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THE LAW OF LANDLORD AND TENANT.[1]

FIRST ARTICLE.

The law of landlord and tenant forms one of the prominent divisions of the most complex and abstruse branch of our jurisprudence, the law of real property. In its numerous ramifications, it affects a large portion of the community, and embraces a great variety of interests. Yet it is only at a comparatively recent period that it has assumed its proper place as a distinct title in the law. It has not been deemed worthy of a separate division in the best English Digests and Abridgments; and, until the publication of Woodfall's bulky work, about half a century ago, the law on this subject had never been presented to the profession in a collected form. Since then, however, many treatises upon it and its numerous subdivisions, have appeared.

No *American* law of landlord and tenant can be said to exist. Our ancestors brought with them the common law, applicable to our situation, upon this, as on all other subjects, and we have done little more than prune away, by our statute regulations, some of the useless and refined subtilties which overrun this branch of the law in

[1] SYLLABUS: Introduction—The contract—Who may lease—Who may be lessees—Powers—Covenants—Tenancy for years—Tenancy at will—Tenancy from year to year—Tenancy at sufferance—Rooms and Lodgings.

the mother country. This title, however, does not affect so large a portion of the people here as in England. Here it is the ambition of the humblest citizen to be a freeholder. Hence many points have not, as yet, come up in this country; and, probably, in future American decisions upon points unadjudicated here, the more liberal spirit of our courts will induce them frequently to deviate from the path of English precedent.

The whole of our real law, influenced by the commercial spirit of the age, is gradually becoming more and more assimilated to that of personal property; and it may well be conceived that the increasing ascendency of commerce and the arts will produce an effect upon this portion of it. The feudal laws against the alienation of land were early changed for the benefit of trade, and the strictness of the ancient law, in relation to fixtures, has been much relaxed from the same motive; and the same enlightened policy will soon, it is hoped, remove the hardships which oppress the agricultural tenant.

No attempt has been made to compress the whole, or half of the law on this subject into the restricted space assigned, which seems the more confined from "the ample room and verge enough" usually enjoyed by legal authors; but the writer has attempted the "art to blot;" perhaps, if he had carried it out *completely*, it would have been better. The need of the power of just discrimination and arrangement has been much felt; but the writer doubts not that he has carried out the *last* clause of the trite Horatian precept,

"Pleraque differat, et praesens in tempus omittat."

These pages are now submitted to the candor of those who themselves have known the difficulties which beset the legal student.

§ 1. The relation of landlord and tenant exists wherever a party, having an estate in lands, tenements, or hereditaments, contracts to convey a portion of it to another party for a consideration, generally the periodical payment of rent. The contract is called a lease, or demise, and may be either by writing under seal, by writing not under seal, by parol, by implication or operation of law, and may endure for life, for years, or during the will of the parties, but

always for a less time than the interest of the lessor. In a written lease, no particular form of words is requisite: it is sufficient if it appear to be the intention of the lessor to dispossess himself temporarily of the premises, and of the other to enter under him,[1] whether the words are in the form of a license, covenant, or agreement. But the words used must be of present demise; and, if the words be ambiguous, the acts of the parties, such as taking possession, etc., may be called in to aid in discovering their intent.[2] A demise need not be contained in a single instrument, but may be constituted by a series of letters.[3] If an agreement clearly appear to be a mere executory contract preparatory to a formal lease, reference will be had to the intention.[4] Where there is merely an agreement for a lease, and the intended lessee enters under it and pays rent, a tenancy is impliedly created even when the amount of rent was not mentioned, but the tenant paid a certain rent.[5] A parol agreement for a lease will be enforced in equity, if there be proof of a substantial part-performance, such as delivery of possession. By a simple agreement for a lease, no legal interest whatever passes. Where there is a sufficient demise, there is an implied promise on the part of the lessor to give up possession to the lessee, and assumpsit lies if he does not.[6]

§ 2. All persons legally capable of contracting, and having a present interest, may make a lease, and actual possession is not requisite, if the lessor have an indisputable right of possession. Tenants in common may lease by their agent, or may join in making a lease. An idiot or insane person cannot make a lease, and a lease made by a person extremely intoxicated, is voidable by him when he becomes sober.[7] A minor cannot make a lease unless it be evidently for his benefit; if not, though not void solely on that account, it is voidable by him on coming of age, and if sued upon it, he may plead infancy.[8] But if the minor make a lease yielding rent, the adult party will be bound by it until the minor chooses to

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[1] 3 Fairf. 478.
[2] 5 Scott, 530.
[3] Ibid. 531.
[4] 7 Ad. & E. 451; 3 Johns. 44.
[5] 3 Bing. 361.
[6] 3 M. & P. 57.
[7] 7 Bing. 440.
[8] Bac. Abr. Lease B.

avoid it. On coming of age, a minor may confirm a lease made by him during his minority. A lease by a guardian of a minor for a term longer than remainder of his infancy, is not void, but voidable by the ward on coming of age, and may be confirmed by part acceptance of rent, or any act equivalent to affirmation on the part of the ward. A married woman cannot make a lease except under certain conditions, such as consent of husband. The husband can make a lease in her right, without her joining in it; but the widow may confirm or avoid a lease, although she may have joined in it.[1]

§ 3. All persons whatsoever may be lessees, even idiots, insane persons, and married women, for the law presumes all leases to be beneficial. If they labor under any disability at the time of making the lease, they may avoid it upon the removal of the disability; but continued occupation of the thing demised, renders the lease binding.[2] An alien may take a lease for years, of a house for the benefit of trade.[3]

§ 4. A power of making leases for a longer time than the party could otherwise legally grant, may be given by power of attorney, to persons who thereby have an estate for life, that they may underlet. To prevent injury to the reversioner, powers generally contain conditions, all of which must be strictly observed. Powers are treated liberally, and are favored in equity.

§ 5. The covenants in a lease are of two kinds: real, or those which run with the land, and personal. The former are for the benefit of the land, independent of collateral circumstances. The latter are those which do not affect the land demised. Besides, covenants may be express or implied, or in deed, or in law. Express covenants are those which are entered into by the act of parties. Implied, are those presumptions which the law makes from the nature of the contract. The latter may run with the land, and may exist in a deed containing express covenants, so far as they are not contradictory to the particular stipulations. Implied covenants

[1] An executor or administrator may make a lease, if the deceased had an estate for years, and an executor may do this before probate. A mortgagor cannot lease so as to bind the mortgagee, and vice versa, if the mortgagor redeem.

[2] 2 Bulst. 69; 2 Cr. 79.

[3] 2 Kent, 61.

are not permitted in New York. Real covenants bind any one who has any estate arising from the original demise, by reason of privity. No particular form of words is necessary to create a covenant, and whether there be a covenant or not, is to be collected from the intention apparent from the whole deed.[1] Covenants must be interpreted in the same way,[2] and if there be any ambiguity, they must be taken most strongly against the covenantor.[3] Covenants to do what is impossible, prejudicial to public interest, or in any way contrary to law, are void. An action of covenant lies not only for the rent reserved, but for all covenants broken, express or implied. When demise is not by deed, assumpsit is the proper remedy for the landlord, and case will lie for breach of an implied covenant to repair and cultivate according to custom.[4] If a tenant is about to do any act against which he has covenanted expressly, a court of equity will issue an injunction to restrain him,[5] but not to compel the performance of any specific act covenanted,[6] the landlord being left to his remedy at law. The question, what are usual covenants, has been the source of endless litigation.[7] There can be no uniform rule on this subject, but reference must be had to the nature of the property demised. The principal covenant on the part of the landland is that for title and quiet enjoyment. A general covenant for quiet enjoyment does not extend to disturbances by a stranger.[8] Covenants for removal are frequently inserted, and they imply a lease for the same term and rent, but not with all the covenants of the former lease, these being merely incidental. Covenants for continued removals are not favored by the courts, for they tend to create perpetuities, but they are valid if explicitly expressed.[9] A covenant to renew, upon such terms as may be agreed on, is void for uncertainty. Covenants to renew, run with the land.[10] The landlord sometimes covenants that he will repair, and pay taxes. The lessee usually covenants to pay rent, though the words "yielding and paying" imply such covenant.[11]

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[1] 1 Ves. 516; 5 T. R. 526. [2] 1 B. & B. 319. [3] 2 M. & S. 541; 9 E. 15.
[4] 5 T. R. 373; 2 Ves. & Bea. 353. [5] 5 Ves. 555. [6] 8 Ves. 159.
[7] Per Mansfield, C. J., 3 Taunt. 73. [8] Vaugh. 118. [9] 6 Ves. 232.
[10] 12 E. 469. [11] 17 Johns. 66; 15 Ibid, 276.

Sometimes, to repair and not commit waste. Not to assign or underlet; but a covenant restraining an assignment only, will not prevent an underletting;[1] a covenant not to *let* or assign, does.[2] A covenant against assignment is broken only by voluntary assignment. Where, therefore, premises are sold under a judgment, and execution against the lessee, there is no breach, unless there has been fraud on his part.[3] A covenant not to carry on a particular trade is not unusual.

[4]§ 6. A tenancy for years occurs when there is a contract for the possession and profits of land for a determinate period, and though it should be for a thousand years, only an estate for years passes, which is still regarded as a chattel interest;[5] and if the lease be made for less than a single year, it is still a lease for years. But a lease for "as long as wood grows or water runs" conveys a fee.[6] A lease for years is a lease *par eminence*, and must in general be in writing, signed and sealed. Leases for more than a certain length of time are required by statute to be recorded, and in some of the States witnessed and acknowledged.[7] In New York a lease for three years or more must be recorded, and if not acknowledged previously, its execution and delivery must be attested by at least one witness. In Massachusetts a lease for several years or more, must be acknowledged, recorded and executed, before one or more witnesses.[8] In general, in America, no seal is necessary to the validity of a lease.[9] "Leases for years may be made to commence *in futuro;* and under a statute requiring registration" of any lease for more than seven years from the making thereof," a lease in future is included, though for a term less than seven years, if the time intervening between the making of the lease and the expiration of

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[1] 2 Ro. Rep. 399. [2] 1 M. & S. 297. [3] 15 Johns. 278.

[4] Only estates less than freehold will be treated of.

[5] 1 N. H. 350; 15 Mass. 439. [6] 1 Vermont 6.

[7] Two witnesses are necessary in N. H., Vt., R. I., Conn., Ohio, Ill., Mich., Ind., Del., Tenn., S. C., and Ga.

[8] Statutes of the respective States. [9] 5 N. H. 216.

the term be more than seven years.[1] Under the statute of frauds, parol leases for years, to commence *in futuro*, are inoperative.[2] The time at which the term is to commence must be stated with certainty, that it may be known when rent becomes due.[3] If made to take effect from an impossible date, it takes effect from delivery; if from an uncertain date, it is void.[4] The day of the date is ordinarily inclusive, contrary to the old rule, that construction being assumed which is most beneficial to the lessee. But if the words are evidently used simply as a date of reckoning, the day of the date is excluded.[5] The continuance of the term may be defined by the express limitation of parties, or by reference to some collateral act; otherwise it is void. The lessee shall have his election, when the lease is made for different periods,[6] as for three, five or seven years, and the tenancy shall be first for the period first mentioned, and if the lessee continue over one period, he extends his holding to the next. A lease for a certain period from a certain day is not determined until the expiration of the anniversary of that day in the last year of the tenancy. A parol lease for years may be void as to the duration of the term and yet regulate the terms of the holding in other respects.[7] Entry upon the demised premises is necessary to complete the title of the lessee for years,[8] the lease of itself vesting no estate before entry. The lessee cannot maintain trespass before entry,[9] but he is bound by his contract, and must perform all covenants in his lease, and he has an *interesse termini*, or right to possession, which may be assigned, and which passes to his executors, if he die without taking possession.[10] When the term is to commence *in futuro*, evidently the lessee cannot enter before the time specified. Under the statute of uses, an estate can be created without entry. The rule of American law is said to be,[11] that the

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[1] 15 Mass. 429. [2] 12 Mod. 610.

[3] "A lease for years ought to have certainty in its limitations, viz: in the commencement, continuance and end of it." Plowden, 272.

[4] 1 Mod. 180. [5] 9 Cranch 104.

[6] 2 Burr. 1434; 5 B. & P. 399–442; 3 Term Rep. 462.

[7] 3 Mo. & M. 325. [8] 7 Car. & P. 360. [9] 2 Phil. Evid, 182.

[10] 1 Cr. 175–6. [11] Walk. Introd. 278.

execution and delivery of a lease perfects the title of lessee to all intents and purposes. This would seem to be more in accordance with the spirit of our institutions, and savors less of the remains of feudalism than the English rule. Where there are no writings the tenancy commences upon delivery of the premises. If a lessee enter before the time agreed on, his entry is a disseisin, and if he continue in possession after the time, he is still a disseisor by relation.[1] When a tenant for years becomes seised of the freehold, the term merges in the freehold, and becomes extinct. So one term merges in another immediately expectant thereon, for a person cannot be at the same time tenant and reversioner in the same estate. Where two estates are successive and not concurrent, there is no merger. The estate in which the merger takes place, must be larger than the preceding estate, and there must be no intervening estate, either vested or contingent. An estate for years may merge in an estate for life, in fee, or in another estate for years in remainder, or in reversion. Merger is not favored in equity, and is not allowed for special reasons.[2] Surrender is similar to merger. It is the yielding-up of an estate for life or years, to him who has the next immediate estate in remainder or reversion. Surrender is the act of the parties, merger of the law. But the latter cannot take place unless the right to make the former exists in the parties to the merger. A surrender may be by deed in writing, or it may be implied by law, when the lessee accepts a new lease from the reversioner, or any estate inconsistent with the old one.[3] A surrender by the original lessor discharges an under-tenant from his covenant, and the payment of rent, though it does not destroy his estate. Quitting possession and delivery of the key by the landlord to the tenant may amount to a surrender.[4] Leases for years may be forfeited if the tenant disclaims holding under his lease,[5] by refusal *in pais* to pay rent, by accepting title from a hostile source, by breach of any condition annexed to the lease, or if the tenant do anything by which he impugns the title of his landlord or claims a greater estate than he is entitled to. By statute in New York and Massachusetts, no conveyance of an illegal estate shall

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[1] 4 Kent's Comm. Lect. lv.
[2] 4 Kent's Comm. Lect. lv.
[3] 3 Monroe, 221.
[4] 11 Mass. 496.
[5] 3 Pet. 49, 4 Wend. 63.

work a forfeiture, and in many States forfeiture is said to be comparatively unknown. Where a lease is made to continue while rent is paid, or certain covenants performed, on failure of fulfilment, the lessor may claim forfeiture but not the lessee.[1] Such contracts are construed very strictly. If the husband forfeit a term held in right of his wife, the forfeiture binds the wife, because he might dispose of it. Where a right of reëntry is claimed on the ground of forfeiture for non-payment of rent, there must be proof of demand with all due formalities.[2] The receipt of rent which accrued subsequent to forfeiture is a waiver of it, and is a good defence.[3] If not *subsequent*, there is no waiver.[4] The forfeiture must be known to the lessor in order to render any acts of his a waiver.[5] Tenancy for years if not terminated previously in some of the above mentioned ways, will, of course, finally be determined by the lapse of time. A tenant for years has many of the privileges of a tenant for life, and is entitled to estovers.

§ 7. A strict tenancy at will continues during the pleasure of either party, though neither can exercise it to the injury of the other. Then lessee is entitled to emblements, and may hold the land until the time of taking them arrives, notwithstanding determination by lessor, but not after determination by himself. And the lessor is not deprived of his rent, although the tenant quit before the time of payment arrives. Tenant at will is entitled to estovers, and to a reasonable time to remove his family and goods,[6] and what is a reasonable time is a question of law.[7] Tenant cannot assign or underlet. It is said that at the present time, under the operation of judicial decisions, all tenancies for an uncertain period are constructively tenancies from year to year, without any express grant or contract to the contrary.[8] But it is apprehended that where there is entry and possession with no rent reserved, or term agreed upon, there is a strict tenancy at will,[9] inasmuch as the chief thing which converts leases for uncertain terms from year to year,

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[1] 7 Wendell 210. [2] Saund. 287. [3] 9 Paige, 427.
[4] 13 Wend. 530. [5] D. & E. 425. [6] Ellis v. Paige, 1 Pick 43.
[7] Ibid. [8] Kent 112. [9] 2 Caines 169.

is the reservation of rent.[1] So that now an estate at will might be defined to be the tenancy which occurs where there is a letting for an indeterminate period, with no reservation of rent. A strict tenant at will is not entitled to notice to quit, but the courts generally require either party desirous of terminating the tenancy, to give the other reasonable notice.[2] Except in regard to notice to quit, tenants at will are regarded as essentially distinct from tenants from year to year.[3] In Massachusetts all parol leases whether for a certain or uncertain time, or with or without annual rent reserved, have the effect of leases at will, and three months' notice in writing must be given; and in case of neglect or refusal to pay rent, fourteen days' notice in writing is sufficient. If a person enter and enjoy lands under a lease which is void, and pays rent, he is a tenant at will.[4] A person in possession of land under a contract with the owner for the purchase, is a tenant at will;[5] also one who holds rent free by the permission of the owner, as a minister placed in possession by the trustees for his congregation.[6] A tenancy at will may be determined by giving notice, by the death of the landlord or tenant,[7] by the sale of the premises by the landlord,[8] or by his leasing them by written demise,[9] and by his exercising any acts of ownership inconsistent with the tenancy. After the tenancy is determined, the lessee becomes a tenant at sufferance, and is not entitled to notice to quit, but may be immediately ejected, and in the case of the written lease the landlord's grantee may treat the former lessee as a trespasser, even before entry or notice.[10] The tenant may determine by any act inconsistent with the tenancy and by assigning or committing waste,[11] when he becomes a trespasser.[12] Waste does not lie against lessee, nor is he responsible for permissive waste.[13] If a tenant at will hold over after the determination of his tenancy by notice, he is a trespasser, but not if he hold over after termination in any other mode without notice.[14] A tenant who disclaims holding

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[1] 2 Wm. Bl. 1173.
[2] Cow. 13, 7 Johns 4.
[3] 4 Dev. 220.
[4] 8 T. R. 3.
[5] 12 Mass. 325.
[6] 12 B. & C. 118.
[7] 17 Mass. 282.
[8] 10 Meto. 283.
[9] Ibid 298.
[10] 1 Pick 367.
[11] 21 Pick. 367.
[12] 5 Rep. 136.
[13] 5 Conn. 280, 400, 155.
[14] 17 Mass. 284

under his landlord is not entitled to notice either from him or his grantee.[1]

§ 8. A tenancy from year to year is created where lands are demised generally for no specific time. Rent is payable yearly, unless otherwise reserved.[2] If a tenant for years hold over by consent given, either expressly or constructively, the law implies a new contract, similar to the former lease, as far as its terms are consistent with a yearly tenancy, with the same rent, payable at the same time, and it is construed to be a tenancy from year to year,[3] and the tenant is responsible as on a hiring for another year.[4] But mere continuance in possession is not a refusal to restore possession, nor a fact from which a jury can infer such refusal;[5] and mere silence on the part of the landlord will not be constructive consent.[6] Although a parol letting for more than three years be void under the statute of frauds, even if a tenant enter and pay rent, yet such letting and tenancy will amount to a tenancy from year to year.[7] A lease from year to year, so long as both parties shall please, is a lease for two years certain, unless notice to quit be given on the day the lease is executed, and if not determined at the end of the second year, by notice previously given, it shall continue until proper notice is given by either party, or until the happening of some event from which the law might imply a determination.[8] A tenant from year to year is entitled to six months' notice to quit, in writing, and the time of quitting must be specified, viz: the end of the year. The Supreme Court of Massachusetts recently pronounced a decision in *Baker* vs. *Adams*, said to be the first application in America of the reasonable and important rule that a notice to quit must expire with some year of the tenancy. The

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[1] 1 Vt. 80; 1 A. K. Marsh. 181. A mortgagor in possession is regarded by the English law as a tenant at will to the mortgagee, who may enter at any time, even before default of payment; and, says Chancellor Kent, this doctrine prevails very extensively in the United States. But he is not entitled to emblements or notice to quit, and is only sub modo a tenant at will and is no better than a tenant at sufferance.

[2] 4 C. & P. 260.

[3] 1 Cr. &. M. 808; 2 M. & R. 418; 1 Pick. 332; 2 Hill, 367; 13 S. & R. 60.

[4] 9 Conn. 334.

[5] 1 Litt. (Ky.) 31.

[6] 7 Halst. 99.

[7] 2 Sm. L. Ca. 74—6.

[8] 1 P. & D. 454; 4 East, 29.

rule of six months' notice prevails in many States, and in others the courts require reasonable notice. In most of the States the matter is regulated by statute.[1] The length of notice varies with the nature of the contract, and the tenancy. Thus, if lodgings be hired by the month, the time of notice is justly reduced.[2] In a case of tenancy under a parol lease from month to month, sixty days' notice was held sufficient.[3] Notice to quit must be given to the landlord's immediate tenant, and to the tenant's immediate landlord. If the landlord distrain for rent, or receive rent after notice to quit, he thereby waives his notice, and the tenancy continues. Tenant from year to year may assign or underlet. He is of course liable for voluntary waste, and to some extent for permissive waste, being bound to make all ordinary tenantable repairs. All general tenancies are constructively tenancies from year to year.[4]

§ 9. Tenant by sufferance is one who comes legally into the possession of land, and holds wrongfully after the determination of his estate. He has only mere possession, and no estate whatever in the land. He is not entitled to notice to quit, and aside from the statutes, he is not liable to pay rent. He holds by the *laches* of the landlord, who may enter upon him at pleasure, but before entry he cannot maintain an action of trespass.[5] Only one who comes to his estate by act of party can be a tenant at sufferance. One who comes by act of law, and holds over, is regarded as a trespasser. By statute in New York, tenants at will and at sufferance are entitled to a month's notice to quit; but when a tenant holds over without consent, he is not a tenant at sufferance within the meaning of the statute.[6] An under-tenant who is in possession at the expiration of the original lease, and is permitted, by the reversioner, to hold over, is *quasi* a tenant at sufferance, and the fact of occupation,

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[1] In Vermont, Kentucky, Pennsylvania, and Tennessee, the English rule prevails. In Maine, New Hampshire, Massachusetts, Michigan, and Indiana, three months is the rule.

[2] 1 Esp. N. P. 94. [3] 2 Pick. 70. [4] 1 Vt. 315; 6 Yerg. 431; 1 Johns. 322.

[5] 17 Mass. 282. [6] 11 Wend. 616.