself says that it shall be recoverable in the same manner as rent is ordinarily recoverable.

The next and the most usual remedy available to the landlord for the non-delivery of possession is the action of ejectment, or, as it is now called, the action for the recovery of land. It will, of course, be quite impossible for me to enter into this matter in any detail here. I must content myself with calling your attention to just a few matters relating to procedure in the action, and distinguishing it from other actions. I will begin with the proceedings in the High Court. No cause of action—except claims for rent, mesne profits, and double value, claims for breaches of the contract of tenancy, and claims for wrong or injury to the demised premises—may be joined with ejectment, unless leave of the Court has been previously obtained. But this will not prevent your claiming without leave a remedy which is merely subsidiary to it, as, for instance, a declaration of title.

Another point is that in certain cases you are entitled to issue a specially indorsed writ, and

apply for summary judgment notwithstanding the defendant's appearance. These cases are: where the tenancy has expired or been determined by notice to quit, or by forfeiture for non-payment of rent. This procedure does not apply to surrender. No other claim than one for rent or mesne profits may be joined in a specially indorsed writ of ejectment; and the action, though maintainable *against* assigns of the lessee as well as against the lessee himself, cannot be brought *by* assigns of the lessor, unless their title has been recognised in some way by the tenant.

With regard to service of the writ, all I need say is that this is clearly one of the cases provided for by the rules, where it would, if necessary, be allowed out of the jurisdiction, the writ having been issued by leave in the first instance. I may also mention that in the case of vacant possession, it is provided that service, if not to be made otherwise, may be effected by posting a copy of the writ on some conspicuous part of the property demised, like the front door of a house.

One remarkable peculiarity about the action of ejectment is that a person not named in the writ at all may apply for leave to appear and defend the action. The object of this is to prevent collusion between the plaintiff and the occupier. What the applicant has to show is that he is in possession, either by himself or by his tenant, of the premises the recovery of which is the subject of the action; and if he applies in proper time, and furnishes (by affidavit) some proof of his possession, he will get the necessary leave almost as a matter of course.

If you are defendant in an action of ejectment, you have got a special defence open to you. You need

not tell your story, as you have to do in other actions. All you have to do is to fold your arms, and say you are in possession, by yourself or by your tenant; and this will afford you complete protection, except where you are relying on some equitable right. The reason for that is this. In the old days no plaintiff could succeed in a Court of law in ejectment except by the strength of his own title, and consequently possession in such a Court was a good defence against anyone until a superior title was shown. But suppose that though a superior title was shown, the person in possession had some equitable ground to be urged against being deprived of it. Of that he could not avail himself in the action of ejectment at all. He had to go to the Court of Chancery, and, of course, he had to start the proceedings there himself, and tell his story in order that that Court should be induced to interfere. You see how this feature has been carefully preserved in the present practice.

With regard to discovery, you must remember that where the action is founded on a forfeiture, or where a penalty, like double value, forms part of the claim, discovery cannot be resorted to against the defendant. It is settled that no information from this source will be given to the plaintiff. This often puts him in a difficulty. He may have grave reason to suspect that a breach of covenant on which he founds his action—let us say of the covenant not to assign—has been committed, but it may not be at all easy for him to prove it, and he will not be permitted either to interrogate the tenant, or to inspect his documents for that purpose. I would, moreover, mention that documents of title are in general privileged from inspection in the action. All that has to be done with

this object is to file an affidavit to the effect that they do not support the adversary's title, and that they relate solely to the party's own title: adding—when the privilege is claimed by the *plaintiff*—that they contain nothing impeaching that title.

The last point I will say anything about as to the action of ejectment is that if judgment be obtained it is enforced if necessary by what is called a writ of possession. All that has to be done for this is to file an affidavit of service of the judgment, and show that it has not been obeyed. Curiously enough, the order dealing with the writ of possession does not contain a clause, as the order does which deals with execution generally, as to how the costs are to be provided for: and it has recently been decided by the Court of Appeal that the costs of a writ of possession which it became necessary to sue out against a tenant were recoverable from him, by force of a provision in one of the Judicature Acts which gives the Court certain large powers over costs. The name of the case I refer to is *Dartford Brewery Co.* v. *Moseley*, reported in the 1st K. B. volume of 1906.

Of the proceedings in ejectment in the County Court I am going to say one thing, and one thing only. There are two kinds of proceedings in that Court, and they are known respectively as recovery of tenements and recovery of land. The former is dealt with by two sections (138 and 139) of the County Courts Act, 1888, whilst the latter is regulated by sect. 59. The two former sections relate to the cases respectively of holding over after the end of a tenancy and of non-payment of rent, and they provide that, subject to certain conditions into which I am not able at present to enter, the landlord may sue to recover

possession in either event. What I wish, however, to point out to you is that the legal effect of an order obtained under either of these sections is essentially different from that of an order under sect. 59. The order, which, as I have said, is one for recovery of possession, has nothing to do with title, ownership, or property: it is merely one to divest the possession from A and place it in B. With actions, however, for recovery of land under sect. 59, this is not the case; and with title and ownership actions of this kind are nearly always concerned. Now comes this somewhat curious feature. One of the County Court rules provides that if an action is brought for the recovery of land which, in the opinion of the judge, "should have been brought" for recovery of possession, no further relief shall be given than if that action had been resorted to. This rule displaces a rule in an earlier code which provided in terms that where an action could be brought for recovery of possession, no action for recovery of land should be brought at all. But in either case I confess that it appears to me open to considerable doubt whether the rule is not *ultra vires* altogether; because you see that after the Act itself, by sect. 59, has given you under certain circumstances an absolute right to bring an action for recovery of land, the rule comes in and says in effect that you are not to exercise it if the judge thinks that the remedy of recovery of possession should satisfy you. It would be interesting to see the point raised, and I have little doubt that some day it will be properly discussed.

I come now to the rights of the tenant, and I shall deal first with fixtures, the right of severing and removing which, in the circumstances I am going to

speak of, may be exercised by him when the tenancy comes to an end. The word " fixture " is by no means always employed in the same sense. It is often used loosely of any personal chattel which comes to be attached in some way to the land or connected with it. But, strictly speaking, only those chattels which are so annexed as to become in a legal sense part of the land are fixtures. Using the word, however, for a moment in the larger sense, there are three classes of cases in which the right of removal exists. First, where the article has not been attached from the legal point of view, and where, therefore, according to what I have just said, it is not in the proper sense a fixture at all. Secondly, where it has been so attached, but for a particular purpose only, whether (*a*) of trade, (*b*) of agriculture, or (*c*) of mere ornament and convenience. Thirdly, where removal is provided for by special stipulations in the lease or agreement. But you must understand that in all these cases—except in the last, where the matter is wholly regulated by the terms of the special bargain entered into by the parties,—for the tenant to be able to remove a fixture he must have erected it himself during the currency of his tenancy. I shall refer to this point again when I come to speak of the time during which the right of removal may be exercised by him.

With regard to the first class, where the article has not become part of the freehold, you must distinguish the case where it merely rests on the land, without physical connection with it at all, from the one where it has such connection, though of too slight a character to permit of drawing the inference that in a legal sense it has become part of the land. In the former, there is a strong presumption that the article is not a fixture,

though like other presumptions it is capable of being displaced. The instance of this which is usually given is that of a statue erected in a building or garden as part of a general design of ornamentation. In such circumstances the statue, though it may be resting on the ground by nothing but its own weight, might well be a fixture. The inference to be drawn in each particular case is always one of fact, depending on the intention of the parties. You will find a detailed exposition of the principles to be applied here, with a review of many of the earlier decisions, in the judgments of the Court of Appeal in the recent case of *Pole-Carew* v. *Western Counties Manure Co.*, in volume 2 of the Chancery Reports for 1920.

In the cases of the other kind, where there exists some attachment of the article to the soil, but the annexation is what is called incomplete, the presumption is the other way. The *primâ facie* inference is that the article cannot be removed. But here also that presumption may be displaced, and both the mode of attachment and the purpose for which it was made are extremely important from this point of view. The principal question always is: Was the article placed in its position for the permanent improvement of the inheritance, or merely for its better enjoyment as a chattel? No doubt in every case both these elements have to some extent entered into consideration, but the question to be asked is, which was the leading element? And if the answer is that it was for the more complete enjoyment of the article itself, the presumption is strong that it is not a fixture. The circumstance, however, that it was obviously intended that it should continue to be attached in its place so long as the tenancy remained on foot, affords a pre-

sumption in the other direction. It is always, as I have just said, a question of fact, and one in which you have to spell out the intention of the parties as best you can. But in doing that you can only look at those things, like the object and the manner in which the article is attached, which are patent to everybody; you are not entitled to take into consideration such circumstances, for instance, as the terms of a private agreement between the tenant, who has hired a chattel and put it up as a fixture, and its real owner. This was laid down in the decision of the Court of Appeal in *Hobson* v. *Gorringe*, in vol. 1 of the Chancery Reports for the year 1897.

I pass now to the second class of removable fixtures, —those attached to the land so as to become part of it, but removable as having been put up for a special object. The most important case is where the object is that of trade. The tenant's privilege here is given to him by the common law, and is at least two or three centuries old. You see, of course, how it crept in for the general benefit of trade, because the tenant would naturally be unwilling to employ his resources in erecting fixtures, in order to increase his output or develop his business, if they became altogether lost to him when he gave up his land at the end of the tenancy. The privilege, however, has naturally certain limitations. Thus it does not extend to erections which are of a permanent and substantial character. Nor can it be exercised if the removal either would cause serious injury to the freehold, or would necessarily result in the disintegration of the fixture itself; though the mere fact that you could only remove it by taking it to pieces is not enough to prevent the removal if you could put it together again afterwards.

For the purposes of the matter we are now considering, agriculture for some reason was not regarded by the common law as a trade. This was solemnly decided more than a century ago in the celebrated case of *Elwes* v. *Maw*, which you will find in the 2nd volume of "Smith's Leading Cases." The legislature, however, intervened, and the matter was first dealt with by an Act of the year 1851. But I shall not further allude to that statute here, though it is still in force, because its effect has been practically superseded by the provisions of the Agricultural Holdings Act. Note that—otherwise than in the case of compensation for improvements, as you will presently see—contracting out of these provisions by the parties is permitted by the Act. Moreover, they do not apply either to fixtures or buildings for which, as I shall explain to you directly, compensation is payable to the tenant under the Act, or to those which may have been erected either in pursuance of some obligation under the lease, or in substitution for fixtures belonging to the landlord. The effect of the statute is to permit removal of fixtures by the tenant, either at the end of the tenancy, or within a reasonable time after, so long as the following conditions are fulfilled. He must have paid all the rent, and performed all the obligations of his lease. He must abstain from all avoidable damage, and make good any injury occasioned by the removal. And he must give a month's written notice of his intention to remove the fixtures to the landlord, who may elect to purchase them at a price to be settled by arbitration.

Of fixtures removable as having been put up, as it is usually termed, for "ornament and convenience," I need not say much. The privilege, as in the case of

trade, is wholly independent of statute law. It does not extend to fixtures, like glass-houses, which are in the nature of buildings, but includes only articles which are of the nature of real chattels and used as substitutes for furniture. The right of removal, as it always does, depends on the circumstances of each case,—the mode and object of annexation, the injury entailed to the freehold by removal, and so on. But many articles of the kind spoken of, generally found in houses, have now by a long course of usage come to be established as belonging to this class; they are often made the subject of arrangement between the outgoing and incoming tenant, and are perfectly well known to house agents. You will find a list of them in Amos and Ferard's treatise on fixtures. You would also do well to consult on this subject the decision of the Court of Appeal—which was afterwards confirmed by the House of Lords—in the very interesting case relating to the tapestries at Luton Hoo. It is called *In re De Falbe*, and is reported in the 1st Chancery volume for the year 1901. It was held that the purpose of the annexation in that case was clearly ornamental,—for the better enjoyment of the tapestry itself rather than for the improvement of the house generally, that the mode of annexation was not closer than was necessary for that purpose, and that the tapestry accordingly belonged to the category of removable articles.

The third head under which fixtures are removable by the tenant is where they are the subject of special stipulations. The question here is of course one of contract and contract only. The parties are left free to make their own bargain if they please, and the only point that can arise is one of construction. I

would, however, say a few words on a particular covenant relating to this matter, because the rights of the parties are so often regulated by it. It is not in general a covenant which confers rights of removal on the tenant, but which restrains them. I have already referred to the subject in that portion of the lecture on covenants which dealt with the covenant to repair, and I told you that the tenant frequently lost his right of removal by covenanting that he would keep and deliver up the premises in repair at the end of his term together with the fixtures. I think I also told you that a covenant of this kind would not prevent him from removing those articles which I have dealt with to-night under my first head,—that is to say, articles only apparently fixtures, but really chattels. Difficulties, however, have often arisen in this way. You find a long string of specific articles which the tenant agrees to deliver up with the premises, and these are followed by "general words"; and the question then arises whether the tenant may remove articles, like trade fixtures, which, as you have seen, are of a removable kind. The rule is that if the specific articles are all of an irremovable nature, the general words will be construed as applying only to those of the same class. There is a recent decision of the Court of Appeal on this point which you ought to look at,—that of *Lambourn* v. *McLellan*, in the 2nd Chancery volume for 1903. The general words there used were very large—"all fixtures and things fastened to the premises,"—but nevertheless the Court held that they did not cover trade fixtures. In these days cogent proof would be required to destroy the tenant's right of removal in such a case.

A few words before I pass from the subject of fix-

tures, on the question of the time of removing them. The general rule is that they can be removed, as I have already said, during the term only, that is to say, during the term in which they have been put up. It is quite settled that if a tenant erects fixtures, and enters into an agreement for a new tenancy with his landlord after his term has run out, without bargaining for his right to remove the fixtures being preserved to him, he will lose it altogether. But what if he retain possession without a fresh lease or agreement? We are then on rather uncertain ground. It is usually said that his right of removing fixtures lasts so long as under such circumstances he has the right to consider himself tenant. Suppose, for instance, he remains in possession whilst negotiations for a new tenancy are pending, and those negotiations afterwards go off. It seems probable that his right would in such case be prolonged. In the case where he holds over without more, and is therefore in the position of a tenant at sufferance, the point is still unsettled; but once the landlord has re-entered, or has issued a writ against him in ejectment, he cannot exercise it.

The same general rule, too, applies not only where the term runs its course, but where it comes to an end by the tenant's own act: so that if he surrender it, he must take his fixtures away at once, and cannot afterwards come back to do so. But in that case, agreeably to a principle I mentioned to you before, a person who has acquired an interest in the fixtures under him, whether by mortgage or by purchase, cannot be prejudiced by that act, so as to lose his right to remove them afterwards. Nor does the general rule apply either to articles in the nature of fixtures which are really chattels, or to cases where the tenant

is given the right of removal by express words in the demise, or to those where the determination of the tenancy is necessarily uncertain. In all these cases—as well as in those within the Agricultural Holdings Act to which I have already referred—the tenant has a reasonable time given to him after the end of the term in order to sever and remove the fixtures. With regard to the case of forfeiture, the matter seems again a little uncertain. According to the earlier decisions, forfeiture stands on the same footing in this respect as other modes of determination of the tenancy, and persons claiming under the tenant are in no better position in such event than he is. The point does not seem to have been ever taken that, as forfeiture depends, as I have already explained, on the will of the landlord, and it is necessarily uncertain how that will may be exercised, both the tenant and those claiming under him should have the extra time allowed to them for taking away their fixtures. And so far as concerns, at all events, persons claiming under the tenant, Mr. Justice Joyce, in a recent case called *In re Glasdir Copper Works*, in the 1st Chancery volume for 1904, appears to have refused to follow the older decisions altogether, though not at all on this ground.

I pass now to the question of what is called tenant-right. I explained to you a moment ago how unfavourably trade would be affected, if tenants were not permitted to take away with them fixtures which they had put up for its purposes and paid for themselves. In much the same way, a farmer would be very unlikely to put his land to its best use, if he were to lose the benefit of all his labour and expense by giving up the farm at the conclusion of his tenancy. For this

reason customs grew up in various districts for tenants to receive compensation in respect of different matters; and legislative sanction has of late years been given to them by successive Acts, which have been passed relating to agricultural holdings, in a manner which I will presently explain. But recourse may, at the tenant's option, still be had to the local custom, even where it covers the same ground, in respect of what are called "improvements," as is covered by statute; and compensation is often to be claimed under a custom where none is given by statute at all. The person, you must remember, who is liable for it is the landlord for the time being, that is to say, the person from whom the tenant is holding when his term ends, and to whom he pays his rent; nor can he get rid of his liability by a subsequent assignment of his interest. A custom to look to the incoming tenant, and to him alone, to the exclusion of the landlord's liability, has been held to be invalid as being unreasonable; but in practice this is often done, the substitution of the one person for the other being a question of fact.

The right to receive compensation is founded either on agreement, or custom, or both. Local custom, as you know, forms part of every agreement, and parties are always held to have entered into their contracts with direct reference to it. I have already touched on this subject in a previous lecture, and can only refer you now, for further information on it, to the notes to *Wigglesworth* v. *Dallison*, in the 1st volume of "Smith's Leading Cases." All I can say here is that a custom will always be displaced by a clause in the agreement which is inconsistent with it, and that this displacement may occur in either of two ways.

The custom and the agreement may relate to the same matter, but may regulate it in a different way. Suppose a local custom to leave manure on a farm at the end of a tenancy on payment for it at a certain rate. Such a custom would be displaced by a stipulation in the agreement binding the tenant to leave it, without payment being mentioned at all; and no money would consequently be payable. Both custom and stipulation here may be said to cover the same ground. But a stipulation, though not exactly covering the custom, may, if I may so speak, run alongside of it. Suppose the lease contains a stipulation that the landlord is to make payments in respect of specified matters, *a*, *b*, and *c*, whilst a custom provides that payment should be made in respect of *a*, *b*, *c*, and also *d*. Then, if the matter *d* is one of a kind similar to the others, the custom would be displaced, but not otherwise.

The first Agricultural Holdings Act was passed in the year 1875. It was made unfortunately a purely permissive Act, and the consequence was that tenants were almost invariably made to contract out of it, and though it has not been formally repealed, I need not further refer to it. The legislature thereupon passed another Act—in the year 1883—by which, as you will see, this was entirely prevented. A further Act was passed in the year 1900, which applies—except as regards procedure—only to improvements executed after that year; and another, which introduced some fresh and important changes, was passed in the year 1906. These Acts have now been repealed and replaced by a Consolidation Act which was passed in the year 1908, and which now regulates the whole subject, though a later Act has also been passed to which I will refer

presently. The object of the legislation is to enable the tenant to recover compensation for certain "improvements" which he may make to his holding. These improvements are of three classes, which are enumerated in the Act. The first class relates to improvements of a permanent nature, like buildings. The written consent of the landlord must be obtained first, and such consent to them may be given subject to any conditions—speaking generally—that he may choose to impose. The second class relates to drainage. Two months' notice in writing must be given by the tenant, and the landlord may either agree with him the amount of compensation that shall become payable, or he may, if he please, execute the improvement himself, charging the tenant interest on his outlay at 5 per cent., recoverable as rent. If he does neither, the tenant may execute it, and thereupon become entitled to compensation. The third class includes improvements which feed the soil, like manures. No consent is necessary, but the parties may agree in writing for compensation to be paid, so long as it is fair and reasonable. In all these cases, when compensation is agreed upon, it is deemed by the Act to be substituted for compensation under it. Apart from this kind of compensation, it is expressly provided that any agreement by which the tenant deprives himself of the right to claim compensation shall, so far as it deprives him of such right, be void both at law and in equity. But having regard to the provision in the Act, that a tenant may, if he please, always resort to any agreement or custom in lieu of relying on the Act, the provision probably means no more than that such an agreement shall be voidable at his option.

The basis of the assessment of compensation is the

value of the improvement to an incoming tenant. Regard, however, is to be had to any benefit given by the landlord in consequence of the improvement, and—in the case of manures—to the value of any manure required by custom or agreement to be returned to the holding, in respect of crops sold off from it during the last two years of the tenancy.

The holdings to which the Act applies are those which are either agricultural or pastoral, or partly one and partly the other, or wholly or partly cultivated as a market garden; market gardens being themselves the subject also formerly of a special Act, passed in the year 1895, now repealed and re-enacted in the Act of 1908. The fact that there are buildings on the land will not in itself prevent the application of the Act; and now, by the Agriculture Act, 1920, even if the buildings are not accessory to the land, or even if some part of the holding be put to a different use, compensation will be payable in respect of the remainder unless otherwise agreed in writing. But the Act, as I take it, applies only to premises where farming is carried on as a business, and I do not think that a park or lands, for instance, attached to a country house could come within it, even though part of them were used for agricultural purposes. The tenancies to which it extends are expressed to be those for years, or for lives, or for lives and years, or from year to year; and a tenancy from year to year would be within it, even though it had not all the incidents of such a tenancy, and was capable by its terms of being put an end to, for instance, by less than the ordinary half-year's notice.

The compensation to the tenant is only payable on his quitting the lands at the determination of his

tenancy, whether from expiration of time or from any other cause. But if he continue tenant afterwards, the improvements for which it is payable—otherwise than in the case of fixtures—need not have been executed during his last tenancy or holding. He will not, however—speaking generally—be entitled to receive compensation for improvements, except manures, executed only during the last year of his holding, unless the landlord either assents to them or fails to dissent within a month after receiving notice from the tenant of his intention to execute them.

The Act contains other provisions of importance, amongst which I may mention those giving the tenant freedom of cropping and in the disposal of his produce (except in the last year of his tenancy). It gave also compensation for expenses he might be put to in the sale or removal of his furniture, implements, and produce where he had been "capriciously" disturbed in his holding. But the latter provision has been now replaced, by the greatly extended protection, from being dispossessed by notice to quit from the landlord, given to tenants by the Agriculture Act, 1920; whilst another recent enactment (of the year 1919) directs that on the making of a contract of sale any then current notice to quit given to a tenant from year to year is to become null and void without his written consent.

The procedure to be followed, in respect of the improvements specified in the Act as giving a claim to compensation, must be always that provided by the Act, independently of the time when the improvement was executed, or of the claim being made under agreement or custom, the procedure being by arbitration as laid down in the schedule to the Act. Notice of his claim must be given by the tenant before the

determination of the tenancy; though where he holds over lawfully part of the holding under custom or agreement, and executes an improvement on that part after the determination of the tenancy, he may give such notice during the period of holding over. The arbitration takes place before a single arbitrator appointed by the parties, or, in the absence of agreement, by the Board of Agriculture. Claims for breach of covenant by either party, or for waste by the landlord, may be included in the arbitration by notice given to that effect. The award to be made by the arbitrator must state separately the amounts awarded by him in respect of the several claims referred to him by the submission. No appeal is allowed by the Act, but the arbitrator is empowered to state a case for the County Court on a point of law that may arise in the proceedings, and may, if he decline, be compelled to do so by an order obtained from that Court. An appeal on the point of law from the decision of the County Court lies—as under the Workmen's Compensation Act—direct to the Court of Appeal. Finally, payment of the sum awarded may be enforced by process of the County Court in the ordinary way.

Gentlemen, with these remarks I bring this short series of lectures to a close. I have endeavoured to give you an insight into some of the leading principles of what I have always regarded as one of the most interesting branches of our law. I have, of course, been sadly hampered by the narrow limits of time within which I have had to compress my observations, —observations which, as I told you at the very first, must necessarily range over a wide field. But I have

done my best, and, in conclusion, I may perhaps be allowed to express the hope that I shall at least have been able to awaken sufficient interest in the subject in your minds to induce you to continue your study of it; because, if you do that, I feel sure that any labour or research you may bring to bear upon it will, to a very great extent, bring with it its own reward.

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