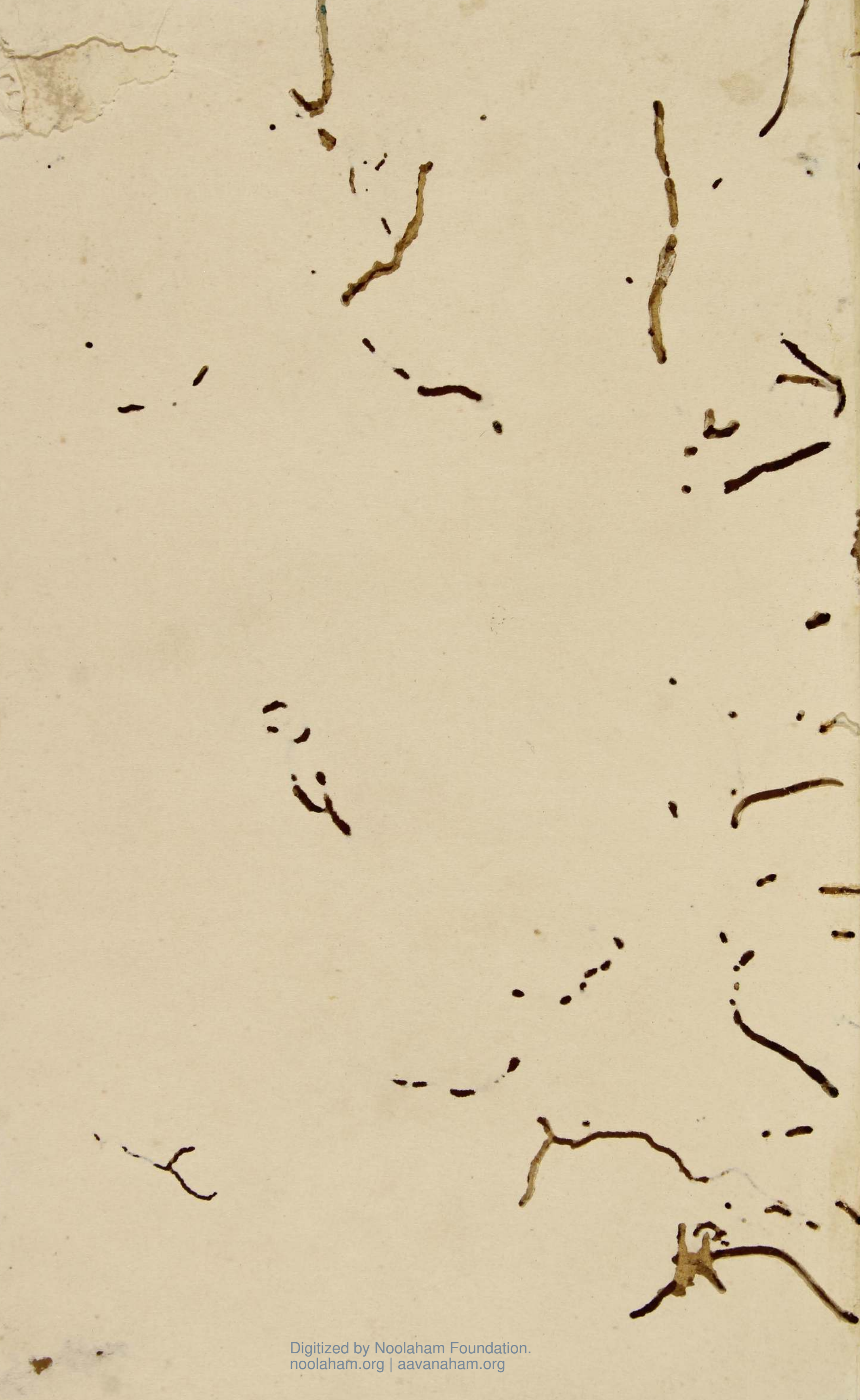

LANDLORD AND TENANT

IN

CEYLON

By

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PREFACE

This work as its title indicates deals only with the law of leases of immovable property. Tenancy cases are of frequent occurrence in our Courts and the law of Landlord and Tenant is an important branch of our law. Hence it is thought that a work of this nature may be welcomed by the profession. If this work would serve some useful purpose to the practitioner and to the student at law I would feel amply compensated for the labour that has been expended.

There are several modern text-books on the subject in other countries. Particular mention must be made of the excellent treatise on the law of Landlord and Tenant in South Africa by Wille and of the monumental work on the law of Landlord and Tenant in England by Woodfall. Though there are some general books on the laws of Ceylon no monograph has been written on this subject.

This is an age of specialisation and hence a pioneer effort is made to state the law of leases systematically as it obtains in Ceylon. Law is not the outcome of logic alone but of experience also. That is the only apology that could be given for the historical introduction. All the leading cases and the relevant statutes have been referred to in this work. In the citation of some of the well known works of the Roman-Dutch jurists references are given to popular translations wherever it is possible. For the benefit of those who do not have access to the South African law reports references are given to the excellent digest of South African case law by Messrs. Bisset and Smith.

It is my duty to thank my friends, particularly Messrs. C. Renganathan and P. A. Senaratne, who assisted me in verifying the references. My thanks are due to Mr. A. R. H. Canakaratne, K.C.,

who was kind enough to peruse the manuscript and to Mr. M. Balasunderam who read through the proofs at the various stages. I should also thank Mr. K. Satia Vagiswara Aiyar for preparing the index and Mr. S. Harihara Aiyar for preparing the table of cases. I am deeply indebted to Mr. N. E. Weerasooria, K. C., who has been good enough to find the time to read through the proofs. But for his help and encouragement this work might not have seen the light of day. I also take this opportunity to thank the Hon. Mr. Justice Keuneman, K. C., Puisne Justice of the Island of Ceylon, for the foreword he has given.

H. W. TAMBIAH.

Law Library, Colombo,
June, 1940.

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A. C. R.	—Appeal Court Reports (Ceylon)
A. D.	—South African Law Reports, Appellate Division
B. & S. Dig.	—The Digest of South African Case Law by Bisset and Smith Consolidated Edition (1927)
Bal.	—Balasingam's Reports (Ceylon)
Bal. Rep.	—Balasingham's Reports (Ceylon)
Bal. Notes	—Balasingham's Notes of Cases (Ceylon)
Berwick	—Berwick Translation of Voet
Bigelow	—Bigelow on Estoppel
Bomb.	—Indian Law Reports, Bombay Series
Br.	—Brown Reports (Ceylon)
Buch.	—Buchanan's Reports
Buckland	—Text book of Roman Law by Professor C. W. Buckland (2nd Edition)
Burge	—Commentaries on Colonial and Foreign Laws by William Burge Edition.
Cap.	—Chapter, Legislative Enactments of Ceylon (Revised Edition 1938)
Calcutta	—Indian Law Reports, Calcutta Series
Camp.	—Campell Reports
Code	—Justinian's Code
C. A. C.	—Court of Appeal Cases (Ceylon)
C. L. Rec.	—Ceylon Law Recorder (Ceylon)
C. L. R.	—Ceylon Law Reports
C. L. W.	—Ceylon Law Weekly
C. L. J. R.	—Ceylon Law Journal Reports
Curr. L. R.	—Current Law Reports (Ceylon)
C. P. D.	—South African Law Reports;Cape Provincial Division
C. T. R.	—Cape Times Reports of the Supreme Court of the Cape of Good Hope.
C. W. R.	—Ceylon Weekly Reporter.
Dig.	—Justinian's Digest.
E. D. C.	—Reports of the Eastern District Courts (Cape) from 1880.
E. D. L.	—South African Law Reports, Eastern Districts Local Division.

Grenier	—Grenier Reports (Ceylon)
Grotius	—Introduction to Dutch Jurisprudence by Hugo Grotius. Translation by R. H. Lee (Edition)
Halsbury	—Halsbury's Laws of England (2nd Edition)
Hayley	—Laws and Customs of the Singhalese by F. H Hayley.
Henry	—Institutes of the Laws of Holland by Vanderlinden Translated by Jabez Henry.
H. C. G.	—Reports of the High Court of Grigualand West.
J. D. R.	—Juta's Daily Reporter, Reporting Cases in the Cape Provincial Division
K. B.	—Law Reports, King's Bench
Koch Reports	—Kochs' Reports (Ceylon)
Kotze	—Vanleeuwen's Cammentaries, Translated by Hon. Sir John G. Kotze.
Lemb.	—Lembruggen's Reports
Lemb. & Asseervathan	—Lembruggen & Asseervathan's Reports (Ceylon)
Lead	—Leader Law Reports (Ceylon)
Lee	—Introduction to the Study of Roman-Dutch Law by R. H. Lee.
Lor.	—Lorenz's Reports (Ceylon)
Law Rec.	—Ceylon Law Recorder
L. R. H. L.	—Law Reports, House of Lords
Maasdorp	—The Institutes of South African Law by Sir A. F. S. Maasdorp.
Mat. Case	—Matara Cases, Edited by Justice (then Mr.) De Kretser
Morg. Dig.	—Morgan's Digest (Ceylon)
Nat. L. R.	—Natal Law Reports (South Africa)
N. L. R.	—New Law Reports (Ceylon)
O. R. C.	—Reports of the High Court of the Orange River Colony (South Africa)

Rec.	—Ceylon Law Recorder (Ceylon)
Ram. Rep.	—Ramanathan Reports
Rib. Peiris	—Ribèro's History of Ceilao (1685), Translation by P. E. Peiris (2nd Edition)
S.	—Searle's Reports of the Supreme Court of the Cape of Good Hope (South Africa)
Sanders	—Justinian's Institutes, Translated by Sanders
S. C.	—Reports of the Supreme Court of the Cape of Good Hope, from 1880
S. C. C.	—Supreme Court Circular (Ceylon)
S. C. D.	—Supreme Court Decisions (Ceylon)
S. C. Min.	—Supreme Court Minutes (Ceylon)
S. C. R.	—Supreme Court Reports (Ceylon)
Swift and Payne	—Translation of Voet by Swift and Payne
S. R.	—Reports of the High Court of Southern Rhodesia
Tamb.	—Tambiah Reports (Ceylon)
Tennen	—Tennents Ceylon (1859)
Thomp.	—Institutes of the Laws of Ceylon, H. B. Thompson
Times	—The Times of Ceylon Law Reports
T. H.	—Reports of the Witwatersrand High Court (Transvaal Colony.)
T. P. D.	—South African Law Reports, (Transvaal Provincial Decision
T. S.	—Reports of the Supreme Court of the Transvaal Colony
Vanderkeessel Thesis	—Select Thesis of the Laws of Holland and Zeeland by Vanderkeessel
Vanderlinden	—Institutes of the Laws of Holland by J. Vander Linden.
Vanleeuwen	—Simon Van Leeuwen's Commentaries on Roman Dutch Law
Voet	—Voet on the Pandects
V. D. L.	—Institutes of the Laws of Holland by Vander Linden

Walter Pereira	—Laws of Ceylon by Walter Pereira (2nd Edition)
Weer.	—Weerakoon's Reports (Ceylon)
Wij.	—Wijeyakoon's Reports (Ceylon)
Wille	—Landlord and Tenant in South Africa, by G. Wille.
Woodfall	—Woodfall's Landlord and Tenant.
W. L. D.	—Reports of the Witwatersrand Local Division of the Supreme Court of South Africa.

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TABLE OF SOUTH AFRICAN AND OTHER FOREIGN CASES.

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Voet on the Pandects, Book 7 Tet. 1, on Usufructs, Translation by Searle and Joubert

Voet on the Pandects, Book 18, Tet. 1, Emptio et Venditio, Translation by Berwick

Voet on the Pandects, Book 19, Tet. 2, Locatio et Conductio, Translation by Berwick

Voet on the Pandects, Book 20, Tet. 2, on Hypothecs, Translation by Berwick

Voet on the Pandects, Book 42, Tet. 8, on Fraudulent Alienation, Translation by De Vos

Voet on the Pandects, Book 46, Tet. 3, on Payment, Translation by Swift and Payne

INTRODUCTION.

The Legal System of Ceylon.

Ceylon occupies a unique position in the legal world, because in no other place can one find such a variety of laws as in this Island. There may be seated in the same room, sons of the soil, owing allegiance to the same Sovereign but each governed by a different system of law. There is the Kandyan governed by the Kandyan law, the Mussalman governed by the Muslim law, the "Malabar inhabitant" (1) of Jaffna governed by the *Tesawalamai*. There are the Mukkuwas, the descendants of Tamil mariners, who at one time were governed by the *Mukkuwa law*. The customary laws of these people are not comprehensive enough and it is the Roman-Dutch law, the common law of the land, which applies if there is a *casus omissus*. To cite the words of A. St. Jayewardene, J. "the Roman-Dutch Law moulded by Grotius, the father of International Law, and Voet, the Prince of Commentators, flows through all these systems filling up the cavities caused in them by age or disuse." (2) It must not, however, be supposed that where provision is not made by these customary laws, it is the Roman-Dutch law that always applies. Express legislation has superseded the Roman-Dutch law in many matters. In some instances the English law has been bodily introduced by legislation. Thus the laws pertaining to partnership, agency and insurance that obtain in England have been introduced into Ceylon in this manner. (3) Some Ordinances which have been enacted here are either exact replicas of the English Statutes or are

(1) The Dutch used the term "Malabar" to describe the Tamils who inhabited Jaffna. But there is a controversy as to whether the Tamils of Jaffna came from Malabar or the Coramandel coast.

(2) Roman-Dutch law by A. St. Jayewardene, page 1.

(3) S. 3, Introduction of English law (Cap 66).

substantially based on them. (4) Our Courts, in the process of interpreting these Ordinances, are compelled to refer to English decisions and text books. In this manner many principles of English Common Law and Equity have been introduced.

Much of the English law has found its way into Ceylon by the process of tacit acceptance. Judges who are called upon to administer justice in this Island are, for the most part, trained in the English legal system and quite freely refer to English text books and decisions in solving legal problems. Thus, it is not an infrequent sight to see counsel citing passages from some English text book or other on leases in a tenancy case, though on the subject of Landlord and Tenant we are substantially governed by the Roman-Dutch law. With advancing civilisation certain provisions of the Roman-Dutch law are either inadequate or ill-adapted to the changing conditions, in which case too, judges and lawyers refer to English cases. In this manner several principles of the English law of Landlord and Tenant have been introduced to suit the changing times and conditions. But before one considers this aspect of the subject it would be profitable to give a brief historical sketch of the law of Landlord and Tenant in Ceylon.

Leaseholds known to the Ancient Sinhalese.

Before the Portuguese and the Dutch occupations there were two principal kingdoms in Ceylon, the Singhalese kingdom, the seat of Government of which shifted from place to place, and the Tamil kingdom which had its seat of Government in the North. Emerson Tennent says that just before the Portuguese arrived, the political condition of Ceylon was deplorable. (5) The sea ports on all parts of the coasts were virtually in the hands of the Mohammedans ; the North was in the possession of the Tamils, whose chief seat of Government was at Jaffna-patam, and the great central region, since known as the Wanni, including Anuradhapura and Polonnaruwa, was divided into a number of petty fiefs, each governed by a Malabar Prince or Princess known as

(4) See the Sale of Goods Ordinance (Cap. 70.) ; The Bills of Exchange Ordinance (Cap. 68).
(5) See Tennent II. 7.

Wanniya or *W'annichee* who called themselves vassals of either the Rajah of Jaffna or the Singhalese kings but were virtually uncontrolled by any paramount authority. From this description of Tennent it appears that some form of feudal tenure was known to the ancient Tamils. Among the Singhalese there was a form of feudal tenure comparable to the feudal tenure of Medieval Europe. (6) It is interesting to note that the feudal tenure among the Singhalese was not in any way influenced or moulded by Roman law. Sir Henry Maine suggests that when the barbarians conquered Rome they distributed the conquered lands among their followers imitating the form of tenure known to the Roman law as *emphyteusis*, and that it was in this way that feudal tenure originated in Europe. (7) It may be that many incidents of feudal tenure were derived from principles of Roman law, but, as he himself suggests later, it is not presumptuous to suppose that the barbarians themselves had some basic idea of feudal system before they conquered Rome. When large tracts of lands are conquered, the lands are usually distributed by the leader of the victorious host among his followers. Probably it was in this way that the feudal system had evolved. Similar historical and economical circumstances might have arisen in different parts of the world, and one should not therefore be surprised to find institutions, almost identical, spread throughout the world. When the Singhalese invaded Ceylon and subjugated the indigenous population, the land might have been distributed among the followers by the leader of the host and a type of feudal tenure might have been thus established. The tenures known to the Singhalese are too numerous to be discussed in this work. But a few tenures resemble leaseholds to such an extent that one will not be wrong in designating them as species of leasehold known to the Singhalese. Dr. Hayley is of opinion that leaseholds were unknown to the Kandyans except to the very limited extent of a temporary possession given to the cultivators in *ande*. (8) No doubt, if one

(6) See Hayley's Laws and Customs of the Sinhalese, page 237.

(7) See Maine's Ancient Law, page 309. (Pollock's Edition) (1920).

(8) Hayley's Laws and Customs of the Sinhalese, page 253.

analyses the incidents of a lease as understood in Roman law and the systems derived from it Dr. Hayley's statement may be correct. But it is important to bear in mind that the constituent elements of a lease would vary in different systems of law. The main feature of a leasehold is the transference of the right of use and enjoyment (*jus utendi et fruendi*) by the owner of the land to another person for a limited period of time in consideration of the latter giving the former a fixed sum of money or a definite weight or measure of the produce. If one considers this as the basic idea common to all forms of leaseholds one is tempted to classify *ande* cultivation and the form of tenure known as *ottu* as species of leasehold known to the ancient Singhalese. In ancient times there were certain fields known as *muttettu* lands which were sown on behalf of the King, proprietor, temporary grantee or chief of a village by cultivators who differed from the other inhabitants of the village in that they were not liable to perform services. There were two kinds of lands possessed under this tenure, namely, *ninda muttettu* and *ande muttettu*. *Ninda muttettu* was cultivated by peasants gratuitously on behalf of the proprietors in consideration of the former possessing other lands belonging to the latter. *Ande muttettu* was sown on the usual condition of giving half the crop to the proprietor ; [9] so that an *ande* cultivator is virtually in the position of a tenant.

Sir John D' Oyly gives the following description of a form of tenure known as *ottu*. He says:— [10] "*Ottu* was of three kinds:—1st —A portion of the crop equal to the extent sown, or to one-and-a-half or double the extent sown in some paddy fields or chenas."

"It was the usual share paid to the proprietor by the cultivator from fields which were barren or difficult of protection from wild animals, particularly in the Hat Kòralé, Sabaragamuwa, Hewaheta, and some chenas in Harrispattuwa."

"In many Royal villages in the Hat Kòralé, there were lands

(9) 2 Thompson Institutes 606.

(10) See Appendix *Niti Nigan-duwa*—page 120 translated by C. J. R. Le Mesurier and Pannabokke (1880).

paying *Ottu* to the Crown."

"2ndly—The share of one-third paid from a field of tolerable fertility or from a good chena sown with paddy."

"3rdly—The share which the proprietor of a chena sown by another with fine grain, received first from the ripe crop, being one large basketful or a man's burden." He also gives a description of a *chena* land. He says:—"Chena land was high jungle ground, in which the jungle was cut and burnt for manure, after intervals of from five to fourteen years, for the purpose of cultivating the paddy called *El-vi* or other fine grains or cotton or sometimes roots and other vegetable. After two or at the most three crops it was abandoned till the jungle grew again." (11) From this description of *ottu* tenure given by D'Oyly it appears that proprietors gave their lands to be cultivated by strangers in consideration of receiving a certain share or measure of the produce. Particularly, the first and the third kinds of *ottu* tenure closely resemble a lease. But in the third kind of *ottu* tenure the measure of the produce is an uncertain one, varying according to the capacity of the basket or the strength of the person employed to carry the produce. As Codrington remarks "payment of *ande* or of *ottu* does not necessarily indicate different interests in the land; in either case the land belongs to the Lord absolutely" (12) and the cultivator is in the position of a tenant.

Leasehold known to the Ancient Tamils.

Among the Tamils, when one considers the provisions of the law of *Tesawalamai* and the history of the Tamils in Ceylon, it is evident that some form of feudal tenure corresponding to the Singhalese tenure existed at one time. Codrington remarks that the original land system in the Tamil districts was not substantially different from that prevalent in the rest of the Island. (13) Apart

(11) Appendix *Niti Niganduwa*—page 120. Also 2 Thompson's Institutes 608, 609.

(12) Ancient Land Tenure and Revenue in Ceylon by H. W. Codrington (Govt. Press)—page 9.

(13) Ancient Land Tenure in Ceylon by Codrington—page 54.

from a system of feudal tenure known to the Tamils it is clear that the conception of a leasehold was known to them. In this connection it is profitable to reproduce *verbatim* the provisions of Part III, section 2, of the Tesawalamai Regulation [14] which is a collection of the customary laws of the Tamils. Under the heading "Renting of Grounds" the following is stated:—

"If a person has not a proper piece of ground as his own on which to plant cocoanut trees, and is allowed to do it on another man's ground, he gets two-thirds of the fruits which the trees planted by him produce, provided that he himself furnished the plants, and the owner of the ground receives the other third; but if the owner of the ground supplies the plants, the planter gets but one third and the owner of the ground receives the other two-thirds; if, however, they have *both* been at an equal expense for the plants, then they are each entitled to an equal share of the fruits and trees. This division mostly takes place in the province of Tenmaràḍchi, for in other provinces they know better how to employ their grounds than to let strangers plant cocoanut trees thereon."

From this description it would appear that this practice was confined only to a particular division of Jaffna, namely, Tenmaràḍchi. Hence it is not such a universal custom as to justify its being called a law. When both parties have spent equally the planter is entitled not only to a share of the fruits but also to a share of the trees, an incident entirely alien to the nature of a lease. Therefore, though this section is headed "Renting of Grounds", it cannot be said that this portion of the code deals with leases as the term is understood in modern systems of law. The true leasehold known to the Tamils is described in section 7 of Part IX of the Tesawalamai Regulation which reads as follows:—"When any person sows the fields of another without a previous agreement what quantity the sower shall give from the harvest to the proprietor of the fields, it is deemed

(14) Tesawalamai Regulation is the collection of the customary laws of the Tamils by Claas Isaaksz (see Cap 51.)

sufficient if the sower pays to the proprietor the *taraivāram*, which signifies the ground duty, and is calculated to be one-third part of the profits, except the tenth part, which is to be given to the proprietor previously. And when the sower has agreed to give a fixed quantity to the proprietor, and the crop happens to fail in the year for which the contract has been made, the sower need not pay to the proprietor the quantity agreed upon, but in case the other inhabitants of the village (in which the sower resides) have all had a good harvest, then the sower of the above description is obliged to pay such a quantity to the proprietor as was agreed upon by him, because in such an event the failure of the crop of the field sown by him is attributed to his laziness and negligence; yet should it happen that he has had a tolerably good harvest and the other inhabitants of his village a bad one, then the proprietor of the ground must be satisfied with the quantity produced by the field, and may not claim *anything* more from sower." From this account it appears that lands were leased out for sowing purposes among the ancient Tamils in consideration of a fixed amount of the produce or a share of it. It is curious to note that in cases of unwonted sterility the provisions of *Tesawalamai* and the Roman-Dutch law are practically the same. The hire of beasts was also recognised among ancient Tamils.[15]

It is unnecessary to consider the question whether the Portuguese when they arrived in 1517 introduced their laws pertaining to leases because it has been shown by many writers of eminence that the Portuguese never introduced their laws here.[16]

Law of Leases during the Dutch Period.

The Portuguese were ousted by the Dutch and from 1656 onwards the Dutch became masters of the Maritime Provinces. Some hold the view that the Dutch themselves did not introduce the Roman-Dutch Law.[17] But the better view seems to be that they administered certain parts of the country and governed a

(15) See Part vi of the Tesawalamai Regulation (Cap. 51).

(16) Rib Peiris 92 cf. Remier article on feudalism in Ceylon (1928) J.C. B. R. A. Vol. XXI.

(17) A. St. Jayawardene on Roman-Dutch Law, pages 3-11.

section of the community partly according to the Dutch Laws but chiefly according to the statutes of Batavia—a special code promulgated by the Supreme Government in India modifying the jurisprudence of Holland to suit local conditions. The Batavian laws were applied only to the Hollanders and to the native servants of the Company or residents within the various ports, and perhaps to other Ceylonese who had adopted Christianity as their religion. (18) The rest were ruled according to their laws and customs.

Law of Leases obtaining in Ceylon.

The British in turn ousted the Dutch, and by a Proclamation dated 1799 introduced the Roman-Dutch law into Ceylon as the common law of the land.

It must not, however, be thought that the whole of the Roman-Dutch law as it obtained in Holland was ever introduced here. From the laws as obtained in Holland, Dutch feudalism and local customs peculiar to Holland have to be omitted. Thompson in his Institutes of the Laws of Ceylon wrote in 1866 as follows:—

"The general, or, as it is popularly termed, the common law of Ceylon, is obtained from treatises on the Roman-Dutch law, that is, the Roman Civil law, added to or abrogated by the feudal customs, and federal or state statutes of the United Provinces of Holland. These variations, additions, or abrogations, appeared not only in the statute books of Holland, but in respect of Dutch customs, in judicial decisions, and in learned treatises of jurisconsults, which bear almost the authority of such decisions. From this Roman-Dutch law, which is popularly regarded as the common law of a great part of Ceylon, Dutch feudalism and local customs must be largely subtracted, as well as other institutions peculiarly Dutch, which do not obtain in Ceylon; so that the Roman-Dutch law, as accepted in Ceylon, re-approaches the civil law; and indeed it will be found, in the old treatises, as in *Voet on the Pandects*, that, when not controlled by some statute or custom, the Dutch commentator always relies on the civil law as his authority." (19)

(18) Hayley, page 23.

(19) 2 Thompson Institutes pages 11, 12.

It is important, however, to bear in mind that in many instances the principles of law pertaining to leases in Roman law are different from those in Roman-Dutch law. Thus the rule in Roman-Dutch law; *"hire goes before sale"* (*huur gaat voor koop*), is peculiar to it and has been adopted both in South Africa and in Ceylon. Again in Roman law the rights of a lessee were considered *jura in personam*, but in South Africa, by a process of historical development, rights of a lessee under long leases are now regarded as *jura in rem*. Garvin, J. has shown in a recent case that even in Ceylon this transition could be observed. It was held in this case that in Ceylon a notarial lease created *rights in rem* and not *rights in personam*.(20) Many principles of Roman law pertaining to leases have been wiped off by express legislation in Holland. Thus, the Placaats of Holland have altered the law pertaining to subletting and assignment and the right of compensation for improvements made by a lessee. It is a moot question whether these Placaats were introduced here. This can only be ascertained by perusing the Dutch records, but unfortunately many of them are lost. The Supreme Court in the case of *Karonchihamy vs. Angohamy* (21) took the view that it was for those who asserted and relied upon the operation of a law enacted since the date of the Dutch occupation of the Island in 1656 to show beyond all question that it operated and applied. Thus in *Goonesekere et al vs. John Singho,* (22) the Supreme Court held that certain Placaats, which dealt with the question whether or not leases could be assigned or sublet without the consent of the landlord, were not shown to have been introduced into Ceylon.

On many topics in the law of leases principles of English law have been invoked. In considering the measure of damages for breach of contract it is the English law that is resorted to and not the Roman-Dutch law.(23) The Roman-Dutch law governing

(20) *Carron vs. Fernando* (1933) 35 N.L.R. 352 at 358 ;13 Rec 124.
(21) (1904) 8 N.L.R. 1.
(22) (1922) 4 Ceylon Law Recorder, page 133 at 134.
(23) *Narayanen Chetty vs. Stevenson & Sons* (1880) 4 S. C C. 2.

forfeiture as between landlord and tenant has not been shown to apply to Ceylon.(24) English principles of Equity have been resorted to in deciding the question whether a lease should be forfeited for breach of an agreement to pay rent before a particular date.(25) The law pertaining to *use and occupation* is the English law.(26) The law dealing with the period within which a valid notice to quit could be given to terminate a monthly tenancy is based on some English decisions which have not been later followed in England. But our law on the subject is still based on the English decisions which, as Jayawardene, J. has shown, have not been followed.(27) In interpreting the Small Tenements Ordinance (28) which is based on the Small Tenements Recovery Act of 1858, (29) our Courts have referred to English decisions. In interpreting certain provisions of the Civil Procedure Code (30) and the Evidence Ordinance, (31) both of which are based on Indian Statutes, our Courts have adopted some Indian decisions. With these few exceptions, the law governing leases is substantially the Roman-Dutch law as modified by our Ordinances and our case law. In elucidating principles of Roman-Dutch law, our Courts refer not only to text books of Roman-Dutch jurists but also to decisions of the Supreme Court of South Africa, particularly those of the Appellate Division. Hence reference is given to the decisions of the South African Courts, wherever it is found to be necessary.

The Method of Approach.

The scheme of this work may be briefly discussed. The work is based on Vanderlinden's Institutes. In this work only letting and hiring of immovable property is considered. The first part deals with the formation of leases. The definition, nature and essentials of a lease are discussed. Contracts closely resembling

(24) *Muruger Ayer vs. Arumugam* (1858) 3 Lorenz Reports 2 at 5.

(25) *Sandford vs. Peter* (1893). 2 S. C. R. 35,

(26) *Sinno Appu vs. Appu Sinno* (1925) 6 Ceylon Law Recorder 171.

(27) *The Imperial Tea Co., Ltd. vs Aramady* (1923) 25 N. L. R. 327 at 329; 5 Rec. 138

(28) Cap. 87.

(29) 1 and 2, Vict. C 74.

(30) Cap. 86.

(31) Cap 11.

the contract of letting and hiring are treated with a view to distinguishing them from the contract of lease. The essentials of a lease, namely, the subject matter, rent and duration are considered under different chapters on account of their importance. Next, the capacity to enter into a lease and the title of the landlord are discussed. Then the formalities necessary to enter into a lease of lands in Ceylon are considered. The law on this subject is chiefly contained in the provisions of the Prevention of Frauds Ordinance, (32) the Evidence Ordinance, (33) the Registration of Document Ordinance,(34) and the cases interpreting these provisions. Wherever necessary the relevent portions of the Ordinances are summarised. The action commonly known as action for *use and occupation* is discussed. The law on the subject is the English law. The important topic, *subletting and assignment* is dealt with. On this subject there is a difference of opinion between the old Roman-Dutch jurists who wrote before some Placaats which altered the law on this subject were passed in Holland, and the later jurists who were influenced by these Placaats. Our Courts have proceeded on the footing that these Placaats were not introduced here.

The second part of this work deals with the obligations and the rights of parties. Vanderlinden enumerates these duties, and with this work as the basis, each duty mentioned by Vanderlinden is developed in a separate chapter. The right to compensation for improvements is discussed. The law on this topic was materially altered in Holland by the introduction of certain Placaats which were inimical to lessees. Though under our law the lessee is not placed on the same footing as a *bona fide* possessor, yet the niggardly basis of assessing compensation suggested by some of these Placaats has not been adopted in Ceylon in all cases. The landlord's hypothec is next dealt with. As the researches of Hoffield show, the landlord's hypothec is in the nature of a power rather than a right. But for the sake of convenience and out of deference to

(32) Cap 57.
(33) Supra.
(34) Cap 101.

accepted legal terminology in Ceylon, it is treated under the heading "special right." Recent decisions on this topic show that a landlord could be deprived of this right. Special legislation is needed in Ceylon to protect the landlord and to make the hypothec effective.

The third part of this work deals with the termination of a lease. The chapter dealing with termination of leases is again based on the provisions of Vanderlinden's Institutes. The Procedure adopted is also discussed in this part. The relevent portions of the Civil Procedure Code (35) and the decisions interpreting these are dealt with. Finally the Small Tenements Ordinance (36) and the cases interpreting the provisions of this Ordinance are considered. The law governing the stamping of indentures of lease is treated in the appendix.

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(35) Cap 86.

(36) Cap 87.

PART I.

THE FORMATION OF THE CONTRACT.

CHAPTER I.

THE CONTRACT OF LETTING AND HIRING.

Definition of Letting and Hiring.

Grotius defines the contract of letting and hiring (*locatio et conductio*) as "a contract whereby a person binds himself to put his own service or the service of another man or of an animal, or the use of some other thing at the disposal of another person and the other in turn binds himself to pay a recompense. (1) Vanleeuwen defines Hire as "a contract whereby the use of a thing, or the benefit of any service or act, is promised for a certain price." (2) Both these definitions do not state whether it is essential that the period during which the use is granted should be limited. Vanderlinden's definition is more restrictive. He defines Letting and Hiring "as that kind of agreement whereby one party binds himself to suffer another to have the use of certain thing during a fixed and limited time, in consideration of a certain sum of money, as hire or rent, which the other binds himself to pay." (3) Later he says that although the rent or hire is payable generally in money, yet sometimes part of the rent is paid in produce. (4) The contract of letting and hiring is divisible into three kinds. It includes within its compass not only the hire of things (*locatio conductio rei*) but also putting out of a piece of job work (*locatio conductio operis*) and the hire of services (*locatio conductio operarum*). (5) We propose here to deal with only the

(1) Grotius Introduction to Roman-Dutch Law. 3.19.1. Lee's Translation Vol. 1 Page 385.

(2) Vanleeuwen 4. 21. 1. Kotze's Translation Vol. 2. Page 164 (2nd Edition.)

(3) Vanderlinden 1.15.11. Henry's Translation Page 236.

(4) Vanderlinden 1. 15. 11. Henry's Translation Page 237.

(5) Lee Page 303 (Third Edition)

letting and hiring of immovable property, the other species of this class of contracts being outside the scope of this treatise.

The person who allows the other party to have the use of the thing is called the *locator* or the lessor. The person who promises to pay the rent is called *conductor* or the lessee. When the thing let is immovable property the lessor is called the landlord and the lessee the tenant—terms that have been adopted from the English Law.

The Essentials of the Contract.

According to Vanderlinden [6] the essential requisites of the contract of letting and hiring are :—

1. a thing capable of being let on hire,
2. the assurance to the lessee or the hirer of a definite use or enjoyment of the property for a limited period,
3. a definite rent or hire payable generally in money, although sometimes part of the rent is paid in produce ;
4. the mutual consent of the lessor and lessee.

Maasdorp says:—"The essential points to be agreed upon in this contract are the thing to be let out or hired, the time or term of the letting, and the rent to be paid. As soon as these points have been agreed upon a valid contract of letting and hiring will have been concluded, but the unequivocal consent of both parties is essential". [7]

Wille is of opinion that agreement regarding the duration of the lease is not essential to the valid constitution of a lease. Wille says:— "A lease is formed by the consent or agreement of the parties on three essential points (1) that the object of the contract is to let and hire, (2) ascertained property, (3) at a fixed rent." [8] He says later:— "If the parties have agreed on the three essential features of a lease the lease is complete even though the parties have made no mention of any further matters, such as

(6) V. D. L. 1.15.11. Henry's Translation Page 236, 237.

(7) Maasdorp Vol. 3 Page 227 (5th Edition.)

(8) Wille Page 2 (Second Edition)

the duration of the lease, the manner of using the property, the date for the payment of the rent or anything else.'' (9)

It is clear from the statement of the law by Vanderlinden and Maasdorp that the essentials of a lease are as follows :

1. The lessor should let the property and the lessee should hire it.
2. The use should be limited for a definite period or duration. (10
3. The thing should be capable of being let.
4. A definite rent or hire, payable generally in money or a fixed and definite weight or measure of the produce, must be agreed upon.

If the parties have discussed other matters and intend that such matters should become terms of the contract then there must be an agreement regarding them. (11) Once the parties are shown to be *ad idem* regarding the material conditions of the contract, the *onus* of proving an agreement that legal validity shall be postponed until the happening of a certain event, lies upon the party who alleges it. (12)

The thing to be let, the rent and duration of the lease are treated separately later on account of their importance. We shall consider here the first requisite for the proper constitution of a lease, namely, that the lessor should let the property and the lessee should hire it. In the first place there must be an actual demise of the property leased at the time the contract is entered into. Where the parties agree to enter into a lease at a future period or on the happening of a certain event, the contract is not a lease but an agreement to lease which will be dealt with later. Also a unilateral promise to let or hire is merely a promise to let or hire, as the case may be, which binds only the promisor. A lease being a bilateral contract there should be a corresponding

(9) Wille 3.

(10) Maasdorp Vol. 3 Page 227. Footnote—A Contract which purports to let land in perpetuity is not strictly speaking a lease.

(11) Wille 3.

(12) *Vide Woods v. Walters* (1921) A. D. Page 303.

promise to hire on the part of the lessee. Secondly the lessee is only granted the use of the property for the term of hiring, and consequently he does not possess the right of destruction or appropriation of the *corpus* of the property. The so called mining leases and licenses for brick-making are not therefore leases but contracts *sui generis*. (13)

Reality of Consent.

The consent should not only be unequivocal on essential matters and on those non-essential matters which the parties intend should become terms of the contract, but also be free and uninfluenced by fraud (*dolus*), mistake (*error*), fear (*metus*) or undue influence. The purpose for which the property is let must be legal. These topics will be found more fully expounded in treatises that deal with contracts generally. Some questions which affect leases particularly are discussed in this chapter.

Fraud.—Fraud is defined by Labeo as "*omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, decipiendum alterum adhibita*, that is to say, " any craft deceit or machination used to circumvent, deceive or ensnare another person." (14) Where a person was induced to become the tenant of another on a false representation of the landlord to the effect that he held a valid lease of the premises, it was held that the false representation vitiated the agreement on the part of the former to become the tenant of the latter. (15) The effect of fraud is to make the contract voidable at the instance of the party who was sought to be defrauded. (16) The contract is valid till it is set aside. Thus in the case of *Madar Saibo v. Sirajudeen*, (17) a fraudulent deed was held to be valid until it was set aside or cancelled. When it was so cancelled the cancellation was said to refer back to the date of the execution of the deed.

Mistake.—To constitute a valid contract there should be a *consensus ad idem* between the parties. Hence mistake makes a

(13) Wille 2 and 3.
(14) Lee 233.
(15) *Mohideen v. Jayasekera*, (1924) 6 Law Rec. 14.
(16) Lee 235 (3rd Edition.)
(17) (1913) 17 N.L.R. 97.

contract void generally. The mistake must however be a reasonable one (*justus erroris*). A mistake may arise in different ways. [18] There may be misapprehension as to:

1. the person with whom one is contracting (*error in persona*),
2. the nature of the transaction (*error in negotio*), thus if one person thinks that he is entering into a contract of lease while the other thinks that it is a sale or some other kind of contract there can be no valid lease,
3. the identity of the subject matter (*error in corpore*); thus if A thinks that he is leasing out the land called Blackacre but B, the lessee, thinks that he is hiring a different property Whiteacre which also belongs to A, there is no contract of lease;
4. the quality of the subject matter (*error in substantia*),
5. generally as to the terms of the contract.

There may be cases in which the parties are in fact agreed but labour under a common misapprehension, as for instance, where the parties contract for the lease or sale of a thing that does not in fact exist. In such cases the contract collapses from its foundation. [19] But where parties are in fact agreed, but the writing to which they have reduced their agreement does not correspond to the actual agreement, the Court will order a rectification of the deed. Thus in the case of *Fernando v. Fernando*,[20] A's vendor intended to lease the entirety of a land, but by mistake only a portion of the land was comprised in the indenture of lease. A, the vendee, was aware of the lease and thought that he was buying the land subject to a lease of the entirety. Four years after the purchase, the vendee discovered the mistake in the deed and brought an action against the lessee to restrict the latter's right to the terms of the deed. The Supreme Court granted relief to the lessee by rectifying the deed of lease so as to include the whole of the land. Where cancellation of a deed is claimed, it is

(18) Lee 224.
(19) Lee 226.
(20) (1921) 23 N.L.R. 266; 3 Rec. 215.

desirable that the parties to the deed should be made parties to the case. (21) Though section 92 of the Evidence Ordinance states that a written agreement cannot be varied by oral evidence, yet under the proviso extrinsic evidence may be led to establish mistake. (22)

Fear (Metus).—If the consent of one of the parties has been extorted by violence or fear, provided that the violence threatened is of such a nature as to be capable of influencing a man of courage, the contract will not be valid. (23) Fear is said to be an alarm or a disturbance of mind caused by present or future danger; but it must be a substantial fear. (24) The degree of fear which would influence a person would be a question of fact for a circumspect judge to decide according to the circumstances of the case. (25) If, however, the act which is done through fear is subsequently ratified, when the fear is completely removed, the contract would be a valid one. (26)

Undue Influence.—Wood Renton, C. J., remarked in a case (27) that the doctrine of undue influence was not recognised in Roman-Dutch Law except in the form of duress. But in the case of *Perera v. Tissera* (28) the Supreme Court held that the English Law of undue influence has become part of the law of Ceylon. Where the parties are shown to have stood in one of the recognised modes of relationship towards each other, such as a parent and child, solicitor and client, etc., or where it is shown by evidence that one of the parties was in a position of active confidence towards the other, the burden of proving that the act was a voluntary one will be on the person who benefited by the act. (29)

(21) *Meerasaibo v. Thevanayagam Pillai* (1922) 24 N. L. R. 453 at 459 per Ennis, J.

(22) *Senaratne v. Rodrigo* (1919) 6 C.W.R. 205 Section 92 Proviso 1 of the Evidence Ordinance Cap 11.

(23) V. D. L. 1, 14, 2, Henry's Translation, pages 188, 189.

(24) Voet 4 2, 1.

(25) V. D. L. 1, 14, 2, Henry's Translation 189.

(26) Voet 4. 2, 16.

(27) *Soysa v. Soysa* (1916) 19 N.L.R. 314 at 316.

(28) (1933) 35 N.L.R. 257.

(29) *Soysa vs. Soysa*, (1916) 19 N. L.R. 314, Section 111 of the Evidence Ordinance Cap. 11.

Legality of Contract.

The agreement must not only be entered into with free and mutual consent but also be directed to a proper object, that is to say, the agreement must not be entered into for a cause or consideration which is repugnant to justice, good faith or good morals.(30) An object is improper if it is condemned either by common law or by statute.(31)

Contracts Illegal at Common Law.—Contracts which are opposed to public policy or to good morals will be deemed illegal at common law. For instance, contracts in general restraint of trade are unenforceable as being contrary to public policy. But the case will be different if the restraint is partial or limited. In such cases the law will enforce the agreement of the parties.(32) Thus a condition in the lease of farms, that the lessor shall not open a shop within six hours' distance on horse back of the property leased, is a valid condition, the breach of which would support an action for damages.(33) If a lease is entered into with the intention of effecting an illegal purpose, or if it is *contra bonos mores*, or against public policy, the lease is void *ab initio*. Thus if the object of the parties is to defraud a third party, as where a lessor grants a lease without any consideration but for the sole purpose of defrauding his creditor, the lessor cannot sue the lessee and obtain any relief if the fraud was accomplished,(34) the maxim of law being "*in pari delicto potior est conditio defendentis.*"(35) But if the contemplated fraud was not carried out by the lessor, as where the creditor succeeded in getting back his money, then the lessor would be entitled to get back his property from the lessee in case the latter refuses to hand over the property to the lessor.(36)

(30) V.D.L. 1, 14, 2. Henry's Translation 190.

(31) Lee 239.

(32) *Krishnan Chetty vs Kandasamy*, (1924) 3 Times 21.

(33) *Brinckman vs. Lindt*, (1877) Buch 60, 3 B. and S. Digest 1076.

(34) *Siyatu vs. Banda*, (1916) 19 N.L.R. 59, Wille 5, *Vide* also.

(35) *De Zilva vs. Cassim*, (1903) 7 N.L.R. 230, Voet 4. 3. 8. Voet 44. 2. 3; Maasdorp 77, (4th Edition.)

(36) *Siyatu vs. Banda* (1916) 19 N.L.R. 59, *Vide* also; *De Silva vs. Cassim* (1903) 7 N.L.R. 230; *Mohamed Marikar Ibrahim vs. Naina*, (1910) 13 N.L.R. 187.

Contracts Illegal by Statute.—Where a statute expressly declares that contracts of a certain description are to be deemed void, then such contracts would be considered void. If a statute expressly prohibits the transaction in respect of which an agreement is entered into, the agreement will be invalid. A contract may be considered illegal, although it is not in contravention of the specific provisions of the statute, if it is opposed to the general policy and intent thereof.(37) When a statute contains no express words making void the contract which it prohibits, but yet inflicts a penalty for the breach of the condition, one must look to the whole of the act as well as to the particular enactment in question and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract or for purposes of revenue, or whether it is intended that the contract should not be entered into so as to be valid at law.(38) The mere imposition of a penalty will not render the contract void when the object of the penalty is only to deter persons from entering into the contract or to protect the revenue.(39) Even the by-laws of a Municipal Council are laws proper and therefore a contract may be illegal if it contravenes the by-laws of the council.(40)

Contracts Resembling "Letting and Hiring."

Agreement to Lease.—An agreement to enter into a lease at a future period must be distinguished from an actual lease. In order to ascertain whether an instrument amounts to a present demise or operates merely as an agreement for a future letting of the premises, the intention of the parties must be gathered from the whole of the words used by them.(41) Thus an agreement to lease the property for five years, where the lease was to commence two and a half years from the date of entering into the agreement, was

(37) Chitty on Contracts, page 780 (18th Edition.)

(38) Chitty on Contracts, page 781 (18th Edition.)

(39) *Kristnappa Chetty vs. Carpen Chetty*, (1912) 2 C. A. C. 11.

(40) *Mohideen vs. Saibo*, (1913) 17 N.L.R. 17.

(41) Chitty on Contracts 370, (18th Edition).

construed as an agreement to lease, and not a lease.[42] Also parties may enter into an agreement to enter into a lease when certain buildings were completed,[43] and further may stipulate for liquidated damages if one of the parties is in default.[44] In case a promissor failed to execute the lease, specific performance may be granted and the promissee may not merely be content with damages.[45]

Again a lease must be distinguised from a mere promise to let or a mere promise to hire. A promise to let or hire differs from a concluded contract of hiring in that in the latter the property is actually let by the contract, whereas in a promise to let, the promissor is bound to let only when the person to whom the promise was made requests him to do so. A promise to let is equivalent to the granting of an option to lease.[46] In order that the granting of an option to lease may be binding on the promissor, consideration is necessary under the English Law. Under our law, however, no consideration is necessary to bind a party to the contract provided there was a lawful *causa*.[47] That is to say, it will be binding if it is entered into with a serious and deliberate intent, even where the consideration amounts to the discharge of a pre-existing moral obligation.[48] In Ceylon a promise to lease or to obtain a lease of immovable property (other than a monthly tenancy or tenancy at will) must be notarially executed.[49]

Sale.—The contract of "*locatio conductio*" is in many respects akin to the contract of purchase and sale and depends on nearly the same rules of law.[50] So much so, that where there is any doubt in regard to the law of lease one may resort to the law of sale by way of analogy.[51] Thus in the case of *Bawa vs. Don*

(42) *Balasuriya vs. Don Juwanis*, (1897) 2 Matara Cases 1.

(43) *Colombo Hotels Company vs. Motoomul*, (1918) 21 N.L.R. 385 P.C.

(44) *Pless Pol vs. Lady de Soysa*, (1911) 15 N.L.R. 57 P.C.

(45) Wille 18, 1910 Edition.

(46) Wille 18, 1910 Edition, Voet 19.2.1. Berwick 189.

(47) *Lipton vs. Buchanan*, (1907) 10 N.L.R. 158,.

(48) *Jayawicrema vs. Amarasuriya*, (1918) 20 N.L.R. 289,

(49) Section 2 of Prevention of Frauds Ordinance Cap. 57.

(50) Voet 19. 2. 1. Berwick's Translation, page 189.

(51) Wille 8, (Second Edition.)

Katrine,(52) Schneider, J., considered the law of sale to elucidate the meaning of the term "vacant possession" in connection with a lease. The laws of Sale and Lease relating to the formation of the contract such as fixing the price or rent, the identity of the thing to be sold or hired and the manner in which the consent is communicated, are identical. As regards the consequences of the contract the seller's and the landlord's guarantees against eviction are identical. The tenant's rights to cancel the lease or to claim remission of rent on account of defects in the leased property correspond entirely to the purchaser's rights under the *actio redhibitoria* and the *actio quanti minoris,* though a tenant has not the privilege of using these technical terms in claiming relief.(53) "The most notable difference," says Wille, "between the two contracts is that the landlord remains the owner of the leased property and the tenant pays him the price in instalments with the consequence that continuing duties are imposed on the parties, whereas the duties of the seller and the purchaser are discharged, as a rule, by a single act on the part of each, namely, delivery and payment respectively."(54) Another difference between sale and hire is that in the case of sale the vendee becomes the owner and has the *jus utendi, jus fruendi* and *jus abutendi,* whereas in the case of lease the lessee only has the *jus utendi* and *jus fruendi* but not the *jus abutendi.*

Usufruct.—A lease is different from usufruct. The distinction between the two is that while a usufruct given for a definite term terminates in any event upon the death of the usufructuary, a lease for a definite period is not terminated by the death of the lessee.(55)

Tenure of a Colonus Partiarius.—A person who occupies a land on condition that he gives a certain portion of the crops gathered to the owner is not a lessee but a *colonus partiarius.*(56)

(52) (1920) 8 C.W.R. 80
(53) Wille 9, (Second Edition.)
(54) Wille 9 (1927 Edition.)
(55) *Days Trustee vs. The Registrar of Deeds and another,* (1910) C.P D. 361, 3 B. and S. Digest 983.
(56) Voet 19. 2. 8. Berwick 196, *Oosthuizen vs. Oosthuizen's Estate,* (1903) T. S. 688; 3 B. and S. Digest 984.

To constitute a lease the rent must be a fixed amount and if fruits are given in lieu of money they must be of definite weight or measure. The person who occupies another's land in consideration of giving a share of the produce to the owner, is considered, in the Cape Colony, not a *colonus partiarius* but a lessee. (57) Agreements whereby a person cultivates the land of another for a year in consideration of a percentage of the crop are very common in Ceylon. This mode of cultivation is known as *ande cultivation*. Under this contract a person undertakes to culivate the land of another for a year and takes a share of the crops as consideration. In the case of *Saytoo v. Kalinguwa*, Clarence, J. says:—"An agreement to let land for cultivation in *ande* on the terms of the land owner receiving a specific share of the crops, is merely an agreement to lease with the rent to be paid in kind, and the term exceeds one month".(58 However, this is not the view of the Roman-Dutch Jurists. An agreement of this nature, as remarked by De Sampayo, J., is more in the nature of a partnership. (59) An *ande* cultivator, to use the words of De Sampayo, J., is only a cultivator under a man in possession, so far as third parties are concerned. (60) In Saytoo's case, (61) it was held that an agreement for *ande* cultivation creates an interest in land and must be notarially executed. This produced hardship to the peasants and consequently section 3 of the Prevention of Frauds Ordinance (62) was enacted which dispensed with notarial agreements in such cases. But where there was an agreement whereby the plaintiff was to receive 5/8 share and the defendant 3/8 share of the produce which might be derived by their joint labour and industry, and they cultivated pineapples, citronella, etc., for over seven years, De Sampayo, J., held that the agreement

(57) Wille 60 (1st Edition.)
(58) (1887) 8, S. C. C. 67 at 68.
(59) *Eliyas vs. Savunhamy*, (1914) 18 N. L. R. 82 at 83; Voet 19. 2. 5. and 19. 2. 8; Berwick, pages 194 and 196.
(60) *Punchiamma vs. Theobold*, (1922) 23 N. L. R. 443 at 444.
(61) *Saytoo vs Kalinguwa*, (1887) 8. S. C. C. 67.
(62) Cap. 57.

created an interest in land and that it should be notarial. (63) The land owner in the case of a land that is cultivated under an *ande* cultivation agreement, does not become the owner of the fruits representing his ground share until they were specifically delivered to him. (64)

Planting Agreement.—A planting agreement whereby a person agrees to plant the land of another in consideration of his becoming the owner of a certain share of the land has some resemblance to a contract of letting and hiring. The planter's share in a plantation, or the planter's interest, if any, in the land planted by him, however, is the creature of the contract made between the owner of the land and the person who undertook the planting. (65) A planting agreement creates an interest in land and must be notarially executed. A planter's share may be acquired either under a notarial instrument or by prescription. Prescription starts running after the completion of the contract, that is, when the planter has taken his share and has begun to possess it adversely to the owner of the land. (66) A planter who has improved a land is entitled to compensation though he cannot claim a part of the trees or of the soil when there is no notarial agreement. (67) A planter who is entitled to a planter's share is not in the same precarious position as a lessee. He has sufficient interest in the land to constitute him a *bona fide* possessor in respect of improvements outside the actual planting. (68)

Quit Rent Tenure.—Vander Linden says :—"The contract termed *erspagtgunning* has a great resemblance to that of sale and also to that of hire. It takes place when anyone grants to another an estate of inheritance in certain lands, on paying yearly some quit rent, or offering in acknowledgment of the original

(63) *Eliyas vs. Savunhamy*, (1914) 18 N. L. R. 82.

(64) *Galappati vs. Babun*, (1915) 1 C. W. R. 134.

(65) *Silva vs. Cottala Watte Hamine*, (1878) 2 S.C.C.4; *Silva vs. Panditaratna*, (1913) 1Bal. notes 78.

(66) *Jayasooria vs. Omer Lebbe Marikar*, (1892) 2 C.L.R. 6.

(67) *Majeedu vs. Dingiappu*, (1910) 2 Matara Cases 30. *Saibo vs. Marikar*, (1903) 2 Matara Cases 45.

(68) *Saibo vs. Baba*, (1917) 19 N. L. R. 441, F. B.

title of the grantor and this right reserved to the grantor, as an imperfect species of property is of a *real nature*, but the contract whereby this right is granted induces personal obligations." (69) This type of land tenure is not identical with *emphyteusis* of the Roman Law nor derived from it though it was influenced in its development by principles derived from the Roman Law. (70) It differs from a lease in that the duration is not fixed but is perpetual. (71) Such a tenure is, however, called emphyteusis by Romanist writers. (72) It could be acquired not only by grant but also by prescription. (73) Further, such a right may be enlarged by prescription as where a person leases out more than a share in perpetuity and the lessee pays the rent for the whole land to the lessor and his heirs and not to the co-owners. (74)

Service Tenure.—An agreement to occupy land without the payment of money as rent but whereby certain services are to be performed by the occupier is not a contract of letting and hiring but an innominate contract.(75) It is of the essence of the contract that there should be definite rent payable in money or a fixed quantity of the produce.

In Ceylon certain lands in the Kandyan Provinces are held under a tenure closely resembling the manorial system.(76) These lands are held not under any contractual relationship, but in various degrees of subjection regulated by custom.(77) Dr. Hayley describing these forms of tenure says:—"There appear to have been only two estates in land of any nature, whether held directly under the Crown or from a mesne Lord and whether subject to services or not, namely, *praveni* (less correctly but more commonly

(69) V. D. L. 1. 15. 13, Henry's Translation, page 241.
(70) Lee 160, 161.
(71) *Vide* 3 Maasdorp 227 Footnot·
(72) Lee 161.
(73) *Daniel vs. Silva*, (1913) 16, N.L R. 481; *Jayawardene vs. Silva*, (1915) 18 N. L. R. 269.
(74) *Podisingho vs. Jaguhamy*, (1923) 26 N. L. R. 87; 5 Rec. 169.
(75) *Leathern v. Tredoux*, (1911) 32 Natal Law Reports 409. 3 B & S Digest 983.
(76) Hayley's Laws and Customs of the Singalese, page 237.
(77) Hayley's Laws and Customs of Singalese, pae 237.

called *praveni*), an estate of inheritance or fee simple and *maruveni* or tenancy at Will." (78)

A Maruveni Tenancy.—A *maruveni pangua* is defined by Section 2 of the Service Tenures Ordinance as (79) "an allotment of land held by one or more tenants at will." This definition is incorrect, because a *maruveni pangua* is a holding given out to a tenant for one year, the year being the year of cultivation. It was not the custom to eject such a tenant at any time during the course of the year.(80) The question whether a *maruveni* tenant resembles a tenant in the proper acceptance of the term will depend on the circumstances of the case. If the *quid pro quo* for possessing and enjoying the land is the rendering of services or giving a share of the produce, then a *maruveni nilakaraya* cannot be called a tenant. But if he is only expected to give a definite measure of the fruits, then such a tenure, though it closely resembles a lease, cannot yet be called a lease as its incidents are regulated by custom.

Praveni Tenancy.—A *praveni pangua* is an allotment or share of land in a temple or *Nindagama* village held in perpetuity by one or more holders subject to the performance of services to the temple or Nindagama village. (81) In the case of *Appuhamy v. Menike,*(82) the Supreme Court took the view that the right of a *praveni nilakaraya* is in the nature of a limited right of ownership. Ennis, J., says: "Ownership has been defined by Maasdorp as comprising (1) the right of possession (2) the right of usufruct (3) the right of disposition, and these facts are all essential to the idea of ownership but need not be present in equal degree at one and the same time. In my opinion a *praveni nilakaria* holds all the rights which under Maasdorp's definition constitute ownership but as nevertheless, does not possess full ownership, in that the *ninda* lord holds a perpetual right to service, the obligation to perform which attaches to the land."

(78) Hayley's Laws and Customs of Singalese, page 250.
(79) Cap. 323.
(80) Perera's Kandyan Law, Vol. 2, page 303.
(81) Section 2, Cap. 323.
(82) (1917) 19 N. L. R. 361 at 363.

Mining Leases.—The so called "mining lease" is not a lease in fact. Under a lease the lessee has only the *jus utendi* and *jus fruendi* and not the *jus abutendi*. Therefore the so-called mining leases by which the lessee has the right to appropriate the mineral found in the land are not leases. It has been held in South Africa that the term "mining lease" used to describe such a contract is a contradiction in terms and that neither a mining lease nor a brick-making license is in the nature of a lease. (83) But a Divisional Court has held in Ceylon that, for the purpose of stamping, such a contract should be regarded as a lease and not as a license. (84)

License—A license must be distinguished from a lease. In the case of a license the owner of the premises only permits another person to do something on his land which otherwise would become illegal. The owner retains the control over the premises even after granting a license to another person. The mere use of the word "lease" does not conclude the matter, the Court ought to look into the nature of the contract in construing whether a contract is a lease or a license. Thus in the case of *Amarasinghe v. Abdul Sheriff,* (85) the Government called for tenders for the lease of a public market and the offer was accepted. It was, however, held that the contract was not one of lease but a mere license and the Government had still control over the market. A watcher who was given a salary and free use and occupation of a tenement as consideration for his services is a licensee and could be ejected by the vendee of the property. (86)

Nature of a Lease.

The question whether a lessee acquired under a lease a *jus in personam* only or a *jus in rem* has been a controversial matter. In Ceylon leases are either informal or notarial. In the case of informal leases the lessee's rights are merely personal in their

(83) Wille (1927 Edition), page 3.

(84) *Pandita Tilleke v. The Commissioner of Stamps,* (1909) 12 N. L. R. 59.

(85) *Amarasinghe v. Abdul Sheriff,* (1918) 5 C. W. R. 227.

(86) S. C. 18 C. R. Colombo 49968. S. C. Minutes, 1st July, 1930.

nature. In notarial leases it has been a moot point whether the lessee had *jus in personam* or whether the right he had over the property amounted to a *jus in rem*. The case of *Carron v. Fernando*, (87) settles this long standing dispute and the view taken there is that in a notarial lease the right the lessee has over the leased property is a *jus in rem*. Garvin, J., in a very illuminating judgment shows how by a process of historical development a right which was regarded only as a *jus in personam* in Roman Law, has undergone a transformation into a real right in modern times. He says (88) :—"There can be no question that in its inception a lessee's interests were not considered to amount to anything more than purely personal rights enforceable against the lessor. But under the Roman-Dutch Law the maxim 'Hire goes before sale' has been called in aid to give some relief to the lessee and gradually the lessee was further permitted to bring actions to protect him in his possession and enjoyment of his leasehold rights not only against the lessor but as against all others who endeavoured to interfere with him in the exercise of his rights. His position has thus gradually grown stronger and more secure and at the present time he enjoys for the term of his lease such security as the owner of any other real right. In South Africa as a result of this development of the law a duly registered lease for over 10 years is now given the same status as an interest in the land and is definitely regarded as a *jus in re*. The lessee under such a lease obtains a real right to the property as against all persons other than a creditor under a mortgage bond which has been duly registered against the same property before the lease was registered. (See Wille on *Landlord and Tenant*, p. 210). On the other hand the interests of tenants under short term leases are still treated as purely in the nature of *jura in personam*.— Wille on *Landlord and Tenant*, p. 209."

"A similar development in regard to the position of a lessee of land has taken place in Ceylon. In *Goonewardena v. Rajapakse*,

(87) (1933) 35 N. L. R. 352 ; 8 Times 87 ; 13 Rec. 124.

(88) (1933) *Vide* 8 Times 87 at 90 ; 35 N.L.R. 352 at 358; 13 Rec. at 128.

when the right of a lessee to maintain an action against his lessor and others to be restored to the possession of the premises and for damages was considered. Bonser, C.J., after referring to the various actions given to a lessee under the Roman-Dutch law to secure him in the enjoyment of his leasehold rights and after referring to the provisions of the Prevention of Frauds Ordinance No. 7 of 1840 allowed the action and expressed himself in the following terms :—'In my opinion we ought to regard a notarial lease as a *pro tanto* alienation and we ought to give the lessee under such a lease during his term the legal remedies of an owner and possessor.' In *Isaac Perera v. Baba Appu,* the law as stated by Bonser, C.J., was affirmed and a lessee under a notarial contract though he had not been put in possession by his lessor was permitted to establish his lessor's title and vindicate his right to the possession of the land. And later in 1909 in *Abdul Azeez v. Abdul Rahiman,* Hutchinson, C.J. in the course of his judgment observes: "A lessee under a valid lease from the owner is *dominus* or owner for the term of his lease. He is owner during that term as against all the world, including his lessor." After considering the provisions of the Prevention of Frauds Ordinance, Garvin. A.C.J., places a notarial lease on the same footing as that on which the law in South Africa places a duly registered lease for more than ten years. Thus a leasehold interest under a notarial lease could be the subject matter of a valid mortgage as any other real right. A notarial lessee is in fact the owner of the leased premises for the term of the lease, subject to the following restrictions: (1) The lessee's title unlike that of an owner is a defeasible one, dependent upon the observance of the implied and expressed conditions of the lease. (2) The lessee cannot for all purposes be considered to be in the same position as the owner, for instance, he cannot destroy or materially alter the property. (3) Even after the lease the lessor who is the owner of the property has certain duties imposed on him. [89]

(89) *Vide* 35 N.L.R. 352 at 359; 13 Rec. at 129.

CHAPTER II.

THE SUBJECT MATTER OF THE CONTRACT.

In a contract of letting and hiring there must be a definite agreement regarding the subject matter of the lease. If the parties are not *ad idem* with reference to the thing to be let, there is no valid lease. However, it is not necessary that the particular subject matter should be ear marked in all cases. If, for instance, one of the parties wishes to hire one or more of a number of similar things from the other it is not necessary that the parties should agree upon the particular things. Pothier says [1] that the contract is valid and completed by the lessor providing an article which is of the standard contemplated. Wille says [2] that the same rule would apply to a lease of one of several similar immovable things, such as for instance, a room in an office, building, hotel, or even one of several houses in a terrace.

The Premises.

The lease of premises includes all things necessary for the due and proper enjoyment of the premises unless a contrary intention appears from the contract. [3] Hence in the case of a lease of a furnished house, if there are no kitchen utensils and practically no crockery, the house cannot be regarded as a furnished house. [4] If, on the other hand, the lessee of a furnished house, knowing that certain essentials are wanting, decides to take the house as it stands, he cannot thereafter complain that it is not a furnished house according to the terms of the lease. [5] If fittings and furniture were expressly placed to fit the house for the purpose for which it was hired, and no special reference is made as to the contents of the leased premises, the furniture and fittings should be included in the subject matter of the lease. [6]

(1) Pothier Section 8. Wille 24 (2nd Edition.)

(2) Wille 24. (2nd Edition.)

(3) *McNeill v. Eaton.* 20 S. C. 507, 13 C. T. R. 600. 3 B & S Digest, page 981. *Pistorius v. Abramson* (1904) T. S. 643. 3 B & S Digest 981.

(4) *Sanders v. Chaperon*, (1919) A.D. 193; 3 B & S Digest 982.

(5) Ibid. 3 B. & S. Digest 982.

(6) *Bowen v. Daverin* (1914) A. D. 632. 3 B & S 982.

The Extent.

The extent of the premises must be correctly stated. If the lessor has represented the extent of the premises to be much greater than what was in fact delivered, the rent must be reduced in proportion to the extent not given for the use of the tenant. (7) In awarding this relief a distinction should be drawn between a lease "*ad corpus*" and one "*ad quantitatem.*" In determining the question whether a sale is "*ad corpus* or *ad quantitatem*", one must look into the various deeds by which the property has been dealt with. (8) The principles that apply to sales would apply equally to leases. (9) Voet, dealing with the contract of sale, says (*Vide* Voet 18.1.7., Berwick, pages 12, 13) that a sale is understood to be *ad corpus* in the following cases :—

1. "A sale is understood to have been made *ad corpus* and not *ad quantitatem*, if no mention whatever has been made of the quantity, as when one simply sells the Cornelian Farm;"
2. "when there has been a statement of the quantity, but accompanied by a protest, as when for example one sells the farm of 100 yokes or as many as it contains, more or less",
3. "the land sold is said to contain 100 yokes, but the boundaries are pointed out at the same time,"
4. "when one sells the estate of 100 yokes but the vendor does not bind himself as to that quantity."
5. "Finally, when the quantity has, indeed, been mentioned, as thus, 'the land sold contains 100 yokes' but the boundaries have been pointed out at the same time."

Voet says, (10) that in the last two cases, if there is a notable discrepancy, the price should be proportionately diminished. This view has been adopted in Ceylon. (11) If there is an essential mis-

(7) Voet 19. 2. 26 (Berwick page 220).

(8) *Crowther v. Benjamin* (1907) 1. Leader 64.

(9) *Vide* Voet 19. 2. 26; Berwick 220. Voet 18, 1, 7. Berwick 11—13.

(10) Voet 18. 1. 7. Berwick 13.

(11) *Fernando v. Summangala Terunnanse*, (1920) 22 N. L. R. 23 at 25, 26.

description of the land, the sale will be set aside even though a clause has been inserted in the deed of sale that the vendor would not be responsible for the extent stated. (12) These observations are equally applicable to leases. But if there is inaccuracy regarding the boundaries or the extent, but yet if there could be no mistake as to the property which was to be leased the maxim "*falsa demonstratio non nocet*" would apply. (13)

Voet says :—(Voet 18.1.7. Berwick 13) "Sale is considered to be *ad quantitatem* when the quantity or the extent is specified. For instance, if ten yokes of Cornelian Estate are sold ; or when simply the *Fundus Cornelinus* is sold, but the price is fixed at so much for every yoke of the land." "In a sale *ad quantitatem* if a lesser quantity is sold, then there should be a proportionate reduction in the price or the vendor ought to be given the discretion to make up the deficiency, or if there is a larger quantity the purchaser may elect whether he will have the price proportionately increased, or will give up the surplus to the vendor. (14)" The same principles will apply *mutatis mutandis* to leases.

The Essentials of the Subject Matter.

The subject matter of a lease must be in existence. It must not be prohibited from being let either by statute or by the common law. To use the words of the Roman lawyers, it must be *intra commercium* and not *extra commercium*. Again from the very nature of a lease, one infers that the subject matter must be of a non-consumable nature. We shall proceed to examine them in greater detail in the light of authorities.

A person cannot let out a thing which is not in existence. Wille says (15) that the thing must either be in existence or have a potential existence. If the parties assume the existence of the subject matter or a material portion thereof, there is no con-

(12) *Lebbe v. Bandaranayake*, (1917) 4 C. W. R. 409. *Vide* Voet 19, 2. 26. Berwick 220.

(13) *Bulner v. Schokman*, (1920) 22 N. L.R. 50; 2 Rec. 75.

(14) Voet 18. 1. 7. Berwick 12.

(15) *Davis. v. Morris*, (1905) T.H. 386. Wille 25 (2nd Edition.)

tract if it was not in existence. Thus, where a lease was entered into by both parties under the impression that certain fixtures were included in the building and such impression proved to be incorrect, the lease was held to be bad. (16)

It is not all species of immovable property that can be leased. Real servitudes, though they come under the category of immovables cannot exist apart from the lands to which they are attached and hence cannot be let apart from those lands. (17) So also rights of personal servitudes cannot be let. (18) Things which are "*extra commercium*" cannot be let. Voet says :—(19) "*Elocari possunt res omnes, quae sunt in commercio, sive corporales, sive incorporales.*" *Res divini juris* and *res publicae* are not *in commercium* and cannot be let. Under the category of *res divini juris* come *res sacrae, res religiosae* and *res sanctae*.

Res Divini Juris.

Dealing with *res sacrae, res religiosae* and *res sanctae* Maasdorp says(20) :—"The first of these consisted of property consecrated by the Sovereign authority of the state to the service of God, such as Churches, and the second of property devoted to the burial of the dead, such as burial grounds. *Res sanctae* or hallowed things were the walls and gates of cities, injury to which was declared a criminal offence. None of these things are *res nullius* at the present day but are possessed in full ownership by the individuals or communities to whom they belong and who may deal with them as such, except in so far as this may be prohibited by any statutory or other legal provision to the contrary."

In Ceylon there are various Ordinances incorporating Christian Missionary Societies and churches.(21) The Roman Catholic Churches in the various localities are incorporated

(16) *Gilbert Fox & Sons v. Simpkins* (1894) 11 C. L J. 288, Wille 25 (2nd Edition.)

(17) Voet 19. 2. 3. Berwick 192.

(18) Voet 19. 2. 3. Berwick 192.

(19) Voet 19. 2. 3.

(20) 2 Maasdorp 8 and 9 (1st Edition.)

(21) Vide the American Ceylon Mission Incorporation Ordinance, Cap. 235 ; 3 of 1911 ; the Dutch Reformed Church in Ceylon (Incorporation) Ordinance, Cap. 227 ; the Episcopal Churches Ordinance, Cap. 233 ; the Non-Episcopalan Churches Ordinance, Cap. 2129.

bodies.[22] Where a trust is created in respect of a religious body the provisions of the Trusts Ordinance [23] apply. The trustees are given the power to lease properties for periods of less than ten years, and with permission of court for longer terms.[24] In the case of Hindu temples, in the absence of a vesting deed in favour of the trustees, the properties dedicated to the temples vest in the persons, who are dedicating them and their heirs as trustees. [25] The Buddhist Temporalities Ordinance [26] makes provision for the lease of lands belonging to the temple. The Trustee or the *Viharadhipati* has the power to rent or to lease all or any of the lands belonging to his temple. But such a lease ('except in the case of a lease for not more than one year, of land worth not more than five hundred rupees or more than five acres in extent') is subject to the following preliminary formalities.

(a) It should not be made without the previous written sanction of the Public Trustee.

(b) After calling tenders it should ordinarily be given to the person making the highest tender, unless the Public Trustee authorises that it be entered into by auction or private treaty.

(c) The full conditions of the lease should be published in one or more local newspapers, if the Public Trustee so directs, specifying a date not earlier than six weeks, after which no tenders should be received.

(d) The tenders should be sent to the Trustee or controlling Viharadhipati and to the Public Trustee.

(e) The Trustee or controlling Viharadhipati should schedule such tenders and send them to the Public Trustee who may make such order as he may think fit.

(22) The Roman Catholic Archbishop and Bishops of Ceylon Incorporation Ordinance, Cap. 236.

(23) Cap. 72.

(24) Section 38 of the Trusts Ordinance, Cap. 72.

(25) *Karthigesu Ambalavanar v. Subramaniam Kathiravelu* (1924) 27 N. L. R. 15.

(26) Section 29, Cap. 222.

No land belonging to the temple, which is leased under the provisions of this Ordinance, should be used for any purpose which is opposed to the principles of Buddhism.

No lease should exceed ninety-nine years. In the case of leases for a period exceeding thirty years a covenant should be inserted therein providing for a revision of the rent at every period of ten years from the date of the commencement of the lease. Such a lease should not be granted to persons in office under the provisions of the Ordinance or to any trustee. In cases where the sanction of the Public Trustee is required, the name and extent together with the amount of rent and conditions should be reported within one month of the granting of the lease by the Trustees or the controlling Viharadhipati. All leases made in contravention of the provisions of this Ordinance should be considered null and void and of no effect whatsoever in law.[27] Every assignment of a lease of land belonging to the temple requires the approval of the Public Trustee and any assignment made without his sanction in writing is null and void and of no effect whatsoever in law.[28] Section 31 of the Ordinance[29] empowers a court to set aside a lease if it is proved to the court's satisfaction that—

(a) any property of any temple has before the commencement of this Ordinance been leased—

(1) for a longer term than is consistent with the interest of the temple, or

(2) on terms showing an improvident alienation, or

(3) for clearly inadequate consideration, or

(4) for the private benefit of the lessor or his servants or relatives, or

(5) with a fraudulent intent;

(b) any lease of the property of any temple or any assignment has been made in contravention of the Ordinance.

(27) Section 29 of the Buddhist Temporalities Ordinance, Cap. 222.
(28) Section 30 of the Buddhist Temporalities Ordinance, Cap. 222
(29) Buddhist Temporalities Ordinance, Cap. 222.

Res Religiosa.

Under this heading churchyards and burial grounds are included. A plot of land which was fenced off and used as a burial ground by a number of people would be presumed to be dedicated to the public so as to constitute it a *res religiosa.*(30) *Res religiosa* cannot be owned by anyone and cannot be the subject matter of a lease both in Roman Law and in Roman-Dutch Law. In modern times they belong to communities or individuals in full ownership, and may be dealt with as such, except in so far as this is prohibited by statute or other legal provision to the contrary.(31) Section 8 of Ordinance No. 12 of 1862(32) penalised any person who disposed of or made use of burial grounds consecrated for burials and in which burials have been discontinued under the provisions of the Ordinance. Now the Cemeteries and Burial Ordinance(33) contains a similar provision. The transaction is also declared void if the permission of the Governor was not obtained.

Res Publicae.

Res Publicae are things belonging to the state, and are intended to be used by the members of the public and cannot be the subject matter of a lease.(34) The use of the seashore is common to all and hence the Crown cannot lease or grant the seashore to any use that would impede the common user, and cannot claim rent or remuneration for occupation of such land.(35) The Crown may, however, grant a license to fishermen to spread their nets on the seashore.(36) But private property belonging to the state or some public body is not *res publica* but *in pecunia populi,* and can be the subject matter of a lease.(37)

(30) *Putlenayagam v. Fernando,* (1900) 4 N. L. R. 88; *Vide Chetty v. Silva* (1883) 6 S. C. C. 21.

(31) 2 Maasdorp 10 and 11 (5th Edition.)

(32) Repealed by 9 of 1899.

(33) Cap. 181 ; Section 7.

(34) Voet 1. 8. 8.

(35) *Attorney General v. Pitche.* (1892) 1 S. C. R. 11.

(36) *Rowel Mudaliyar v. Pieris,* 1 N. L. R. 81.

(37) Lee 133, *Vide* Footnote.

THE NATURE OF THE PROPERTY LEASED.

Lastly, a lessee has the *jus utendi* and *jus fruendi* but not the *jus abutendi*. Hence the subject matter of a lease must necessarily be of a non-consumable nature. Thus a mining lease is a contradiction in terms. (38) This term is frequently used in Ceylon but the so called a mining lease cannot be regarded as a lease. It is a contract *sui generis*.

CHAPTER III.

THE RENT.

AGREEMENT REGARDING RENT.

It is of the essence of the contract of letting and hiring that there should be a definite agreement regarding rent. (1) Either the amount of the rent must be fixed or there must be a definite agreement regarding the mode in which it is to be fixed subsequently; as where parties agree that they would abide by the decision of some definite person. (2) If there is no such agreement then there is no contract of lease. (3) When a party enters into possession of the land with the owner's permission, but without any agreement regarding rent, then the owner of the property is entitled to recover a reasonable sum for use and occupation though there is no lease. (4) In such a case a reasonable rent for use and occupation may be recovered under our law, although the agreement establishing such use and occupation was in the nature of a verbal contract of lease for more than a month. (5)

(38) Wille 3, 25.

(1) *Totoyi v. Neuka*, (1909) E.D.C. 113. 3 B & S digest 985.

(2) Voet 19. 2. 7. Berwick 195, 196.

(3) *Brown v. Hicks*, (1902) 19. S.C. 314, Wille 31; 1 B. & S. Dig. 1057, *Duncker v. Paddon and Brock*, (1903) T. S. 468, Wille 30. 3 B. & S. Dig. 1016.

(4) Wille 30, 31.

(5) *Dissanayake v. Pranciscu*, (1899) 1 Tamb. 23.

The Commodity in Which Rent is Payable.

The payment of rent is usually in money, but in the interests of agriculture a person is allowed to lease out a land for a definite weight or measure of the produce.(6) Even in the latter case, there must be a notarial agreement to constitute a valid lease for a period of over a month.(7) For purposes of stamping the notarial document the price of a certain measure of the produce is usually entered in the deed. In such a case, if the lessee fails to deliver the stated measure or weight of the produce, the damages are assessed not at the price stated in the bond for purposes of stamping, but at the market price prevailing at the time the produce should have been delivered.(8) But where no definite weight or measure of the fruits is agreed upon, but the parties agree that a share of the produce should be given, then such a contract is not one of lease but one which closely resembles partnership and the occupier under such an agreement is called a *colonus partiarius*. The Roman-Dutch authorities and the South African courts have taken different views as to the nature of this contract, but the better view is that such a contract is neither a lease nor a partnership but a contract *sui generis*.(9) In Ceylon the mode of cultivation, commonly known as *ande* cultivation, is of the same nature.

The Amount.

The amount of the rent must not be illusory.(10) But there need be no complete correspondence between the rental and the value of the use of the leased property.(11) If the rent agreed is less than half the rent for which the property could have been leased at the time of the lease, then the principle of *laesio enormis* which is applicable to sales, would apply equally to leases,

(6) Voet 19. 2. 8. Berwick 196, V. D. L. 1. 15. 11. Henry's Translation, page 237.

(7) *Charles v. Baba*, (1920) 22 N. L. R. 189; *De Silva v. Thelenis*, (1916) 3 C. W. R. 130; *Subramanium v. Visvanathan*. (1937) 17 C. L. Rec. 32.

(8) *Vyramuttu v. Dissanayake*, (1920) 22 N. L. R. 195.

(9) Voet 19. 2. 8. Berwick 196. Wille 35 (Second Edition.)

(10) Voet 19. 2. 8. Berwick 196.

(11) Wille 32 (2nd Edition).

but the difference in value should exist at the time of the lease or sale and not thereafter.(12) The party who is prejudiced by such an improvident sale may bring an action to set aside the contract or in the alternative to recover the difference in the price. It is left to the discretion and election of the defendant in the suit to determine which of these two courses he will adopt.(13) It is submitted that the same rules would apply to leases *mutatis mutandis*.

Variation of Rent.

Once the rent has been fixed the landlord has no more right to increase the rent than the tenant to reduce it. The rent must be enhanced or reduced by the same method by which the original rent was fixed, namely, by the mutual agreement of the parties. If the original contract provides for such a variation, then a variation may be made in terms of the contract.(14) If only one of the lessors agrees to reduce the rent the other lessors are not bound by such an agreement and consequently can recover their share of the rent originally agreed upon.(15) In the case of monthly tenancy a landlord cannot claim enhanced rent by serving the tenant with a notice merely increasing the rent without at the same time giving him notice to quit. The tenant may decline to pay the enhanced rent.(16) But the landlord can serve a notice to the effect that the tenant should either pay the enhanced rent or quit at the end of the month. If the tenant, after being served with such a notice, fails to pay the enhanced rent or to quit the premises the landlord may claim damages for *use and occupation* which will be computed not at the old rent but at a value, the use and occupation is reasonably worth. The increased rent suggested by the landlord may be fair material on which the claim would

(12) *Wijesiriwardene v. Gunesekere*, (1917) 20 N. L. R. 92 ; *Gunewardene v. Gunesekere*, (1917) 4 C. W. R. 199.

(13) Voet 18. 5. 3. Berwick 115, 116.

(14) *De Silva v. Perera*, (1928) 29 N. L. R. 506 at 507.

(15) *Kumarihamy et al v. Gnanapandithan*, (1939) 14 C. L. W. 30.

(16) *De Silva v. Perera*, (1928) 29 N. L. R.506. 5 Times 155. *Vide Caffoor v. Mohamad*, (1913) 16 N. L. R. 383.

be assessed by the court.(17) The landlord could serve a notice on the tenant enhancing the rent or in the alternative asking him to quit the premises even where the tenant has paid rent for a number of months in advance; the application of the amount deposited being only a matter of accounting between the parties.(18) Where the landlord serves a notice enhancing the rent or in the alternative asking the tenant to quit the premises, and the tenant overholds, another view that may be taken is that the tenant by his conduct has accepted to pay the enhanced rent.(19)

ARRHAE.

In Roman Law it is usual for the vendee to pay or give something as *earnest* (*arrha*) to bind the other party to a contract of sale. Money or any other thing may be given as earnest. The advantages of giving earnest were these:—1. It marked the stage when mere proposals culminated in a definite agreement. 2. The forfeiture of the earnest was an inducement for the faithful performance of the contract. According to Justinian, in sales which require writing, the contract was not completed till the agreements were reduced to writing and signed by the parties. If the contract was to be made before a notary (*tabellio*) the sale was not complete till all the necessary formalities were gone through. As long as these conditions were not fulfilled it was open to either party to withdraw with impunity, provided no earnest had been given. Where earnest was in fact given, if the buyer refused to fulfil the contract he lost what he had given and if the seller defaulted, he had to pay double the amount paid as earnest (J. 3. 23) (Sandars 362). The same rules were applicable to leases *mutatis mutandis* in Roman-Dutch Law.

In Ceylon leases have to be entered into notarially in certain cases, in other cases mere informal agreements would suffice. In our law the principle governing the recovery of earnest advanced when the contract falls through is established on what may be

(17) *Jacob v. Ebert* (1883) 6 S.C.C. 70.

(18) *Abdul Caffoor v. Mohamed*, (1913) 16 N. L. R. 383; 1 Wij. 18.

(19) *De Silva vs. Perera* (1928) 29 N.L. R. 506 at 508, per Dalton, J.

termed as the fault basis. However, a notable difference between our law and the Roman law is that a lessor is not bound to pay back double the amount paid as earnest.

When a person advances money on an informal agreement he is entitled to a refund only if the other party refuses to complete the transaction or is incapable of completing the transaction. On the other hand, if he himself refuses to complete the transaction the deposit made by him will be forfeited. (20) A distinction has to be made between an advance and a deposit. If it is an advance the money could be recovered even by the defaulting party. (21) Where a contract should have been entered into notarially but the parties entered into an informal agreement and the tenant in furtherence of such an agreement made a deposit of rent in advance, it was held that he was not entitled to recover the sum he had deposited if he quitted the premises before the expiration of the lease as long as the lessor was willing to comply with the terms of the agreement. (22) But on the other hand, if the fault is with the lessor as where he fails to put the tenant in possession, then the tenant can recover whatever he has paid as advance. (23) If the fault lies in neither party, as where a lease is terminated by the happening of an event which could not have been foreseen and over which neither party had control, then the tenant can recover any sum he has paid as advance. (24) In a sale the vendor must agree that the money should be treated as a deposit or *arrha*, otherwise the money cannot be treated as a deposit and could be recovered by the purchaser though he was the defaulting party. (25) The same principles will apply to notarial leases *mutatis mutandis*.

(20) *Nagur Pitchi v. Usoof*, (1917) 20 N. L. R. 1 F. B.

(21) *Sinnatamby Vannitamby v. Thamby Ramanathan*, (1936) 1 C. L. J. R. 20; *Pieris v. Vieyara*, (1926) 28 N. L. R. 278 ; 8 Rec. 112.

(22) *Vilo Mohamed v. Alibhoy Chagla, Co.*, (1920) 2 Law Rec: 160.

(23) *Kuruneru v. De Silva*, (1894) 3 A. C. R. 155.

(24) *Holtshousen v. Minnaar*, 10 H. C. 50. 3 B & S Digest 1018, 1019.

(25) *Vide Palaniappa Chetty v. Mortimer*, (1923) 25 N. L. R. 209,

No Agreement Regarding Rent.

If the parties have agreed on other essentials but no agreement has been made fixing the rent or making it ascertainable, there is no lease. (26) Voet, however, states that under the Roman Law the hire is valid as there was 'a tacit agreement to pay what was customary to promise.' (27) But the better opinion is that occupation by a person under such an agreement cannot be regarded as under a lease. (28) The occupier under such circumstance should be sued for *use* and *occupation*. He is bound to pay a reasonable amount for the use of the premises. We shall discuss this question in detail in a subsequent chapter. (29)

CHAPTER IV.

DURATION OF LEASES.

A lease must be for a fixed or a limited time and not for an unlimited period. (1) The lease may be for a period which may be terminated by the efflux of a definite period of time or by the happening of an event which is bound to happen though the date thereof is uncertain. The duration of the lease may also be terminated by the act of one of the parties, as in the case of periodic leases or leases at will, which are usually terminated by notice. We shall consider these cases in their due order.

Leases for a Fixed Term.

The agreement may be to the effect that the lease shall continue from one fixed date to another fixed date, in which case it will commence and terminate on the agreed dates. Where the

(26) Wille 30 (2nd Edition.)
(27) Voet 19. 2. 7. Berwick, page 96.
(28) Wille 30, (2nd Edition) Pothier section 32. *Dunker v. Paddon Brock*, (1903) T. S. 468; 3 B. & S. Dig. 1016.
(29) Chapter VIII

(1) V. D. L. 1. 15. 11. Henry's Translation, pages 236, 237. (1920) 22 N. L. R. 165 at 168 in the matter of an application of J. E. de Saram, Notary Public, regarding stamp duty, No. 467, 3 Maasdorp 227 footnote.

date of commencement and the period of duration are given, the date on which the lease commences should be included in the calculation of the term of the lease. Thus a lease that commenced on the 16th of December, 1892, for a period of three years terminated on the 15th of December, 1895.[2] Sometimes the period during which the lease is to run is agreed upon without fixing a particular date at which the lease is to commence. In such a case the lease commences on the day request is made by the tenant, and consequently, immediately the contract has been concluded.[3]

Leases Terminable on the Happening of a Condition Subsequent.

A lease may be terminable on the happening of an event. The event that is contemplated must be of such a nature that it is certain to take place though the date of which is not necessarily certain.[4] Voet says that the duration may be indefinite. Thus, curators of minors may enter into a lease to the effect that the lease shall endure till the minors attain majority by reaching the proper age, by marriage or by getting letters of *venia aetatis*.[5] Similarly, a lease may be entered into to last till a particular war ends.[6]

Periodical Leases.

Periodic leases which run for a definite period, as in the case of weekly, monthly and yearly tenancies, belong to the same species as the above but differ in this respect that the event, namely, notice by either party terminating the tenancy, is within the control of either of the parties.[7] In such cases reasonable notice must be given by either of the parties. Creasy, C.J., stated in an old case that the length of the notice must be one commensurate with the term for which the lease was entered into, that is to say, a week's notice

(2) *Andris Appu vs. Silva*, (1896) 2 N.L.R. 175.
(3) Wille 36 & 118 (2nd Edition).
(4) Wille 37.
(5) Voet 19. 2. 9. Berwick, page 197.
(6) *Davy vs. Walker & Sons*, (1902) T.H. 114. 3 B. & S. Digest, p. 980.
(7) Maasdorp, Vol. 3. p. 229, (4th Edition)

in the case of weekly tenancies, a month's notice in the case of monthly tenancies, and a year's notice in the case of yearly tenancies. But evidence of custom may be given which will have the effect of varying the presumption arising from the nature of the tenancy.[8] In the case of monthly tenancy, a calendar month's notice must be given [9] and in the case of weekly tenancies a week's notice is reasonable and sufficient.[10] But in the case of yearly tenancies it has been held in South Africa that three months' notice is sufficient and that there is no necessary relationship between the period of the lease and the notice given to terminate the lease since what is required is a reasonable notice. The old view that a year's notice is necessary is no longer followed.[11]

Tenancy at Will.

Tenancy at will is of such a nature that it is terminable at the will and pleasure of the landlord. Tenancy at will must be created by a distinctive agreement. If not, the tenancy will be held to be a monthly tenancy.[12] The earlier view that a tenant in possession under an agreement which is invalid in law for non-compliance with the provisions of the Prevention of Frauds Ordinance[13] should be regarded as a tenant at will is no more accepted.[14] He is to be regarded as a monthly tenant, and cannot be dispossessed by force.[15] Though the tenant at will is not entitled to notice of any particular duration yet he is entitled to reasonable notice, and he cannot be turned out "neck and crop."[16] A tenancy at will is terminated either by a reasonable notice or by the death of the landlord.[17] A lease may be validly made for so long as the tenant pleases. In such a case it is the tenant who has the

(8) (1873) Gren. 2, p. 23 at 24 C.R. Colombo, 87694.

(9) *Vide* post, Chapter XXIII, notice to quit.

(10) Wille 38.

(11) *Tiopaizi vs. Bulawayo Municipality*, (1923) A. D. 317 at p. 327. Wille 38.

(12) 2 Thomp. 384.

(13) Cap. 57.

(14) *Bandala vs. Appuhamy* (1923) 25 N.L.R. 176; *Bultjens vs. Carolis Appu*, (1919) 21 N. L. R. 156.

(15) *Fonseka vs. Perera*, (1925) 3 Times 109.

(16) (1854) 2 Thomp. 384. (1854) Nell 230, 231. C. R. Negombo 5435.

(17) Voet 19. 2. 9. Berwick 197.

right of choosing when to terminate the lease, and the landlord is not entitled to terminate it by giving notice. (18)

Agreement Regarding Duration.

We have stated the divergent views expressed by Wille and Maasdorp as to the necessity of a definite agreement between the parties regarding the duration of a lease. Though it is essential to the constitution of the lease that there should be an agreement regarding the term of hiring, yet it is not essential that such an agreement should be expressed. The agreement may be an implied one. Usually the agreement concerning rent would express or imply some period of time for which it is payable, and hence an agreement regarding rent also fixes the period of the lease. Unless it is reasonably implied from the language that the lease is for one such fixed period only, the lease is to be regarded as a periodic one terminable on notice. (19)

CHAPTER V.

CAPACITY OF PARTIES

A lease valid in other respects may be void on the ground that the landlord had no contractual capacity to grant a lease. The capacity to enter into a contract of lease is the same as the capacity to enter into contracts generally. In this chapter certain topics pertaining to leases are discussed.

Minority.

In Ceylon a person under twenty-one years of age is a minor unless majority is conferred by operation of law. Marriage confers majority on either spouse except in the case of Muslims. (1) Generally a minor's contract does not bind him, but this rule is subject to several important exceptions. A minor, for example, may emancipate himself by living separately from his parents and by carrying on an independent trade. However, to

(18) Wille 39. (2nd Edition).
(19) Wille 39. (2nd Edition).

(1) The Age of Majority, Ordinance Cap. 53.

make him liable he must incur his obligations in the due course of business (*imperitia negotiorum*). (2) A minor may emancipate himself in similar circumstances even after the death of his parents. (3)

In Ceylon a lease by a minor is not void but only voidable at the instance of the minor. It is only when the minor exercises the option, that the law takes effect, and the transaction is said to be "*ipso jure void*". (4) Another view taken is that a minor's contract is neither void nor voidable in the sense in which it is understood in the English Law. According to Roman-Dutch Law a minor's contract is such that it does not bind the minor unless he ratifies it on attaining majority while it binds the other party to it. (5)

In the case of *Silva vs. Mohamedu* (6) all the previous decisions on this point were reviewed and the court, following the South African case of *Breyten Bach vs. Frankel,* (7) decided that a sale of land by a minor is voidable but the minor must bring an action (*restitutio in integrum*) within three years of his attaining majority to set aside the deed, if he so desires and that a subsequent sale to another person, after attaining majority, without having set aside, the previous deed executed by him during his minority, passes no title to the purchaser. It is submitted that the same principles are applicable to notarial leases *mutatis mutandis*. A duly appointed curator may let out the minor's property on a monthly tenancy without the permission of Court, (8) but leases by the curator of a minor's property, which are required to be notarially executed, are void unless sanctioned by Court. (9) When

(2) *Vide Muthiah Chetty vs. de Silva,* (1895) I. N. L. R. 358 at 360.
(3) *Silva vs. Mohammadu,* (1916) 19 N. L. R 426.
(4) *Fernando vs. Fernando,* (1916) 19 N. L. R. 193; 3 C. W. R. 139.
(5) *Fernando vs Fernando,* (1916) 19 N. L. R. 193 at 200, 3 C. W. R. 139, per Schneider, J.
(6) (1916) 19 N. L. R. 426.
(7) (1913) A. D. 390.
(8) *Mohamed Anvar vs Arumugam Chettiar,* (1939) 40 N. L. R. 382.
(9) *Mahawoof vs. Marikkar,* (1928) 31 N. L. R. 65, 9 Law Rec. 202; *Perera vs. Perera,* (1902) 3 Brown reports 150. These rulings have been doubted. See *Mohamed Anvar vs. Arumugam Chettiar,* (1938) 12 C. L. W. 163 at 165, 3 C. L. J. R. 159. 40 N. L. R. 382 at 384.

sanction is given by Court to lease a property to a particular person at a certain rent, the curator cannot lease it to another. He must strictly observe the sanction given by Court in dealing with the minor's property. (10) A guardian may sell immovable property belonging to a minor with the sanction of Court. Such a sale should be by public auction with a reserve price put upon the property by the Court. The Court should also give directions as to the manner of the sale. (11) The same observations would apply to notarial leases. Under Kandyan Law, a father as the natural guardian may manage his minor son's property for his son's benefit, but he cannot alienate it, by granting a lease of it without the leave of Court.(12)

Lunacy.

When one of the parties was insane at the time of entering into the contract, the contract is null and void, (13) even though the other party contracted *bona fide* and without knowledge of the insanity. (13) It is not necessary that a person should be adjudged insane and incapable of managing his affairs by a Court of Law. If there is a plea of lunacy, it is a question of fact, and evidence may be lead to prove that the person was a lunatic at the time of entering into the contract. But a contract entered into during a lucid interval is valid.

Prodigality.

In an early case it was held that a person who was not a lunatic but who was incapable of managing his own affairs, if he was interdicted from the management of his affairs, was incapable of entering into contracts. (14) This case was decided before the Civil

(10) *Meydeen vs. Ghouse*, (1921)23 N. L. R. 445, 3 Law Rec. 163.

(11) *Mana Perera vs. Perera Appuhamy*, (1895) 1 N. L. R. 140.

(12) *Juwan Appu vs. Helenahamy* (1901) 2 Br 19, *Vide* also (1877) Ram. Rep. 386 D. C. Kandy 68848.

(13) *Soysa vs Soysa*, (1916) 19 N. L. R. 314 at 316.

(14) *In the matter of Rodrigo* Ram. Rep. 1872-76 p. 40; *Vide* also *Molyneux vs. Natal Land and Colonization Co. Ltd.* (1905) A. C. 555,

Procedure Code [15] came into operation. It is doubtful whether this case will be followed in modern times.

Deaf and Dumb Persons.

A deaf and dumb person may enter into a valid contract if he is capable of understanding the nature of the legal act, but it would be necessary to shew that the person was appraised of the nature of the act by some person who could converse with him by signs or by some other means.[16]

Coverture.

Under the Common Law.—Under the Roman-Dutch Law, on marriage there was community of property between the spouses. The wife passed on marriage from parental control to the custody and power of her husband. All her property came under the control of her husband. The husband being the managing partner of the joint estate could deal with his own property or the property of his wife. If there was an antenuptial contract then the rights would be regulated by the terms of such contract. In the absence of such contract the husband had the right to lease out his wife's lands not only for a period extending to his own lifetime but also for a period after his death and extending up to his wife's lifetime. [17]

Under the Matrimonial Rights and Inheritance Ordinance. [18]—After the Matrimonial Rights and Inheritance Ordinance came into operation a married woman could dispose of or deal with (lease included) her property by an act *inter vivos* with the written consent of her husband. [19] Although the movables of the wife (except jewels and implements of trade) vest in the husband, [20] the rents or income from immovable property owned by the wife

(15) Cap. 86.
(16) *Sabapathipillai vs. Tirumanchanam.* (1913) 17 N. L. R. 146,
(17) *Dharmagoonewardene vs. Kutty Cangany.* (1898) I Tamb 11.
(18) Cap. 47.
(19) Section 8 of the Matrimonial Rights and Inheritance Ordinance, Cap. 47.
(20) Sections 10 and 17 of the Matrimonial Rights and Inheritance Ordinance, Cap. 47.

belong to the wife. Hence she is entitled to receive them and give a valid receipt. [21] The husband's consent to leasing out immovable property may be dispensed with, if the husband has deserted his wife, if he is separated from her by mutual consent, if he is imprisoned for a sentence exceeding two years, if he is a lunatic or an idiot, if his place of abode is unknown, or if his consent is unreasonably withheld. In any one of these cases an application should be made to the District Court for an order dispensing with the husband's consent. [22] Where a wife, whose husband is separated from her, desires to lease out her immovable property, the proper course is not to apply for a general order empowering her to lease without her husband's consent and concurrence but to bring the proposed lease before the Court and ask that her husband's concurrence be dispensed with. [23] This Ordinance does not apply to Kandyans or Mohammedans or to the Tamils governed by the *Tesawalamai*, [24] or to persons who were married before the Ordinance came into operation. [25]

The Married Women's Property Ordinance — By the Married Women's Property Ordinance [26] a married woman is given greater freedom. She holds her property as separate property independently of the intervention of any trustee. But the Ordinance applies only to persons married after 1st July, 1924. [27] If a woman married before that date wants to bring an action after July 1924 in respect of a land bought (or leased) by her before July 1924 she need not join her husband as a party to the action. [28] Section 10 of the Married Women's Property Ordinance enacts that a woman married before the com-

(21) *Rosairo vs. Abraham.* (1914) 17 N. L. R. 357.

(22) Section 11 of the Matrimonial Rights and Inheritance Ordinance Cap. 47.

(23) *Silva Hamine vs. Agonis Appuhamy*, (1900) 4 N. L. R. 101.

(24) Section 2 of the Matrimonial Rights and Inheritance Ordinance, Cap. 47.

(25) Section 4 of the Matrimonial Rights and Inheritance Ordinance, Cap. 47.

(26) Cap. 46.

(27) Married Women's Property Ordinance, Cap. 46, *Vide* Govt. Gazette No. 7388 of April 17, 1924.

(28) *Vide Nona vs. Manuel*, (1927) 29 N. L. R. 161.

mencement of this Ordinance shall be entitled to dispose of any immovable property which accrued to her after the commencement of the Ordinance, as a *femme sole*.

Under the Tesawalamai.—Section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance [29] enacts that a married woman can only deal with the property acquired during or before marriage (except *tediatetam*) with the written consent of her husband. A notarial lease being a *pro-tanto* alienation, it would appear that when a wife, who is subject to the *Tesawalamai* and whose rights are governed by this Ordinance, leases her property (other than *tediatetam*) the written consent of the husband is necessary.

Section 4 of the Jaffna Matrimonial Rights and Inheritance Ordinance [29] states that the respective matrimonial rights of a husband and wife with regard to property or status under or by virtue of any marriage solemnized before the commencement of the Ordinance shall be governed by such law as would have been applicable thereto as if the Ordinance had not been passed.

CORPORATIONS.

Companies.—Where a corporation is created in pursuance of the provisions contained in a general act as the Joint Stock Companies Ordinance or Ordinance relating to Companies, it cannot enter into a contract inconsistent with or foreign to the objects set forth in the memorandum of association. A contract, which is required to be in writing, as in the case of a lease for over a month, must be under the common seal of the company. A lease for a month may be made by parol on behalf of the company by any person acting under the express or implied authority of the company. [30]

Municipal Council.—The Council, with the sanction of the Governor, may sell by public auction or lease any lands or buildings vested in them either in block or in parcels as they may

(29) Cap. 48.
(30) 53 of Ordinance 4 of 1861. See section 30 of Ordinance 51 of 1938.

find most advantageous. (31) Provisions of the Prevention of Frauds Ordinance (32) do not apply to leases affecting immovable property to which the Council is a party. (33) A contract that is to continue for a period extending beyond the end of the financial year is invalid, unless the consent of the Council is obtained. (34) The Council cannot sell or otherwise alienate any waste lands vested in the Council without having obtained the written consent of the Governor and without having, after obtaining such consent, given notice of such intention during three successive weeks in the "Government Gazette".(35)

District Councils.—A District Council may lease any property vested in the Council. The consent of the Local Government Board is necessary if the lease exceeds a term of three years.(36)

Local Board.—A local board with the sanction of the Governor may take on lease land or buildings for purposes of town improvement and for other purposes referred to in the Local Boards Ordinance, (37) and pay for the same out of the local fund. It may also sell, lease or exchange the same or any other property vested in the board. (38) Local Boards have the power to make contracts for the sale of the privilege of collecting market fees. An agreement, whether it be a sale or a lease, for a year of the right to take and appropriate the rents and tolls from stall-holders, being an agreement affecting land, must comply with the terms of Section 2 of Ordinance No. 7 of 1840. (39)

(31) Section 153 of the Municipal Council Ordinance, Cap. 193.

(32) Cap. 57.

(33) Section 153 (2) of the Municipal Council Ordinance, Cap. 193.

(34) Section 63 of the Municipal Council Ordinance, Cap. 193.

(35) Section 68 of the Municipal Council Ordinance, Cap. 193.

(36) Section 47 (d) of the Local Government Ordinance, Cap. 195.

(37) Section 60 (b) Cap. 196.

(38) Section 60 (b) of the Local Boards Ordinance, Cap. 196.

(39) *Board of Health Trincomalie vs. Subramaniampillai.* (1906) 2. A. C. R. 146.

CHAPTER VI.

TITLE OF THE LANDLORD.

In the previous chapter the capacity of the parties to contract was considered. In this chapter an attempt is made to consider the title of the landlord to grant leases. A person may have absolute dominion over his property. A person may succeed the landlord. A person may divest himself of some of the rights over his property and invest them in another. The person who still has the residuary rights may be called the owner of encumbered property. The person in whom the fractional rights are invested may be said to be the owner of *jura in re aliena*. A person may grant a lease in a fiduciary capacity. Lastly, a person may have no title to grant a lease. We shall consider in due order the title of these persons to grant a lease.

Absolute Owner.

An absolute owner has obviously sufficient title to grant a lease for any period.(1) This power is subject to important limitations. Thus, if the owner is in insolvent circumstances and assigns or transfers any real property to any of his children or to any other person (except upon the marriage of his children or for some valuable consideration), the Court has power to order any such property to be sold and disposed of for the benefit of the creditors under the insolvency.(2) If a person is in insolvent circumstances and assigns or transfers any real property with a view to defraud his creditors such a transfer would be set aside if a *Paulian* action is brought by any of the creditors within three years.(3) Similarly, if a person in insolvent circumstances attempts to lease out his property for a long period at a low rental the Court will set aside the lease.(4) A lease executed *pendente lite* is void, but it is valid if the lease was executed before the service of summons.(5) Under the provisions of section

(1) Wille 13 (2nd Edition).
(2) Section 51 of the Insolvency Ordinance, Cap. 82.
(3) Wille 13.
(4) Voet on Fraudulent alienation. Book XLII. Tit. 8. De Vos Translation, 15, 16.
(5) *Muheeth vs. Pillai and another*, (1917) 4 C.W.R. 26. 19 N.L.R. 461, F.B.

11 of the Registration of Documents Ordinance [6] a *lis pendens* must be registered before it can bind immovable property. A lease executed during the pendency of partition proceedings is not an alienation within the meaning of section 17 of the Partition Ordinance, [7] and is therefore not void; [8] the earlier decisions avoided such a lease. If the land is partitioned the lease attaches to the divided portion allotted to the lessor. [9] A mortgage pending partition proceedings of any share which may ultimately be allotted does not create a real right. Consequently, where a lessor granted such a mortgage and also executed a lease pending partition proceedings it was held that the mortgage was subject to the lease. [10] A co-owner of an undivided property who lets any portion of it without the knowledge or consent of his co-owner must account to the latter for his share of the profits derived from the lease. If a co-owner desires to lease a portion of the property as if it was his own, he can always protect himself by claiming a division of the property before entering into the lease. [11] The lessor and the lessee must be two different persons and therefore a person cannot lease out his own property to himself. [12] In donating a property the donor may impose a condition that the donee should not lease the property for a period exceeding a certain term, but in order that such condition may be effective, there must be a penalty attached to the breach. [13]

Successors of the Landlord.

Though a person did not originally grant a lease, yet by subsequent acquisition of the ownership of the property he may become the landlord. This may happen in the case of a sale or a donation.

(6) Cap. 101.

(7) Cap. 56.

(8) *Kirihamy vs. Mudiyanse*, (1921) 23 N. L. R. 272. *Appuhamy vs. Nonis*, (1922) 23 N.L.R. 415.

(9) Section 13, Cap. 56.

(10) *Murugappa Chetty vs. Alpisingho*, (1936) 1 C.L.J.R. 16; 38 N.L.R. 57.

(11) Wille 13.

(12) *Silva vs. Kumarihamy*, (1923) 25 N.L.R. 449.

(13) *Saida vs. Samidu*, (1922) 4 Law Recorder 110.

Donee.—Where an owner grants an informal lease and donates the property to another person, the donee steps into the shoes of the donor and hence could validly grant a notice to the tenant to quit the premises.(14) In the case of a notarial lease it is submitted that the relationship of landlord and tenant would be established between the donee and the tenant subject to the condition that the donee is bound by all the quities that existed between the donor and his tenant, provided there is an attornment or an assignment of the landlord's rights with due notice to the tenant.

Vendee.—Where a property that has been leased out is sold, the vendee succeeds to all the rights of the vendor on the lease without any special assignment of it from the latter to the former.(15) The vendee in execution proceedings buys the property subject to the lease, if the owner had previously leased it and the lease is registered prior to the seizure and the registration of the Fiscal conveyance. The fact that the owner's claim was disallowed and he failed to bring a 247 action does not prejudice the rights of the lessee. The order disallowing the owner's claim was conclusive only against him and his privies, that is to say, those subsequently deriving title through him.(16) Even where the lessee has paid his lessor eleven years' rent in advance on an informal lease, he cannot retain possession against the vendee of his lessor.(17) Where the sale was conducted in pursuance of execution proceedings, the lessee should pay the rent to the vendee from the date of the sale provided the lessee has notice of the sale, because in a Fiscal Sale the title dates back from the time of sale.(18) Section 288 of the Civil Procedure Code(19) prescribes the mode of delivery when a tenant is in occupation of the property sold. If the property is sold under a mortgage decree,

(14) *Dona Agida vs. Suaris*, (1920) 8 C.W.R. 91.

(15) *Silva vs. Silva*, (1913) 16 N.L.R. 315.

(16) *N. Charles de Silva and another vs. Wimalasuriya and another*, (1937) 2 C.L.J.R. 111.

(17) *Pemanande Unnanse vs. Appusingo*, (1917) 5 C.W.R. 20.

(18) *Morris vs. Mortimer*, (1879) 2 S.C.C. 96.

(19) Cap. 86

subject to any special conditions of the sale, the lessee need only pay the rent from the date of the execution of the transfer as the purchaser's title does not relate back to the date of the actual sale as in the case of Fiscal's Sales.[20] The principle that a vendee who is not able to obtain possession is entitled to the rent from the tenant as the equivalent of possession does not apply to sub-tenants.[21] A purchaser sometimes may not care to take the property with the vendor's tenant in occupation. In such a case the tenancy between the vendor and the tenant continues, and the vendor, in spite of the sale, can take steps to eject the tenant.[22]

Owners of Encumbered Property.

A person may lease or mortgage his property. The property may also be subject to a servitude. Under such circumstances the owner of the property has not the *plenum dominium.*

1. **Owner of property subject to a lease.**—The owner of property, which is subject to a lease conferring real rights on the tenant, has no title to grant an effective lease in favour of another person over the property or a portion of it, for any period of time covered by the former lease.[23] Wille says that no real right could be conferred on a tenant unless he is put in possession by the landlord and, consequently, if the first lessee was not put in possession but the second lessee was given possession, the latter obtains sufficient real rights in the property so as to exclude the other, provided he is in ignorance of the first lease.[24] In Ceylon in dealing with this case one must consider the provisions of the Registration of Documents Ordinance.[25] It has been held that where a notarial lease is granted, a subsequent transfer for valuable consideration will prevail over the lease if the subsequent transfer is registered first.[26] A notarial lease being a *pro-tanto* alienation,

(20) *Mohideen vs. Isey*, (1922) 24 N.L.R 239.

(21) *Udayappa Chetty vs. Goonetileke*, (1925) 3 Times 76; 6 Rec. 121.

(22) *Wijesinghe et al vs. Charles*, (1915) 18 N.L.R. 168.

(23) Wille 14.

(24) Wille 122, 123.

(25) Cap. 101.

(26) *Singho Appuhamy vs. Amaratunge*, (1922) 1 Times 110.

where a lessor grants two leases for valuable consideration, the lessee who registers his lease first will gain priority over the other. If the lessor places a person in possession in pursuance of an informal lease, and later grants a notarial lease to another person the latter acquires real right over the property and may validly bring an action for ejectment after due notice against the person in possession under the informal lease.[27] But, in the absence of an assignment, or an attornment by the original lessee to the lessee under the notarial lease, the latter could not give the former notice to quit.[28]

II. **Owner of property subject to a mortgage.**—The owner of immovable property subject to a duly registered mortgage bond may, if not precluded by the bond, grant a lease of the same without the consent of the mortgagee.[29] But where there is a stipulation that the mortgagor should not lease the mortgaged property without the consent of the mortgagee, any lease granted without such consent is rendered nugatory as between the lessee and the mortgagee, or the lessee and any person claiming under the mortgagee.[30]

III. **Owner of property subject to a servitude.**—Where property is subject to a praedial servitude, Wille says[31] that the owner of the property has sufficient title to grant a lease of it if the servitude is of such a nature that its use and enjoyment will not be interfered with by the existence of the lease or by the exercise of the rights under the lease. But in the case of a personal servitude, as, for example, a usufruct, it is the usufructuary who has the title to grant a lease.[32]

Persons Vested with Jura in Re Aliena.

(*a*) **Usufructuary.**—A usufructuary has the right of possession of the property for a defined period, often lasting his lifetime. A

(27) *Bandara vs. Appuhamy*, (1923) 25 N.L.R. 176.
(28) See *Ukkuwa vs. Fernando*, (1936) 38 N.L.R. 125.
(29) Wille 13.
(30) *Seneviratna vs. Seeni*, (1917) 4 C.W.R. 161.
(31) Wille 15.
(32) Wille 15.

usufructuary may let the property over which he has the usufruct for a period extending over his own period or a portion of it. If he purports to lease the property for any period beyond his period of tenure the lease for such period is not binding on the owner of the property.[33]

(*b*) **Usufructuary Mortgagee.**—A usufructuary mortgagee may let such property. If the rent is greater than the legal amount of interest due on the mortgage debt, the mortgagee must account for the excess, which goes to reduce the debt.[34]

(*c*) **Usuary.**—A person who merely has the *usus* of a spacious house may let a portion of the house.[35] But he cannot let out the whole of the property, as it is necessary for him to reside in a portion of the house in order to assert his title.[36]

(*d*) **Habitator.**—A person who has the *habitatio* of a house may let it for the period of his right.[37]

Owners of Entailed Properties.

Fiduciary.—If the fideicommissum, says Wille,[38] is constituted by means of a restraint against alienation, the fiduciary has no title to grant a long lease, since such a lease is virtually an alienation. In Ceylon a notarial lease is placed on the same footing as a long lease in South Africa, and therefore such a lease will be considered an alienation.[39] If there was a provision in the deed or will creating the fideicommissum that the fiduciary should not lease the property beyond a certain term, there must be a provision for a penalty in case the fiduciary attempts to lease it beyond the period mentioned. In the absence of such a provision a lease beyond that period is valid.[40] When there is a prohibition

(33) Wille 16; Voet 19. 2. 4; Berwick 193; Voet 19. 2. 16 ; Berwick, page 204.

(34) Wille 15; *Uduma Lebbe v. Segu Mohammedu*, (1893)2 C.L.R. 158.

(35) Voet 19. 2. 4; Berwick 193.

(36) *Vide* Wille 16.

(37) Wille 16; Voet 19. 2. 4 ; Berwick 193.

(38) Wille 16, 17.

(39) *Carron v. Fernando*, (1933) 35 N. L. R. 352 ; *Goonewardana v. Rajapakse*, (1895) 1 N. L. R. 217.

(40) *Soida v. Samidu*, (1922) 4 Law Recorder 110; *Sitta Naima v. Gani Bawa*, (1930) 32 N.L.R. 155.

against leasing land for a period exceeding a certain number of years, the fiduciary donee cannot grant a lease for a period exceeding the term, even with the consent of the donor without reference to the reversioners. (41)

In the case of the simplest form of fideicommissum, namely, where the property is to pass to the fideicommissary on the death of the fiduciary, the latter is in no better position than a usufructuary, and therefore his right to grant leases is similar to that of a usufructuary, (42) The fiduciary has the right to lease the property even after an application to sell the property under the Entail and Settlement Ordinance(43) has been made, but before the Court allows the application. The doctrine of *lis pendens* does not apply to an application to sell property under the Entail and Settlement Ordinance. (44) The lease granted by such a fiduciary is good till it is terminated by the death of the fiduciary or the termination of the period whichever may happen first. (45) If, however, the *fideicommissarius* dies before the fiduciary, then the latter becomes the absolute owner of the property and, therefore, a lease granted by the fiduciary for the full term is valid.(46) This happens only when the fideicommissum is created by a will. If the fideicommissum is created by a deed *inter vivos* and if the *fideicommissarius* dies before the fiduciary, the former transmits the expectation of the benefits under the *fideicommissum* to his heirs (47) and hence the lease is not valid for the full period even where the fideicommissary predeceased the fiduciary. If the fiduciary and the fideicommissary jointly grant a lease it is valid for the full term. (48)

Fideicommissary.—A fideicommissary is only a contingent owner of the property prior to the fulfilment of the condition mentioned in the deed creating the fideicommissum, and hence he has no

(41) *Abeyasinghe v. Perera*, (1915) 18 N. L. R. 222.
(42) Wille 16.
(43) Cap 54.
(44) *Punchi Mahatmaya v. Walloopillai*, (1920) 7 C. W. R. 209.
(45) *Fernando v. Fernando*, (1913) 1 Bal. Notes of Cases 99; *Abeyasinghe v. Perera*, (1915) 18 N. L. R 222; *Sitta Naima v. Gani Bawa* (1930) 32 N.L.R. 155.
(46) Wille 16.
(47) *Mohamad Bhai et al v. Silva et al*, (1911) 14 N.L.R. 193, F. B.
(48) *Thampimuttu et al v. Tillaimpalam*, (1917) 4 C.W.R. 204, Wille 17.

title to grant a lease to be effective before such fulfilment. (49) But if the fiduciary and the fideicommissary act in concert, they have sufficient title to grant an effective lease for any period.(50)

Persons in a Fiduciary Capacity.

Under this heading it is convenient to consider the title of an agent, executor, administrator or a trustee to grant a lease.

Agent.—A person who holds a power of attorney from the owner of the land with power to lease the property can effectively lease his principal's property. But when he purports to lease the same, he must act in the name of his principal and his signature standing by itself is not sufficient. (51) The agent must act within the scope of his authority. But where an agent purporting to act on behalf of his principal exceeds his powers in granting a lease of land, the principal could however ratify the lease, provided he was fully aware of the nature of the unauthorised act of his agent. In such cases it is not necessary to produce a notarial document to prove ratification. (52) Acceptance of rent under the lease by the owner with full knowledge of the facts is sufficient ratification. (53) A principal when he acquiesces in a lease by his attorney is estopped from questioning his attorney's authority. (54)

Executor.—An Executor in Ceylon has the same powers as an English Executor with the addition that his powers extend to movable as well as immovable property. (55) Under the English Law an executor has the power to lease the property belonging to the estate of the deceased for purposes of administration. (56) An executor when he sues on an existing lease must sue as executor and not in his personal capacity. (57) If there are debts of

(49) Wille 17.

(50) *Tampimuttu et al v. Tillaimpalam*, (1917) 4 C. W. R. 204,

(51) *Arunachalam Chetty v. Bilinda*, (1922) 1 Times 68.

(52) *Sinnathamby v. Johnpulle*, (1915) 18 N. L. R. 273.

(53) Wille 17.

(54) (1874) Grenier Reports, C. R. 11 at 12.

(55) *Hadden v. Gavin*, (1867) Ram. (1863-68) 246 at 250, Gren, (1873) D. C. 52 at 53.

(56) Williams on Executors (11 Edition) Vol. I, page 700.

(57) *Silva v. Arumugam*, (1921) 23 N. L. R. 204,

the estate an executor can assign the right to recover the rent to the creditor of the estate for the purpose of releasing a debt.(58)

Administrator.—An administrator cannot lease out the property belonging to the estate of the deceased, without the permission of Court.(59) Even to surrender an existing lease the permission of Court is necessary.(60)

Trustee.—Before the Trusts Ordinance(61) came into operation it was held that a trustee could grant a lease of trust property for a reasonable period, provided that there was nothing to the contrary in the instrument creating the trust.(62) Now the Trusts Ordinance provides that if a trustee leases a trust property for over ten years the permission of Court has to be obtained.(63) But he has the power to lease the property for a lesser period without the permission of Court.

Persons Who Have no Title.

A person may let immovable property to another without having any right or title to it or without any authority from the true owner. Such a lease is binding as between the landlord and the tenant. But the owner of the property is not bound by such lease.(64) The true owner is entitled to have the lease declared null and void and to have an order to eject the person in occupation who claims to be the tenant. But the owner may subsequently ratify the lease and thereby become bound by it. Ratification will be presumed when the owner accepts rent under the lease with full knowledge of the facts.(65)

Effect of Lease on Parties.—As between the parties the lease is binding and they acquire the rights and become subject to the obligations of landlord and tenant respectively. Thus if the tenant is ejected by the true owner the landlord is liable to the ten-

(58) *Fernando v. Muneherjee*, (1883) 5 S.C.C. 141.
(59) *Rajaratnam v. Sinnadurai*, (1935) 4 C. L. W. 94, at 95, Per Koch, J.; 15 Rec. 101.
(60) *Rajaratnam v. Sinnadurai*, (1935) 4 C. L. W. 94 ; 15 Rec. 101.
(61) Cap. 72.
(62) *Mohamedu v. Meydeen*, (1916) 2 C. W. R. 93.
(63) Section 38 of the Trusts Ordinance, Cap. 72.
(64) Wille 18.
(65) Wille 18, Wille 17.

ant in damages provided the tenant was ignorant of the defect in the landlord's title.(66) On the other hand, a tenant cannot dispute his landlord's title and refuse to pay rent on the ground that the premises were to the knowledge of the tenant, at the time of the tenancy, the property of some other person, and that he has received notice from such person to the effect that the landlord was only an agent of such person and the rent should not be paid to the landlord.(67) In an action for rent and ejectment it is not possible for a tenant during the continuance of the tenancy to deny that his landlord had title at the date of the lease. (68) But the tenant may, however, prove that since the tenancy commenced the landlord's title had expired, (for example by a partition decree) and that he had been evicted by *title paramount*. (69) Actual physical dispossession is not necessary, but the eviction may be constructive or symbolic. However, a threat of eviction is sufficient, and if the tenant in consequence of such a threat attorns to the claimant he can set up this by way of defence to an action for rent. (70)

CHAPTER VII.

FORMALITY OF THE CONTRACT.

It is necessary to observe certain formalities in entering into a contract of lease of immovable property beyond a certain period. In South Africa the forms relating to, and the incidents arising from, formality of leases, are of a complicated nature. In Ceylon the matter is simplified by statute law. We may begin with a statement of the different cases in which notarial execution is required by law and the formalities that have to be observed in such

(66) Voet 19.2.17; Berwick 207; Wille 19.

(67) *Ameen v. Rasheed*, (1935) 12 Times 117. 14 Law Recorder 210.

(68) *Edwin et al v. Wickramaretne*, (1932) 1 C. L. W. 394, Section 116 of Ordinance 14 of 1895.

(69) *Cader v. Hamidu*, (1921) 23 N. L. R. 91.

(70) *Annie Tillekaratne v. Coomarasingham*. (1926) 28 N. L. R. 186 at 189; 8 Rec. 13.

cases; then we may discuss the question whether any parol evidence can be led to vary or supplement the terms of a notarial document and lastly we may deal with the subject of registration of leases and the law governing stamping.

Cases in which Notarial Execution is Essential.

Subject to certain exceptions discussed hereafter, an agreement or promise to establish any interest or encumbrance affecting land or other immovable property is of no force or avail in law, unless the same is in writing and signed by the party making the same or by some person lawfully authorised by him or her, in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed or instrument was duly attested by such notary and two witnesses. [1] Plantations which are permanently attached to the land and the produce of which come under the description of *fructus naturales* should be regarded as immovable property. Thus, a lease for more than a month of growing coconut trees, [2] *cinchona*, [3] or coffee growing in one's garden [4] must be notarially executed. But an agreement by a person to clear within one year a block of land and to stock all the timber in consideration of the owner of the land permitting such person to sow the land with *kurakkan* and take the produce for a year need not be notarially executed. [5] A contract whereby a person undertakes to improve and cultivate the land of another for a period exceeding a month in consideration of a promise by the other to give a share of the produce must be notarially executed. [6] An agreement, whether it be a sale or a lease, for one year of the right to take and appropriate rents and tolls which are due or which would become due from stall holders of a market, being an agreement establishing an interest

(1) Sec. 2 of the Prevention of Frauds Ordinance, Cap. 57

(2) *Fernando vs. Perera*, (1923) 1 Times 264. *Peiris et al vs. Perera*, (1910) 13 N. L. R 291.

(3) *Lee Hedges vs. James Seville*, (1886) 8 S. C. C. 21.

(4) *Seriyanan vs. Meneck-rala*, (1859) 3 Lor. 284.

(5) *Jayasuriya vs. Sinno Appu*, (1912) 16 N. L. R. 65.

(6) *Eliyas vs. Savunhamy*, (1914) 18 N. L. R. 82.

in immovable property, is of no force or avail in law in the absence of notarial execution. (7) Where the creation of a lease of immovable property should be notarially executed, the surrender of such a lease need not be notarially executed. (8)

Essentials of an Indenture of Lease.

The principles which govern notarially executed instruments apply also to notarial indentures of lease and may be summarized as follows :—

(1) The first requisite of a notarial indenture of lease is that it must be signed by the party making the same or by some person lawfully authorised by him. An instrument of lease, though executed by the lessee only, is admissible in evidence. (9) The authority given to an agent to execute an instrument, which is required by law to be notarial, need not be contained in a notarial instrument and may be given orally. (10)

(2) Secondly, the instrument must be signed in the presence of a licensed notary and two or more witnesses present at the same time. In interpreting the words "in the presence of the testator etc." in Section 4 of the Prevention of Frauds Ordinance (11) the Court took the view that the witnesses need not be present in the room in which the instrument is executed provided they can see and hear what is being done or said, if they choose to do so. (12) The same observation would apply in interpreting Section 2 of the Prevention of Frauds Ordinance. (13)

(3) Thirdly, the execution of such writing, deed, or instrument must be duly attested by the notary and the witnesses. It is essential to the validity of a deed that the attesting witnesses to it should subscribe their signatures in the presence of the parties

(7) *Board of Health and Improvements, Trincomallee vs. Subramaniampillai* (1906) 2 A. C. R. 146.

(8) *Ishohami vs. Appuhamy* (1920) 7 C. W. R. 290.

(9) *Candappa vs. Ranewakegey,* (1856) 1 Lor. 188.

(10) *Meera Saibo vs. Paulu Silva* (1899) 4 N. L. R. 229; (Notarial instrument not necessary to prove ratification) *Sinnatamby vs. John Pulle* (5161) 18 N. L. R. 273. *Vide* also *Beebee vs. Beebee,* (1920) 8 C. W. R. 232; Rec. 172.

(11) Cap. 57.

(12) *Ibrahim Neina vs. Kosumma,* (1911) 15 N. L. R. 46.

(13) Supra.

to the deed, the notary, and also in the presence of one another.[14] The attestation should not be on a separate detached piece of paper.[15] The omission of a notary to mention in the attestation of a bond the names and residences of the witnesses does not render the bond invalid.[16]

Cases in which Notarial Execution is not Essential.

Leases at will and leases for a period not exceeding one month need not be notarially executed.[17] An exception is also made in the interests of agriculture, in certain districts, in respect of contracts for the cultivation of paddy fields and *chenas* for a period not exceeding twelve months, if as a consideration for such a contract or agreement the cultivator gives to the owner of such field or land a share of the crop or produce.[18] This form of cultivation is known as *ande* cultivation. As previously pointed out such an agreement cannot be called a lease. Crown leases need not be notarially executed. Section 17 of the Prevention of Frauds Ordinance[19] exempts Crown leases from the operation of the provisions of the Ordinance. The provisions of the Crown Grants (Authentication) Ordinance[20] now govern leases of Crown lands. Also Section 153 (2) of the Municipal Councils Ordinance[21] provides that the Prevention of Frauds Ordinance has no application where one of the parties to the lease is the Municipal Council.

Deeds Executed Before Judges.

All deeds or instruments which by Section 2 of the Prevention of Frauds Ordinance should be executed before a notary and two witnesses may also be executed before two witnesses and a District Judge or Commissioner of Requests for the District in which the

(14) *Punchi Baba et al vs. Ekanayaka*, (1881) 4 S. C. C. 119.

(15) *De Zylva vs. Auwardt*, (1878) 1 S. C. C. 28.

(16) Gren. 1874 D. C. 39, D. C. Negombo 5742.

(17) Sec. 2 of the Prevention of Frauds Ordinance; Cap. 57.

(18) Section 3 of Cap. 57. This Ordinance is proclaimed in all Provinces except Eastern Province, Cap. 57 Vol. 2, p 100, footnote.

(19) Cap. 57.

(20) Cap. 317.

(21) Cap. 193.

party making such deed or instrument resides or before a Justice of the Peace for such District specially authorised by the Governor to act in that behalf and of whose appointment notice has given in the Government Gazette. The execution of such deed or instrument should be certified at the foot or end thereof under the hand and seal of such Judge or Commissioner or such Justice authorized as aforesaid. (22)

Informal Leases.

Persons may enter into an informal lease in cases where a notarial lease is required by law. At one time there was a controversy whether Section 2 of the Prevention of Frauds Ordinance which requires an agreement relating to land to be notarially executed, rendered the contract void or merely unenforceable if such requirement was not complied with. There was also a controversy whether the English equitable doctrine of part performance had been imported into our law. In *Nanayakkara vs. Andris,* (23) it was held that a landlord could sue his tenant for compensation for use and occupation, in the absence of a notarial bond. In this case, Bertram, C.J., observed that there was nothing to prevent the adoption of the doctrine of part performance as part of the legal system of the Island. According to the doctrine of part performance, when a man enters upon land under an agreement that is not enforceable in law, in the expectation that he will have a certain interest in the land, and lays out money on the land, equity will compel the landlord to give effect to the agreement. (24) The Privy Council has held in a later case (25) that the doctrine of part performance has no application to the stringent provisions of section 2 of the Prevention of Frauds Ordinance. (26)

This being the present state of the law, what is the position of a tenant who takes possession under an informal lease? In the

(22) Section 2 Cap. 58.
(23) (1921) 23 N. L. R. 193
(24) *Ramsden vs. Dyson, and Thornton*, L.R. 1. H L. 129 Cited in 23 N. L. R. at p. 199.
(25) *Arsecularatne vs. Perera,* (1927) 29 N. L. R. 342.
(26) Cap. 57.

case of the *Secretary of State for the War Department vs. Ward,* (27) it was held that a tenant in such circumstances was a tenant at will. But a tenancy at will must be created by a distinctive agreement. (28) In later cases, the case of the *Secretary of State for War Department vs. Ward,* has been distinguished and the present view is that the tenant in these circumstances is to be regarded as a monthly tenant upon the terms of the agreement so far as they are applicable and are not inconsistent with the incidents of monthly tenancy.(29) But it there is a breach of any of the terms of an informal agreement no damages can be claimed by the lessee. (30) This case was decided in 1913 on the footing that the lessee had no interest at all in the land as he was regarded as a tenant at will, but today such a lessee is regarded as a monthly tenant and hence may recover damages. In England such a tenant is considered a tenant at will, but in other respects the terms of the agreement which are not inconsistent with the tenancy will apply. (31) As Schneider, J., points out,(32) this view taken in England is due to the fact that Section 1, of the English Statute of Frauds, states that all parol leases for a term of years shall have the force and effect of *leases at will* only. In South Africa, if a lease requiring notarial execution has not been so executed, it is void and neither party can waive such execution. If the tenant, who is in occupation under these circumstances, has paid rent monthly he is to be regarded as a monthly tenant, but if he has not paid rent he is merely a tenant at will.(33)

Variation of Terms in an Indenture Lease by Parol Evidence.

When the terms of a lease are embodied in a document no evidence shall be given in proof of the terms of such lease

(27) (1901) 2 Br. 256.
(28) 2 Thomp. 384.
(29) *Bultjens vs. Carolis Appu,* (1919) 21 N. L. R. 156; *Bandara vs. Appuhamy,* (1923) 25 N. L. R. 176; *Kira Fernando vs. Ukkuwa,* (1936) 1 C. L. J. R. 96.
(30) *De Silva vs. De Silva,* (1913) 2 C. A. C. 121,
(31) Woodfall (18th edition) Page 259 mentioned in 25 N, L. R. at 182.
(32) 25 N. L. R. at 182.
(33) Wille (2nd edition) p. 92.

except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. (34) When once the terms are proved in this manner, no evidence of any oral agreement or statement shall be admitted as between the parties or their representatives in interest for the purpose of varying, adding to or subtracting from its terms. (35) This rule is, however, subject to important exceptions.

Exceptions.—(I) Any fact which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want or failure of consideration, want of capacity, wrong date, mistake of fact or law may be proved. (36)

(II) The existence of any separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms may be proved, but the Court will have regard to the degree of formality of the document.(37)

(III) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation may be proved. (38) Thus, where a lessor orally guaranteed that the land would yield 7200 nuts a year it was competent to the lessee to lead evidence of such oral guarantee as a condition precedent. (39) Where in an indenture of lease it was provided that a reduced rental should be paid so long as a certain debt due from the lessor to the lessee remained undischarged, and where subsequently, the lessor alleging that the debt was waived, sued for the full rental, it was held that oral evidence could be led to prove the waiver. (40) Proviso 4, of Section 92, of the Evidence Ordinance(41) is not appli-

(34) Section 91 of the Evidence Ordinance, Cap, ii.

(35) See Section 92 of the Evidence Ordinance Cap. 11.

(36) Proviso (1) of Sec. 92 of the Evidence Ordinance, Cap. 11; *Senaratne vs. Rodrigo*, (1919) 6 C. W. R. 205, (Mistake in description could be proved by oral evidence. *Kiri Banda vs. Marikar*, (1917) 20 N. L. R. 123 (Consideration.)

(37) Proviso (2) of Sec. 92 of the Evidence Ordinance, Cap. 11.

(38) Proviso (3) of Section 92 of the Evidence Ordinance, Cap 11.

(39) *Appuhamy vs. Dissanayake*, (1921) 23 N. L. R. 88 at 89.

(40) *Fernando and another vs. Saibo*, (1931) 9 Times 8.

(41) Cap. 11.

cable to leases required by law to be in writing.[42] Consequently, it was held in an old case that an agreement made subsequent to a deed of lease to accept a smaller rent than that stipulated in such a deed cannot be proved by evidence other than the notarial instrument.[43] However, in the case of *Kumarahamy at al vs. Gnanapandithan*,[44] the Supreme Court took the view that the rent may be varied by a non-notarial agreement, since the nature of the property leased and the period of the lease are the two factors which determine the necessity for a notarial document. Where the lessor was unable to give possession in terms of the lease, a subsequent oral agreement to waive the rent for eighteen months may be proved, since such an agreement is not a variation of the terms of the original lease, but is in fact a new agreement which was entered into after the lessor had been found unable to carry out the terms of the original lease.[45]

(IV.) Any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of the same description may be proved, provided that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract.[46]

(V.) Any fact may be proved which shows in what manner the language of a document is related to existing facts.[47] Where there was an agreement to enter into a lease when the new buildings were completed, oral evidence was admitted to show what was meant by the term "new buildings."[48]

(VI.) When the language used in a document is plain in itself but is unmeaning in reference to existing facts, evidence may be lead to show that it was used in a particular sense.[49] But when on the face of the document the language is ambiguous or

(42) *Karunaratna vs. Goonetileke*, (1916) 2 C. W. R. 128.
(43) *De Silva vs. De Silva*, (1907) 1 A. C. R. 107.
(44) (1939) 14 C. L. W. 30.
(45) *Dineshamy vs. Siyadoris*, (1921) 3 C. L. Rec 75.
(46) Proviso (5) of Section 92 of the Evidence Ordinance, Cap. 11.
(47) Proviso (6) of Section 92 of the Evidence Ordinance, Cap. 11.
(48) *Colombo Hotel v. Motoomul*, 21 N. L. R. 385
(49) Section 95 of the Evidence Ordinance, Cap. 11.

defective, (50) evidence cannot be led to supply the defects. When the language is plain, and applies correctly to existing facts, oral evidence cannot be led to shew that it was not meant to apply to such facts. (51)

(VII.) When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given to shew which of the persons or things it was intended to apply to as where a person lets out his "White House" and he has two "White Houses." (52)

(VIII.) When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply. (53) Thus where the subject matter of a transfer is described as lying within certain boundaries and is described as comprising certain lots in a plan, but there is a lot in the plan which is outside the boundaries stated, evidence may be led to prove that the lot was included in the transfer. (54)

(IX.) Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, local and provincial expressions, of abbreviations and of words used in a peculiar sense. (55)

(X.) Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the agreement. (56)

REGISTRATION.

Apart from the necessity of entering into a notarial document for leases beyond a certain period, it is also expedient that

(50) Section 93 of the Evidence Ordinance, Cap. 11.
(51) Section 94 of the Evidence Ordinance, Cap. 11.
(52) Section 96 of the Evidence Ordinance, Cap. 11.
(53) Section 97 of the Evidence Ordinance, Cap. 11.
(54) *Ratranhamy v. Singho*, (1928) 30 N. L. R. 197.
(55) Section 98 of the Evidence Ordinance, Cap. 11.
(56) Section 99 of the Evidence Ordinance, Cap. 11.

the parties should observe another formality, namely, registration. The law as to registration is dealt with in Jayawardene on Registration [57] and the Registration of Documents Ordinance. [58] In this book a few observations are made regarding the effect of registration on leases.

Any instrument establishing any interest in or creating an encumbrance on land is an instrument affecting land, [59] and unless it is duly registered under Chapter III of the Registration of Documents Ordinance or in the books mentioned in Section 26 of the Land Registration Ordinance 1877, the instrument shall be void as against all parties claiming *an adverse interest on valuable consideration* by virtue of any subsequent instrument which is duly registered under the provisions of this Ordinance. [60] But fraud and collusion in obtaining such subsequent instrument or in securing prior registration thereof shall defeat the priority of the person claiming thereunder. [61] If the only interest created or dealt with is a tenancy at will or tenancy for a period not exceeding one month or for a period determinable by the landlord at a month's notice, then, the instrument creating such interest will not be one affecting land [62] and hence need not be registered.

Adverse Interest.—A lease by a usufructuary mortgagee and a subsequent Fiscal's Conveyance of the mortgagee's right, title and interest are adverse interests, and hence the one that is duly registered first has priority. [63] But where a person sold his property and subsequently leased it, Lawrie, J., was of opinion that no adverse interests were created, since although a lease is adverse to a sale because it prevents the purchaser from having complete possession, a sale

(57) Jayawardene on the law of Registration of deeds in Ceylon published in 1919 by the *Ceylon Daily News*.

(58) Cap. 101.

(59) Section 8 of the Registration of Documents Ordinance, Cap. 101.

(60) Section 7 (1) of the Registration of Documents Ordinance, Cap. 101.

(61) Section 7 (2) of the Registration of Documents Ordinance, Cap. 101.

(62) Section 8 of the Registration of Documents Ordinance, Cap. 101.

(63) *Uduma Lebbe v. Segu Mohamaau*, (1893) 2 C. L. R. 158 ; *Sennaiya Chetty v. Appuhamy*, (1885) 7 S. C. C. 111.

is not adverse to a lease because it merely changes the party to whom the rent is paid.(64) Where the property is sold subject to a lease and the purchaser buys it subject to the lease, even where the lease is not registered, the purchaser cannot bring a partition action, obtain a decree, and by registering the decree obtain priority over the lease.(65)

Valuable Consideration.—The subsequent deed in respect of which priority is claimed must be for valuable consideration. The words valuable consideration must be interpreted according to English Law.(66) A dowry deed conveying land is taken to be for valuable consideration although it purports to be a deed of gift. Such a deed obtains priority by registration.(67)

Stamps.

There is also another formality which has to be observed in entering into an indenture of lease or an agreement to lease. The indenture of lease must be duly stamped. The basis on which an indenture of lease has to be stamped is dealt with later.(68) Generally all instruments chargeable with duty and executed in Ceylon should be stamped before or at the time of execution;(69) such stamps should be cancelled by the party executing the same, and if it is a notarial instrument by a notary writing across the stamp his name or initials and the true date of his so writing and the number of the deed.(70) If an instrument chargeable with duty is not duly stamped it shall not be admitted in evidence for any purpose or acted upon.(71) But if it is once admitted in evidence it is not open to the parties to object to the instrument being admitted.(72) Its admission cannot be questioned in the Appellate Court.(73) If the proper stamps are not affixed the

(64) *Uduma Lebbe v. Segu Mohamedu*, (1893) 2 C. L. R. at 160.

(65) *Gamage Siman v. Usubu Lebbe*, (1894) 3 S. C. R. 113.

(66) *Salmān v. Obilias*, (1918) 6 C. W. R. 1.

(67) *Jayasekere v. Wanigaratna*, (1909) 12 N. L. R. 364.

(68) See Appendix 1.

(69) Section 14 of the Stamp Ordinance, Cap. 189.

(70) Section 7 of the Stamp Ordinance ; Section 30 (7) of the Notaries Ordinance. Cap. 91.

(71) Section 35 of the Stamp Ordinance, Cap. 91.

(72) (11931) (1915) 5 Bal Notes 21. 161 D.C. Galle, Section 37, Cap. 189.

(73) *Fernando v. Peiris and another*, (1937) 8 C. L. W. 142.

instrument itself is not invalid,[74] but the duty and the penalty may be recovered by the proper officer.[75] Generally the expenses of providing proper stamps in the case of a lease or agreement to lease are borne by the party who agrees to pay the same. But in the absence of such an agreement the expenses should be borne by the lessee or the intended lessee as the case may be.[76]

CHAPTER VIII.

USE AND OCCUPATION.

Nature of the Action.

In certain circumstances a landlord though he cannot bring an action based on tenancy may yet bring an action for use and occupation. The law governing the subject in Ceylon is the English Law. In the case of *Sinno Appu vs. Appu Sinno* [1] it was held that the action for *use and occupation* which obtained in England has been formally and authoritatively adopted into the law of Ceylon. This is one of the numerous instances where the English Law has been introduced tacitly into Ceylon. An action for use and occupation is an action for compensation arising out of an obligation attaching to the person who has enjoyed the benefits under a contract to reimburse the other party.[2] To quote the words of Lord Ellenborough in the case of *The Dean and Chapter of Rochester vs. Pierce*:[3] "The action for use and occupation

(74) See Proviso Section 38 of Notaries Ordinance, Cap. 91, Section 8 of Stamp Ordinance, Cap. 189; Proviso (2) Section 37 of Stamp Ordinance; Section 44 of Stamp Ordinance, Cap. p. 189.

(75) See Sections 32, 35, 37 of Stamp Ordinance. Cap. 189.

(76) Section 27 (d) of Stamp Ordinance. Cap. 189.

(1) *Perera vs. Fernando*, (1925) 6 Law Recorder, 171. (1864). Ramanathan reports, 1863-68 page 83. 1874—Grenier Reports, C.R. 1 (C.R. Gampaha 29129). 1873 Grenier 16 (C.R. Batticaloa 3318). *Perera vs. Thelenis*, (1883) 5 S.C.C. 133.

(2) (1864) Ramanathan Reports 1863-68 page 83. *Sinno Appu vs. Appu Sinno* (1925) 6 Law Recorder, 171. *Kanagaratne vs. Banda*, (1923) 25 N.L.R. 129 at 135. *Wijesiriwardene vs. Soysa*, (1906) 1 A C.R. 43. *Dissanayake vs. Pranciscu*, (1899) 1 Tamb. 23.

(3) (1808) 1 Camp. 466.

does not necessarily suppose any demise; it is enough that the defendant used and occupied the premises with the permission of the plaintiff."

In the case of *Perera vs. Thelenis,*(4) the Court took the view that an action for use and occupation is based on contract. This is the earlier view taken by the English Courts. It will be more correct to say that to bring this action the defendant must have held or occupied the premises as tenant of the plaintiff, or with his permission or sufferance. (5)

CASES IN WHICH AN ACTION FOR USE AND OCCUPATION LIES.

Generally speaking, the action for use and occupation lies in all cases where there was occupation of the premises as tenant with the permission or sufferance of the plaintiff, but where due to some defect a proper lease had not been constituted. Hence the action would lie in the following cases:—

(1) When parties purport to enter into a lease but there is no agreement for rent, and the tenant enters into occupation, then the occupier is liable to pay the owner a reasonable amount for the use and occupation of the property. (6)

(2) Where some agreement is made between the parties by which one of them has the use of property belonging to the other without some consideration being fixed, no contract of lease is constituted but the occupier may be sued for use and occupation.(7)

(3) Where the provisions of the Prevention of Frauds Ordinance (8) are not complied with an action may be brought for use and occupation if the tenant has entered into possession. (9) The tendency of our Courts is to regard such a person as a monthly tenant. (10)

(4) (1883) 5 S.C.C. 133.
(5) Woodfall's page 568 (15th Edition).
(6) Wille 30.
(7) Wille 29, 30 (1st Edition)
(8) Cap. 57.
(9) *Kanagaratne vs. Banda,* (1923) 25 N.L.R. 129 at 135, 136, 137. *Jayawickreme vs. Arnolis Appu,* (1914) 1 C.W.R. 71. *De Silva vs. De Silva* (1913) 2 C.A.C. 121. *Dissanayake vs. Pranciscu,* (1899) 1 Tamb. 23.
(10) *Wambeck vs. Le Mesurier,* (1898) 3 N.L.R 105. *Bultjens vs. Carolis Appu,* (1919) 21 N.L,R. 156. *Ukkuwa v. Fernando,* (1936) 1 C. L. J. R. 96.

Cases in which an Action for Use and Occupation Does Not Lie.

1. An action for use and occupation is an action *ex-contractu* and does not lie where the defendant has never admitted title in the plaintiff but has occupied under a claim of title hostile to that of the plaintiff.(11) An action for use and occupation does not lie unless there has been a contractual relationship express or implied between the parties.(12) Thus, where A, the prospective vendee of a land was put in possession of the land, but later the sale was not completed and the owner of the land brought an action for use and occupation after serving A with notice to quit, it was held that such an action could not be brought since the facts did not show that there was an implied contract to pay rent.(13)

2. The action does not lie to enforce an agreement which should have been notarially entered into. Thus where the plaintiff alleged that the defendant had use and occupation of a certain paddy field and had promised to give him sixteen bags of paddy or their value of Rs. 80/- the Court took the view that the action was not maintainable in the absence of a notarially executed agreement.(14) But the action is maintainable if the plaintiff sues on a *quantum meruit* and does not seek to enforce the agreement.(15)

3. An action for use and occupation does not lie also where the defendant has never entered and taken possession of the leased premises.(16) But constructive occupation is sufficient. Thus the lessee who had sublet the premises may be sued for use and occupation though he himself was not in actual occupation.(17)

4. A lessee, who overholds after the contract of tenancy has been terminated either by notice or otherwise, cannot be sued for

(11) *Perera vs. Thelenis Peries*, (1883) 5 S.C.C. 133. *Dambaradeniya vs. Vidane Henaya*, (1921) 3 Law Recorder, 87.

(12) *Isla Marikar vs. Andre Appu* (1907) 10 N.L.R. 178.

(13) *De Mel et al vs. Amarasinghe* (1938) 12 C.L.W. 14.

(14) *Charles vs. Baba*, (1920) 22 N.L.R. 189.

(15) *Wijesiriwardene vs. Soysa*, (1906) 1 A.C.R. 43.

(16) Woodfall 569 (15th Edition).

(17) Woodfall 574 (15th Edition).

use and occupation if the landlord treats him as a trespasser. The proper action is an action for damages. But if the landlord has acted so as to raise a presumption of a continued tenancy then he may sue the tenant for use and occupation.[18]

5. An action for use and occupation does not lie where the defendant has occupied the premises as a tenant of some other person or as a wrong-doer.[19] Thus, it is submitted that a fideicommissary cannot sue the tenant of the fiduciary for use and occupation even after the death of the fiduciary and the consequent vesting of the property in the fideicommissary. But if the tenant accepts the fideicommissary as his new landlord either by word or act then the fideicommissary may claim rent from him, as there is a tacit relocation.[20]

Evidence.

In *Wijesiriwardene vs. Soysa,*[21] it was argued that where a lease which should have been notarially executed was entered into informally it was void for all purposes under section 2 of the Prevention of Frauds Ordinance,[22] and consequently, an action for use and occupation was not maintainable. It was further contended that an action for use and occupation does not lie in view of the provisions of section 91 of the Evidence Ordinance,[23] which state that in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given except the document itself. But Wood Renton, J., took the view that all the evidence that is necessary to enable the owner of a land to recover compensation on a *quantum meruit* could be proved. Hence evidence may be led to prove the entry of the person as a lessee with the owner's consent, the use and occupation of the subject demised in pursuance of the entry, and the amount of reasonable compensation payable.[24] There may be various ways in which the relationship of landlord and tenant could be established.

(18) Woodfall 574 (15th Edition).
(19) *Dambaradeniya vs. Vidane Heniya* (1921)3 Law Rec. 87; Woodfall 569 (15th Edition).
(20) Voet 19. 2. 16 (Berwick page 204, 205). *Vide* also Voet 19. 2. 13; Berwick 200, 201.
(21) (1906) 1 A.C.R. 43.
(22) Cap. 57.
(23) Cap. 11.
(24) (1906) 1 A. C. R. 43 and 47. Supra.

Payment of rent is a sufficient recognition of the landlord's title to support the action. A judgment in a previous action for use and occupation between the same parties is *prima facie* evidence that the defendant occupied with the sufferance of the plaintiff. But parol evidence may be led to show for which premises the judgment was obtained Notice to quit given by the defendant is sufficient evidence.(25) The defendant by way of defence can show that he surrendered the premises or quitted the premises after due notice before any rent claimed became due.(26)

Amount of Compensation.

In an action for use and occupation a reasonable amount could be recovered.(27) In England the defendant is ordered to pay what a jury may find the occupation is worth. If there was a specific rent agreed upon, then such rent is the proper measure of damages.(28) If the defendant did not have the use of the whole of the premises, or if there had been eviction from a part by reason of a defect in the plaintiff's title, the jury may ascertain the value of the occupation of the land actually enjoyed without regarding the amount of rent received on the agreement.(29) If the landlord had failed to perform certain repairs, the jury would find the reasonable value the occupation in the then state and condition of the premises was worth If the property was destroyed by fire, the jury would take this fact into account.(30) The same principles will be followed by a judge in Ceylon.

If the tenant holds over without the acquiescence of the landlord then the tenant is in unlawful occupation and damages could be claimed. But, on the other hand, if the tenant holds over with the acquiescence of the landlord then the amount granted for use and occupation will not necessarily be based on the rent paid before and a larger rent may be granted if the circumstances so require.(31) Where the landlord served notice to quit and also intimated that in the event of the tenant holding over, he should pay an enhanced

(25) Woodfall 581 (15th Edition).
(26) Woodfall 582 (15th Edition).
(27) *Dissanayake vs. Pranciscu*, (1899) 1 Tamb. 23.
(28) Woodfall 583 (15th Edition).
(29) Woodfall 583 (15th Edition).
(30) Woodfall 584 (15th Edition).
(31) Woodfall 584 (15th Edition).

rent, it was held that the amount due for use and occupation was not to be computed at the old rental but at a fair value of what such use and occupation was worth. The enhanced rental may be taken as a fair basis in assessing the amount due. (32)

CHAPTER IX.

ASSIGNMENT AND SUBLETTING.

The contract of letting and hiring like all consensual contracts is binding on the original parties to the contract. By act of parties the contractual rights and liabilities may be transferred to persons who are not the original parties to the contract. The interests of the lessor and the lessee respectively are assignable by act of party. (1) If the lessor assigns, the lessee must pay the rent to the assignee even though he may have paid the lessor the rent in advance. (2) Such an assignment may take place when the lessor sells the property, gives a legacy, or grants a usufruct to another person. (3)

When the interests in a lease are transferred by a lessee, a distinction has to be made between assignment and subletting. An assignment or cession of a lease is a transference by the tenant of all his *rights and obligations* under his lease to another person so that the assignee is substituted in place of the tenant. The tenant drops out altogether; he loses all rights and is relieved from all obligations and responsibility under the lease. (4) But a sub-lease has no such effect. It is a contract by which the original lessee lets the property to a third party for the whole or a part of the unexpired term of the original lease. A fresh contract of lease termed a sub-lease is created between the tenant and the

(32) *Jacob vs. Ebert* (1883) 6 S C. C. 70

(1) Lee 310 (3rd Edition).

(2) Voet 19. 2. 19. Vide Berwick 210 at 211.

(3) *Silva v. Silva* (1913) 16 N. L. R. 315; Vide Voet 19. 2. 19. Berwick 210 Walter Perera (2nd Edition) 664, *Allis v. Sigera* (1897) 3 N. L. R. 5.

(4) *Goonesekera v. Ramapillai* (1933) 35 N. L, R. 309 at 310, 13 Rec. 53; Wille 102, Lee 310.

sub-tenant. The original lease between the landlord and the tenant is not affected in any respect and remains in force. (5) As between the lessor and the sublessee there is no privity of contract, and therefore the rent under the lease is still payable by the lessee to the landlord while the rent under the sublease is payable by the sublessee to his landlord, that is to say, the lessee. (6) The right of the tenant to assign or sublet under the common law may be varied by agreement in accordance with the maxim: "*Modus et conventio vincunt legem.*" We shall first consider therefore the right of the tenant to assign or sublet when there is no agreement governing it and then consider his right when there is specific agreement regulating it.

Assignment Where There is no Agreement.

The rule in Roman Law was: "*nemo prohibetur rem quam conduxit, fruendam allii locare si nihil aliud convenit*'. (7) But this rule of Civil law has been varied by a number of Placaats of the Netherlands, the most important of which is that of the States of Holland of the 26th September 1658. The interpretation of these Placaats has led to a great divergence of opinion among not only the Roman-Dutch Jurists but also the Courts of South Africa. The different views of the Roman-Dutch Jurists are set forth in chronological order by Wille. (8) Of these Jurists those who based their opinions on the Placaats were unanimous in saying that a tenant of rural property was not allowed to sublet or cede his lease without the consent of the owner. Thus Neostadius, Voet, De Haas and Schorer took this view basing their opinion on the Placaats of 1515 and 1580. Vanderkeesel took the same view basing his opinion on the Placaats of 1658 and 1696. On the other hand, Grotius, Groenewegen, and Vanleeuwen, were of opinion that a tenant may sublet a rural tenement without the consent of the owner. (9) Therefore, in stating the Law of Ceylon, one has to consider whether these

(5) Wille 102. Lee 310.
(6) Wille 103. Lee 310.
(7) Code 4, 65, 6.
(8) Wille pages 93-99.
(9) Wille 99.

Placaats have been introduced into Ceylon. As to how much of the Statute Law of Netherlands was introduced in Ceylon there has been much controversy.

In *Karonchihamy v. Angohamy,* (10) the Court took the view that the Placaat of July 18, 1674 was never in force in Ceylon and it was for those who asserted and relied upon the operation of a law enacted since the date of the Dutch occupation of the Island in 1656 to show beyond all question that it operated and applied. Even as to those Placaats passed before 1656, if the long established custom is contrary to the provisions of the Placaats, the presumption is that they were never introduced or if introduced were discarded by disuse. (11) However interesting this question may be it is not possible to discuss it at length in this work. Reference may be had to the text books that deal with this subject. (12)

In *Goonesekara et al v. Johnsinno,* (13) the question whether the rights under a lease can be assigned without the lessor's consent was considered. Ennis J. in dealing with it says :—

" It would seem that in South Africa—in certain portions of it, it has been held that a lease of rural property cannot be assigned without the consent of the lessor, and this was decided on certain placaats, which it was held, had been introduced into the law of South Africa. The counsel for the appellant was unable to assure us that these Placaats had been introduced into Ceylon. On the contrary it would seem to have been always accepted that rights under a lease can be assigned without the permission of the lessor where there was no express provision in the lease." (14) In this case it was held that an assignee of a lessee could successfully bring an action for a declaration of title to the possession of the leased premises for the unexpired period of the lease even though the lessor's consent was not obtained for the assignment.

(10) (1904) 8 N. L. R. 1.
(11) *Silva v. Balasuriya* (1911) 14 N. L. R. 452.
(12) Walter Pereira (2nd Edition) 12 Lee 28. Jayawardene on Roman Dutch Law. 12.
(13) (1922) 4 Ceylon Law Recorder 133.
(14) (1922) 4 Ceylon Law Recorder 133 at 134.

In an assignment not only rights but also obligations are transferred. Therefore, as Professor Lee remarks,(15) it is in accordance with principle to hold that it can only take place with the landlord's consent. Dalton J., commenting on the decision in *Goonesekara v. John Sinno* says *obiter*:(16) "No question arises here (although it has been incidentally touched upon in the argument before us) as to whether consent of the lessor is necessary to effect a discharge of the original lessee of his liabilities under the lease. Consent of the lessor to an assignment is provided for in the lease and has been given. I might point out, however, that the decision (*Goonesekara v. John Sinno*) on this particular point, that where the question of consent is not referred to in the original contract a lease can be assigned without the consent of the lessor, the lessee thereby freeing himself from his liabilities under the lease does not appear to follow the common law as it is applied today in South Africa, and would also appear in Professor Lee's view to be contrary to principle."

Subletting When There is no Agreement.

In South Africa, in the absence of any agreement, the tenant of an urban tenement may grant a sublease without the consent of the landlord. In the case of a rural tenement it has been held in the Cape Colony and in the Orange Free States that the tenant should not grant a sublease without the consent of his landlord. These decisions, Wille says, proceeded on the ground that Art 9 of the Placaat of 1658 which enacted that tenants of lands could not make over their leases without the consent of the landlord (in writing) was in force in South Africa.(17) It has not been proved that this Placaat was introduced into Ceylon.(18) In the case of subletting, the rights only are assigned and the obligations between the lessor and the lessee are not affected. Therefore it is submitted

(15) Lee 310, 311.
(16) *Goonesekara v. Ramapillai* (1933) 35, N. L. R. 309 at 311, 13 Rec. 53.
(17) Wille 106.
(18) *Gunasekara et al v. John Sinno* (1933) 4 Ceylon Law Recorder 133.

that even on principle it is not wrong to sublet the premises without the lessor's consent.

But Voet says [19] that a tenant may sublet the leased property to another except in the following cases :—

(a) The tenant cannot sublet when the condition of the second lessee is such that his use would be more prejudicial to the thing hired than the user of the original lessee. Wille says [20] that this form of exception to the general right of subletting is not recognised in South Africa. In Ceylon too this exception does not seem to have been recognised.

(b) When the subtenant is going to use the property for a purpose other than that for which it was originally hired it cannot be sublet. It is submitted that in such a case the tenant is liable to the landlord for breach of an implied duty, namely, to use the property for no other purpose than that for which it was let, and on that ground the lease may be cancelled.

(c) Where the lessee is a *colonus partiarius*, he cannot sublet since a *colonus partiarius* is to be regarded more as a partner than as a lessee. This is based on the principle that one partner cannot introduce another partner without the consent of all the partners. In Ceylon agreements by which a person undertakes to cultivate the property of another in consideration of a promise a certain share of the produce are of this nature.

(d) When the landlord wishes to take the land himself at the rental offered to the subtenant the property cannot be sublet to a third person. Wille says [21] that this rule is abrogated in South Africa and is obsolete in certain colonies. In Ceylon a notarial lease being regarded as a *pro-tanto* alienation this rule ought to be considered obsolete.

Assignment and Subletting when there is Agreement.

Permission to Assign or Sublet :—An express provision that the tenant will have the right to assign the lease without the

(19) Voet 19. 2. 5. Berwick 194.
(20) Wille 109.
(21) Wille 110.

consent of the landlord, entitles him, if he does so, to be relieved of his obligations, and consequently, the tenant is not liable for rent becoming due after the cession. A right to assign the lease without any reference to the right to sublet gives the tenant the right to sublet the premises impliedly. But a clause permitting a sublease does not authorise an assignment, the reason being, that in an assignment the tenant transfers not only his rights but also his obligations. (22)

Prohibition against assignment and subletting.—When there is a prohibition against assignment and subletting a voluntary assignment made by a tenant in breach of an express agreement not to assign either absolutely or without the landlord's consent is not binding. The case is different if the cession was compulsory. (23) Compulsory cession takes place by operation of law, as, for instance, when the lessee is declared an insolvent. (24) The property of the insolvent vests in the assignee absolutely upon his appointment and not merely for the purpose of the trust. But in order that the property may so vest it is not necessary that a formal sequestration of the property should emanate from Court. (25)

Absolute Prohibition.—Where the lease contains an absolute prohibition against subletting a sublease made by the tenant in breach of the agreement can confer no rights on the alleged subtenant. Therefore, if the subtenant enters into occupation of the leased property the landlord is entitled to an ejectment order against him. (26) But the subtenant must be made a party to the case. A writ of possession issued under a decree entered in an action for ejectment against the tenant only, is not binding on the subtenant. (27)

Conditional Prohibitions.—A prohibition against assignment and subletting may be conditional and not absolute. The usual form of conditional prohibition occurs when there is a clause

(22) Wille 111.
(23) Wille 111, 112.
(24) Section 70, 71 of the Insolvency Ordinance, Cap. 82.
(25) *Janz v. Idross Lebbe* (1891) 1 C. L. R. 63.
(26) Wille 112, 113.
(27) *Mohammedu Haniffa v. Dassenayake* (1922) 4 Times See Chap. 24 "Persons bound by the decree."

which provides that the consent of the landlord is necessary. Such a condition must be specific. Thus, where there was a provision in a lease to the effect that the lessor should not withhold, except for exceptionally strong and good reasons, his consent to the lessee assigning all his interest in the said lease to any other party during the continuance of the lease, but there was no specific provision that the lessor's consent was absolutely necessary to effect an assignment, the Privy Council took the view that the above provision was not so specific in its terms as to justify the introduction by implication into the agreement a provision that the lease contained a covenant by the lessee not to assign or subdemise his interest without the consent of the landlord.[28] When the tenant asks for consent to assign the lease the landlord cannot arbitrarily refuse to give his consent.[29] Wille says:—"If the tenant asks the landlord for his consent and he refused the same the Court has no power to make a declaratory order compelling the landlord to give his consent. The tenant's proper course is to sublet or assign the lease in spite of the landlord's refusal. When the landlord applies to the Court for an ejectment order or other relief the Court will decide whether the landlord's refusal was reasonable or not."[30] When there was an assignment without the lessor's consent, in contravention of a clause prohibiting alienation without the written consent of the lessor (the Crown), the Supreme Court held that the assignment was valid until it was set aside by a Court of Law at the instance of the lessor, and that appropriate steps to set aside the alienation could only be taken by the parties to the lease and not by strangers.[31] The Privy Council, however, reversed this finding and held that the assignment was void and passed no interests to the assignees.[32] Where there is a condition in the lease that the land shall revert to the Crown if the lessee's interests are sold, the lessee has no saleable interest

(28) *Pless Poll v. Lady de Soysa* (1911) 15 N. L. R. 57 at 59 P. C.
(29) Wille 114.
(30) Wille 114.
(31) *Jayawardene v. Jayawardene.* (1936) 7 C L. W. 16, 39 N. L. R. 135, 16 Rec. 151.
(32) *Jayawardene v. Jayawardene et al* (1939) 14 C. L. W. 13, 18 Rec. 109.

and immediately upon sale in execution of the lessee's interest in the lease the land reverts to the Crown. (33)

Effect of a breach of Provision against Cession or Subletting.—Where there is a breach of a covenant against assignment or subletting without the consent of the landlord, neither under the English Law nor under Roman-Dutch Law could the tenant obtain relief from forfeiture in consequence of such a breach unless the penalty could be considered outrageous or, in the language of the Roman-Dutch Law, "*immanis*" in the circumstances of the particular case. (34) In the absence of any provision in the lease for its forfeiture upon a breach of a clause prohibiting subletting and assignment, Wille is of opinion (35) that the landlord can claim cancellation of the lease only if he is materially prejudiced. But if there is specific agreement to the effect that when there is a breach of a convenant of this nature there should be cancellation, then the landlord is entitled to ask for cancellation, even though the breach does not prejudice him. (36)

Waiver of Breach.

A breach by the tenant of a covenant against subletting may be waived by the landlord either expressly or impliedly. Waiver is implied when with full knowledge of the facts the landlord accepts rent from an assignee whom he is not bound to recognise. (37) Merely because the landlord had acquiesced in a particular breach it does not follow that he has thereby impliedly consented to subsequent breaches of the covenant. Thus, where a lessor, who has acquiesced in the breach of a convenant against subletting without his consent, sued for cancellation of the lease on a subsequent breach, it was held that the acquiescence in the previous breach did not involve a waiver of the right of forfeiture for the subsequent breach. (38)

(33) *Silva v. Kanakaratne* (1939) 15 C. L. W. 8.
(34) *Salieh v. Othuman* (1917) 4 C. W. R. 92 at 93.
(35) Wille 115.
(36) Wille 116.
(37) Wille 116.
(38) *Salieh v. Othuman* (1917) 4 C. W. R. 92.

PART II.

OBLIGATIONS AND RIGHTS OF PARTIES.

OBLIGATIONS OF THE LANDLORD.

CHAPTER X.

DELIVERY OF PROPERTY.

Duty to Deliver and Give Vacant Possession.

The lessor must give the lessee possession of the thing let at the time fixed in order that he may have the use of it. (1)

Duty to Deliver.—By the word delivery is meant actual delivery of possession. Mere symbolic delivery, as, for instance, where the lessor merely hands over the deeds, is not sufficient. There must be physical delivery of the right of occupation under the lease which alone enables the lessee to enjoy the rights conferred on him. (2) In the lease of a chose in action, as for instance, the lease of the rents due from a line of tenements, the requirement as to the delivery of possession is fulfilled by the execution of an assignment of the right to recover rents. A formal attornment from each tenant to the lessee is not necessary. (3) As it is the duty of the landlord to deliver the property he has to bear the expenses of the delivery of possession unless there is an agreement to the contrary. Thus the cost of discharging a bond should be paid by him if the land cannot be used by the tenant while it is subject to such security. (4) Similarly, where a property has been let for some special purpose which presupposes the fitting up or rearrangement of the property, the expenses of such alterations have to be borne by the landlord. (5) Notarial fees for executing leases are often shared by agreement. As a rule each party pays half the costs. (6) In Ceylon, in the absence of agreement, stamp fees are payable by the lessee. (7) Where there are two lessees it is doubtful whether delivery of possession should be given to both. Thus, where A and B took a land on lease but neither could get possession, and A assigned his rights to C who took

(1) V. D. L. 1. 15. 12. Henry's Translation 237, Buckland Text Book of Roman Law 500. (Edit.)

(2) *Wijanaike vs. de Silva* (1906) 9 N. L. R. 366. at 368; 1 A. C. R. 9; 3 Bal. Rep. 36.

(3) *Maraliya vs, Fernando* (1922) 24 N. L. R. 42.

(4) Wille 120.

(5) Wille 120.

(6) Wille 120.

(7) Section 27 (d) of the Stamp Ordinance, Cap. 189.

possession,. and B assigned his rights to D but neither B nor D could get possession, it was held that B and D could recover a part of the consideration and were also entitled to damages, the fact of C having obtained possession not affecting the case.(8) But in an earlier case, it was held, that some co-tenants could not sue a landlord for breach of covenant to give possession of the premises where one of them had already been given possession of the premises and was enjoying the benefits.(9)

Vacant Possession.—It is not sufficient if the lessee is given mere possession when there are others in possession. It must be possession unmolested by the claims of any person in possession.(10) Where the agent of the lessor forcibly marked off trees in the presence of protesting claimants while giving possession to the lessee, it was held that it did not amount to giving vacant possession.(11) In the absence of fraud or an express warranty of title, a vendee cannot decline to accept vacant possession on the ground that the vendor's title is defective. (12) It is submitted the same principles will apply to leases *mutatis mutandis*. But where the lessee himself had the branches tied round the trees leased at the bidding of the lessor five or six days after the lease bond was drawn up and after tying the branches had entrusted the trees to a man on the adjoining land, but later when he went to pick nuts he was prevented by a third party, it was held that actual physical possession had been given and that the lessee had exercised two acts of possession, namely, the tying of the branches round to prevent theft, and the giving of the trees in charge of a caretaker. (13)

Effect of giving vacant possession.—Both the text of the Roman-Dutch Law itself and its interpretation in a long and practically unbroken series of decisions establish as a rule of law

(8) *Danoris de Silva vs. Josinahamy* (1911) 2 Matara Cases 98.

(9) *Subehamy et al vs. Basnayake et al* (1893) 2 S. C. R. 41 at 43.

(10) *Ratwatte vs. Dullewa* (1907) 10 N. L. R. 304 F. B.

(11) *Wijayanaike vs. De Silva* (1906) 9 N. L. R. 366, 1 A. C. R. 9.

(12) *Jamis v. Suppa Umma* (1913) 17 N. L. R. 33 (F. B.)

(13) *Bawa vs. Dona Katrina* (1920) 8 C. W. R. 80.

the proposition that a lessee who has been put in vacant possession of the property demised cannot, in the absence of an express covenant by the lessor empowering the lessee to do so, make his lessor a defendant to an action brought by the lessee against a third party not claiming title under the lessor until and unless the lessee has been evicted by the decree of a Court of Law.(14) So that, till the lessee is evicted by due process of law, it is his duty to take steps to eject the trespasser once vacant possession has been given to him by the lessor.(15) But if the third party claims title from the lessor himself both the trespasser and the lessor may be sued in one action.(16)

Effect when vacant possession is not given.—Even before vacant possession is obtained the lessee may proceed to eject the trespasser who claims adversely to the lessor.(17) But in the case of *Perera vs. Rodrigo*,(18) Phear J., took the view that a lessee, by virtue of the title to possession alone passed to him by the lease, is not entitled to maintain an action for ejectment against a stranger to a lease in respect of lands of which he was never put in possession. The lessee who has not been put in possession of the property may also repudiate the lease and recover any rent which he has paid in advance.(19) However, to make the lessor liable the lessee must call upon the lessor to put him in possession. Thus, where a stranger was in occupation and the lessee did not call upon the lessor to put him in possession but himself brought an action against the trespasser and obtained judgment for possession and damages it was held that the lessee was liable to pay rent to the lessor in the absence of evidence to show that the lessee called upon the lessor to put him in possession and that the lessor had failed and neglected to do so.(20)

(14) *Alagiawanna Gurunanse vs. Don Hendrick* (1910) 13 N. L. R. 225 F. B. at 232, 233 Per Wood Renton, J.

(15) *Alagiawanna Gurunnanse v. Don Hendrick* (1910) 13 N .L. R. 225 at 232, 4 Weer. 63 at 65.

(16) *De Silva vs. Senaratne* (1932) 34 N. L. R. 188.

(17) *Pinhamy vs. Puran Appu* (1891) 1 S. C. R 144.

(18) (1878) 1 N. L. R. 99.

(19) *Wijeyanaike vs. De Silva* (1900) 9 N. L. R. 366, Wille 125.

(20) *Ratwatte vs. Rankira* (1915) 1 C. W. R. 88.

The Thing Let.

The landlord must deliver the property in accordance with any description as to the extent, nature or other qualifications agreed upon. (21)

Where the intention is clear a misdescription of the property will not vitiate the lease in accordance with the maxim, "*falsa demonstrata non nocet.*" Thus, where a party who was allotted a divided lot in a partition decree leased after the decree an undivided share of the land it was held that the intention of the lessor to demise his share under the decree was unmistakable and that the misdescription did not affect the validity of the lease. (22)

Effect of Mistake in Description.—In the absence of any fraud on the part of the lessor when the lands were leased, and in the absence of any dispute as to the lessee having received the whole estate which he meant to take on lease, he is not entitled to an abatement of the rent agreed upon on a mere error in describing the property as consisting of so many acres or as yielding a certain amount of rental. (23) But if the lessor had represented the property to be of larger extent and the misdescription in regard to the quantity is a *notable* one then the lessee is entitled to have the rent reduced in proportion to the extent found short and to ask for a rectification of the lease, or in the alternative to repudiate the lease. (24) Even a special clause in the indenture of lease exempting the lessor from responsibility for the quantity represented would not relieve him of liability, especially if the lessor knew the extent. (25) If the lease is *ad quantitatem* an abatement of rent can be claimed if a smaller extent is given.

The subject matter of the lease.—The lessee may claim not only the thing let but also the delivery of all things which are necessary for the due and proper enjoyment of the property. (26)

(21) Wille 119.
(22) *Fernando vs. Fernando* (1911) 14 N. L. R. 412.
(23) *Stork vs. Orchard* (1893) 2 S. C. R. 1 at 5 per *Lawrie J.*
(24) *Stork vs. Orchard* (1893) 2 S. C. R. 1 at 8 per *Withers J.*
(25) Voet 19. 2. 26; Berwick 220.
(26) Voet 19. 2. 14. Berwick 262.

Thus, if there is no access from the leased premises to a public thoroughfare but the landlord possesses a land which may be used as the means of communication between the two, the tenant may claim to have a right of passage.(27)

Time of Delivery.

The lessee should be placed in occupation of the property on the day agreed upon. If no day is fixed then the lessor should give possession on the day the lessee requests him to give possession and consequently as soon as the contract has been concluded. (28)

Remedies of the Lessee when Possession is not Granted.

(a) **Specific Performance.**—When the lessor fails to put the lessee in possession of the leased premises the lessee may ask for specific performance. The granting of this remedy is in the descretion of the Court. Wille says that lease is *par excellence* the type of contract in which the Courts will exercise their discretion in enforcing it, for it is a contract to deliver the occupation of property which is unique and special in character and damages are not adequate for a breach of such contract. (29) But the Court will not enforce specific performance where the landlord is not in a position to perform it. (30)

In the following cases it is impossible for the landlord to give occupation and therefore the Court will not grant an absolute order for specific performance. Where the property has been destroyed in the meanwhile, or where a building has not been completed, or where the landlord has no title, or where third persons who are ignorant of the lease have acquired real rights which are in conflict with those of the lessee, specific performance will not be granted. (31) Specific performance will be granted in Ceylon if there is a reasonable *causa* to support the contract. The rule that specific performance should be refused for want of mutuality must be considered from the point of view of the Roman-Dutch Law

(27) Wille 119.
(28) Wille 118.
(29) Wille 120.
(30) Wille 121.
(31) Wille 121.

and not the English Law. (32) In Ceylon specific performance will not be granted to enforce an informal agreement even if there has been part performance. (33) A claim for specific performance may be prescribed. Prescription starts running from the time when the performance of the obligation is due. When there is no fixed date of performance then prescription starts running from the moment of demand and refusal. (34) The Court may order specific performance by ordering the landlord to give occupation to the tenant, to sign the lease, and to execute the lease in writing and register it. (35)

(b) **Damages.**—The lessee can also claim damages actually suffered which includes the loss of profits and in addition he can recover any moneys he has advanced, if the landlord is responsible for the default. (36) When the landlord does not give him occupation at the date agreed upon, the tenant can institute an action immediately and claim the loss of profits for the whole term. (37) The tenant is not bound to accept occupation when it is later tendered ; but if the tenant has not made other arrangements such a tender by the landlord would mitigate the damages claimable. (38) Similiarly, where a person *bona fide* lets a property without title, and the true owner refuses to allow the tenant to occupy it, the landlord can escape liability if he tenders the tenant a habitation equally convenient. (39) As it is often difficult to assess the damages in case default is made, the Courts will enforce an agreement to pay liquidated damages if such an agreement is fair and reasonable and if the parties did not intend it to be regarded as a penalty. (40) In the case of the breach of an informal lease the tenant can only recover the money which he has paid by way of advance but he is not entitled to any

(32) *Abeyasekara vs. Gunasekara* (1918) 20 N. L. R. 404; 5. C. W. R. 242.

(33) *Arsekularatne vs. Perera* (1927) *Vide* 29 N. L. R. 342. *P. C.*

(34) *Ismail vs. Ismail* (1921) 22 N. L. R. 476.

(35) Wille 123, 124.

(36) *Saibo vs. Appuhamy* (1893) 2 S.C.R. 126; *Wijanaike vs. De Silva* (1906) 9 N. L. R. 366. Wille 124,

(37) Wille 125, 126.

(38) Wille 126.

(39) Wille 126.

(40) *Pless Pol vs. Lady de Soysa* (1909) 12 N. L. R. 45 at 48.

damages. Thus, where a lease requiring notarial execution was entered into informally, it was held that the tenant could not recover any damages for the breach, though he could recover any sums he had paid by way of advance after deducting a reasonable sum for use and occupation. (41)

Rescission.—If the tenant is not put in possession he may also rescind the contract as well as recover any money paid as advance. (42)

CHAPTER XI.

QUIET POSSESSION AND ENJOYMENT.

A tenant is entitled to the quiet enjoyment of the thing let for the full term of the lease. In Roman Law the lessee had only *detentio* of the leased premises. He did not have juristic possession. Hence the *locator* had to guarantee the *conductor* against eviction. (1) Though in modern times the lessee has juristic possession, yet without this guarantee a lease becomes futile. The lessee is entitled to quiet enjoyment of the thing let and there is an obligation on the part of the landlord and third parties not to interfere with his enjoyment of the property. (2) The tenant may be either dispossessed or disturbed by the landlord himself, by a person having a lawful title, or by a person who has no manner of title whatsoever. The disturbance may be due to an event over which the parties had no control (*vis major*). These are considered under different headings and the appropriate remedies available to the tenant are also briefly discussed in this chapter.

(41) *De Silva vs. De Silva* (1913) 2 C. A. C. 121 at 124.

(42) *Kuruneru vs. De Silva* (1894) 3 A. C. R. 155.

(1) Buckland Text Book of Roman Law (2 Edition.) 500.

(2) V. d. L. 1. 15. 12. Henry's Translation, page 238.

Landlord's Duty not to Dispossess or Disturb the Tenant.

Dispossession.—It is the duty of the landlord not to dispossess the tenant during the term of the tenancy. (3) Dispossession may take various forms. There may be actual ejectment of the tenant by the landlord. The landlord may barricade the entrance to the premises or put a third person in possession in the absence of the tenant. (4) But where the barricading was done for the mutual benefit of both parties the tenant cannot claim damages. (5) The Roman-Dutch authorities say that when a landlord requires the house through some necessity which did not exist at the time the lease was entered into (*ex nova causa*) then the tenant can be dispossessed. (6) In South Africa it has been declared by legislation in some places that no lease shall become void on this ground. (7) In Ceylon, a notarial lease is regarded as a *pro-tanto* alienation. (8) Hence it is doubtful whether on this ground a landlord can take back, during the period of lease, the property which he has leased notarially. In the case of an informal lease he can always take back the property provided he gives due notice to the tenant.

Tenant's Remedies for Dispossession.—If a tenant is dispossessed by the landlord, he may claim to be re-instated by bringing a *rei vindicatio action*. As a notarial lease is a *pro-tanto* alienation, the lessee has, during his term of lease, the same remedies as an owner. (9) As regards the question whether a lessee can bring a possessory action, the Court took the view, in *Perera vs. Sobana*, (10) that the lessee could bring such an action. But Walter Pereira says that it is doubtful whether a lessee can bring a possessory action against his lessor on the strength of his so called possession. (11) The lessee may also claim

(3) Wille 132.
(4) Wille 132, 133.
(5) Wille 133.
(6) Grotius 3. 19. 11 Lee's Translation, page 389; Voet 19. 2. 16; Berwick p. 212, *Vide* contra Vander Keesel Thesis 675. Lorenz Trans. 242, 243.
(7) Wille 133, 134.
(8) *Goonewardene vs. Rajapakse* (1895) 1 N. L. R. 217 at 219.
(9) *Goonewardene vs. Rajapakse* (1895) 1 N. L. R. 217.
(10) (1884) 6 S. C. C. 61.
(11) Walter Pereira Laws of Ceylon (2nd edition) Pages 544, 545.

damages. (12) He may accept the repudiation of the lease and claim any rent paid in advance in addition to the damages for loss, if the interference was of such a nature that the tenant could not use the premises for the purpose for which they were let. (13) In the case of an informal lease the damages must be confined to one month from the date of possession. (14)

Disturbance.—The landlord has a duty not to interfere with the tenant's enjoyment of the property. If he enters the land with intent to commit an offence or to annoy, he will be guilty of criminal trespass. (15) If he enters the property and interferes with the commodious use of the property, he will be liable in damages.

The commodious use of the property should be given to the tenant. (16) The landlord may interfere with the commodious *usus* of the tenant by unlawful omissions as, for instance, by his failure to repair the property, or by unlawful commissions, as where he cuts off supply of electricity merely because the tenant has failed to pay the meter rent and electric charges. (17)

The Tenant's Remedies for Disturbance.—If commodious use to which the tenant is entitled is seriously interfered with, the tenant is entitled to cancel the lease. (18) According to Voet, it is one of the just causes which enable the tenant to quit the premises and entitle him to refuse to pay the rent which has accrued after the commodious use was interfered with. (19) If the interference is of a minor character, the tenant may ask for an interdict under the Roman-Dutch Law against the landlord restraining him from committing the nuisance. (20) The procedure available under the Roman-Dutch Law is not available under our law. (21) Under our law an injunction may be granted in appropriate cases. (22)

(12) Wille 135, 136.
(13) Wille 135.
(14) *Rengasamy vs. Coonjimoosa & Co. et al* (1924) 2 Times 153.
(15) *Rodrigo vs. Fernando* (1899) 4 N. L. R. 176.
(16) Voet 19. 2. 23; Berwick 215.
(17) *Dissanayake et al vs. Paulusz* (1936) 5 C. L. W. 48. 15 Rec. 209.
(18) (1936) 5 C. L. W. 48 at 50. 15 Rec. 209.
(19) Voet 19. 2. 23; Berwick 215.
(20) Wille 135.
(21) *Seyadoris vs. Hendrick* (1892) 1 S. C. R. 152.
(22) Section 86 of the Courts Ordinance, Cap. 6.

Eviction by Person Who Has Legal Title.

It is an implied duty of the landlord to guarantee that the tenant is not disturbed in his use or enjoyment of the property by a third person in the exercise of a legal right. (23)

Tenant's Remedies.—The tenant who had been in possession and who was dispossessed by a person otherwise than by process of law can bring a possessory action though the latter may have a better title. (24) This remedy is available to a bona-fide lessee even when the lease is technically defective. (25) Where the third person claims title through some person other than the landlord the tenant has no cause of action against the landlord till he is evicted by due process of law. (26) Therefore the tenant cannot, in the absence of an express covenant empowering him to do so, make the lessor a party defendant and claim damages against him in an action by the tenant against a trespasser for declaration of title. But if there was an express covenant in the deed of lease to the effect that in the event of any dispute in respect of the lease the lessor should warrant and defend the rights of the lessee, then it is the duty of the lessee to take proceedings against the interrupter and also to call upon the lessor to warrant and defend title. (27) If the lessor was present and was a party to the case and judgment was delivered against the lessee, merely because the lessee did not take any step to appeal from that order, the lessee will not be debarred from recovering damages from the lessor. (28) The rule that a lessee who has obtained vacant possession of the leased premises must in the first instance sue the trespasser in ejectment does not apply where the trespasser claims title through the lessor. In such a case the lessee may sue also the lessor for damages. (29)

(23) V. D. L. 1. 15. 12. Henry's Translation p. 238.

(24) *Dingiriya vs. Payne* (1908) 11 N. L. R. 105.

(25) *Fernando et al vs. Fernando et al* (1910) 13 N. L. R. 164.

(26) *Alagiawanna Gurunnanse vs. Don Hendrick* (1910) 13 N. L. R. 225 at 232.

(27) *Perera vs. Cooray* (1906) 1 A. C. R. 32.

(28) *Siriwardene vs. Banda* (1920) 22 N. L. R. 254.

(29) *De Silva vs Seneviratne* (1932) 34 N. L. R. 188.

If evicted by due process of law the tenant may claim damages if the flaw in the landlord's title was in existence at the date of the lease whether the landlord knew of it or not. (30) However, if the tenant knew of the flaw at the time the lease was entered into, he cannot recover damages. (31) Although both parties were aware of the defect in title, if an express guarantee was entered into by the landlord, the lessee can claim damages. (32) If the defect supervenes after the lease was entered into, then the landlord is only liable if the defect was due to his act or default. (33) The *quantum* of damages would be the actual loss sustained and the profits not obtained, which include the extra rent for which the tenant may have sublet the premises. (34)

Eviction by a Person Who Has No Legal Title and Against Whom an Action is Possible.

The landlord does not guarantee the tenant against dispossession or disturbance by persons who have no title to the property and against whom a remedy lies. The reason for this rule, says Wille, (35) is that the tenant has sufficient *locus standi* of his own to enforce the appropriate legal remedies. Hence a tenant who is merely deprived of the use of the subject matter is not relieved of the liability to pay rent if he is deprived of its use by the act or default of a party against whom he has a legal remedy. (36) Thus, where the lessee was temporarily prevented by rioters from enjoying the property, the lessor was able to claim rent from the lessee for that period, as it was the duty of the lessee to look after his possession and to recover it by possessory action if he was wrongly dispossessed. (37)

Tenant's Remedies.—The tenant can bring a possessory action (38) and in addition, can claim damages against the person who ousts him. (39)

(30) Wille 137; Voet 19. 2. 17; Berwick 205, 206.
(31) Wille 137; Voet 19. 2. 16. Berwick 204.
(32) Wille 137.
(33) Wille 137
(34) Voet 19. 2. 17; Berwick 206.
(35) Wille 138.
(36) *Finlay vs. Denison* (1907) 2 A. C. R. 80.
(37) *Omardeen vs. Marikar* (1916) 3 C. W. R. 123.
(38) *Perera vs. Sobana*, 6 S.C.C.61.
(39) Wille 138.

Eviction by Person Who Has no Title and Against Whom no Remedy Lies or Eviction Caused by Vis Major.

It is only when the trespasser is amenable to the Courts that the tenant can obtain redress from him. If the entry was by an enemy, whom the tenant could not resist, he is entitled to a remission of rent, (40) but for a mere criminal entry by thieves, the landlord is not liable. (41) Where the commodious use is interfered with by *vis major* as, for example, by an inundation, the tenant is entitled to remission of rent. (42)

CHAPTER XII.

MAINTENANCE OF LEASED PREMISES.

It is the duty of the landlord to maintain the property let in a proper state of repair so that the lessee may have the due enjoyment of it.(1) The landlord must do this at his own expense.(2) He has to make the necessary repairs to the doors, windows, roofs etc. which have deteriorated by age or otherwise.(3) He must also remedy all defects or flaws in the premises which unreasonably interfere with the use of the premises for the purpose contemplated. However, it is not incumbent on him to make structural alterations or improvements to the premises.(4) He must repair not only the premises but also all fixtures and fittings which form the subject matter of the lease.(5)

Cases in which the Landlord is Exempted from this Duty.

(1) **When the Tenant Takes Upon Himself the Burden of Repairs.**—The landlord is relieved of this duty where by

(40) Voet 19. 2. 24, Berwick 216.
(41) (1899) Koch Reports 14.
(42) Voet 19. 2. 24, Berwick 216.
(1) V. d. L. 1 15.12. Henry's Translation 238. Grotius 3.9.12. Lee's Translation 389.
(2) 2 Thomson 381: *Poynton v. Cran* (1910) A. D. 205 at 211, 212; *Cape Town Municipality v. Payne* (1923) A. D. 207 at 218.
(3) Voet 19.2.14. Berwick 202.
(4) *Poynton v. Cran* (1910) A.D. at 227.
(5) *Poynton v. Cran* (1910) A. D. 205.

express contract the tenant has taken upon himself the burden of ordinary repairs.(6) Such an agreement must however be clear and explicit and the duty of proving it's existence is on the landlord.(7) Usually clauses which impose the duty of making repairs are difficult to interpret and must be strictly construed.(8) If the tenant agrees to relieve the landlord of a portion of his obligation only, he does not thereby release him from the remainder as well, and, consequently, the duty of making repairs must be shared by the parties.(9) An undertaking by the tenant to keep the leased premises in good and tenantable repair does not relieve the landlord of the obligation of placing them in due repair at the commencement of the lease.(10) When a lessee undertakes to repair the premises, the repairs are restricted to those necessary for the maintenance of the buildings. If he erects any new structure with the lessor's consent, any oral agreement regarding the incidence of cost and which is not inconsistent with the terms of the written lease could be proved.(11)

(2) **When Damage is Caused by the Act of the Tenant.**— The landlord is also relieved of his duty to repair when damage has been occasioned to the property hired by such fault on the part of the tenant as that which would render him liable by the nature of the contract to make good.(12) The reason for imposing the duty of making these repairs on the tenant is that he should on the expiry of the lease restore the premises uninjured to the landlord.(13) The landlord takes only the risk of the premises being deteriorated through fair wear and tear, but not the risk of damage which might be caused by the intentional or negligent acts of the tenant.(14) Wille, citing Pothier, says that, in an inquiry to determine who is responsible for such

(6) Voet 19.2.14. Berwick 202.
(7) Wille 141, 142.
(8) *Shapiro v. Yutar* (1930) C. P. D. 92; 1930 B. & S Dig. 212.
(9) Wille 142, *Poynton v. Cran* (1910) A. D. 224.
(10) Wille 142, *Poynton v. Cran* (1910) A. D. 224.
(11) *Mohamado v. Pattumuttu* (1909). 1 Curr L. R. 132 at 134.
(12) Voet 19.2.14. Berwick 202.
(13) Wille 141. Voet 19.2.32 .Berwick 227.
(14) Wille 141.

damage, the landlord is aided by two different presumptions in his favour : the first is that the premises were originally in good condition, and the second is that damage to the inside of the leased premises was caused by the default or negligence of the tenant except in cases where the landlord's servants had access to the premises.(15) In Ceylon the Law of Evidence is codified and hence it is submitted that facts cannot be presumed except those which the provisions of the Evidence Ordinance (16) expressly state could be presumed. In a *casus omissus* the English Law of Evidence for the time being would apply.(17) The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.(18) The presumptions mentioned by Wille are presumptions of facts and not presumptions of law and if they could be brought within the purview of Section 114 of the Evidence Ordinance, (19) they would become applicable in Ceylon.

(3) **When the Tenant Waives his Rights.**—The landlord is under no duty to repair if the tenant impliedly waives his rights, as for example, where he enters into occupation of the leased premises with the knowledge of the existence of defects, and shows by his conduct that he accepts the premises in the condition in which it is given to him. (20)

Tenant to Vacate Premises During Repairs.

If the repairs are urgently needed and cannot be properly made while the tenant remains in occupation of the premises, the landlord may require the tenant to vacate the premises without becoming liable in damages for breach of contract. The tenant, however, need not pay rent for the period during which he was deprived

(15) Wille 141.
(16) Cap. II.,
(17) Section 100 of the Evidence Ordinance Cap II.
(18) Section 114 of the Evidence Ordinance Cap. II..
(19) Cap. II.
(20) Wille 143.

of the beneficial enjoyment of the premises, unless the repairs took only a few days to be effected. (21)

Remedies of the Tenant When Landlord Does not do the Repairs.

Where the lessor does not do the necessary repairs, he cannot be compelled to do them. The reason is that the duty is of such an uncertain and indefinite character that the Court cannot enforce its own judgment.(22) However, the lessee has any one of these remedies. He can do the repairs himself, he may abandon the use of the premises hired to him, or he may pay less rent in proportion to the time during which he has not had the use of the premises.(23)

(a) **The Tenant may make the Repairs.**—If the landlord neglects to keep the thing let in proper state of repair the tenant may himself do the repairs and deduct the amount spent on the repairs from the rent.(24) But to make the landlord liable due notice of the state of the premises must be given to the landlord in order to give him the opportunity to repair the premises himself.(25) The tenant cannot make structural alterations on the pretext of effecting repairs. The right of the tenant to have the repairs made is confined to repairs properly so called, that is to say, the remedying of such dilapidation and flaws as those which reasonably interfere with the use of the property for the purpose contemplated. But the right does not extend to the making of structural alterations.(26) The tenant must have actually effected the repairs. If the cost of repairs had been merely estimated but the repairs had not in fact been effected, the tenant cannot recover the estimated costs from the landlord.(27)

(b) **The Tenant may Quit the Premises.**—If the landlord fails to effect the necessary repairs to the house which has become useless for the purpose for which it was let, the

(21) Wille 143.
(22) Wille 143.
(23) 2 Thomson 381.
(24) 2 Thomson 381.
(25) *Caneganayagam v. Dixon* (1856), 1 Lor 2.
(26) Wille 144.
(27) Wille 144.

tenant is entitled to quit the premises even without due notice.[28] However, in order that the tenant may adopt this remedy the defect must be of such a serious nature as to render the premises practically useless for the purpose for which they were hired.[29] As a general rule, the tenant is not justified in quitting the premises if repairs could be effected within a reasonable time and the landlord is willing to do them. For the period during which he was deprived of the use of the premises, the tenant can claim remission of rent.[30]

(c) **The Tenant may Claim Remission of Rent.**—The tenant, while remaining in occupation of the premises may claim reduction or abatement of rent. He cannot claim remission for a temporary or trivial inconvenience which merely prevents him from occupying some portion of the premises with the same degree of comfort as usual. The amount of reduction of rent to which the tenant is entitled will be proportionate to the extent to which he has been deprived of the use of the premises.[31] The tenant has got the choice of one of the three remedies mentioned above, according to the circumstances of each case.[32]

Statutory Duty.

Apart from the common law liability to maintain the premises in good condition, a statutory duty is cast on the owner of the house, building or wall not to allow the same to be in a ruinous state or in a state which is dangerous to the inhabitants of such house or building or to the occupiers thereof or to passengers.[33] Whenever it appears to the Board of Health or to a Magistrate that any work or thing ought to be done as required by the Nuisances Ordinance[34] or by any by-law, the Board of Health or the Magistrate may give notice

(28) *Shockman v. Ratnayake* (1929) 30 N.L.R. 373, 6 Times 112, 10 Law Rec. 44.

(29) *Blidon v. Carasov* (1927) C. P. D. (1927) B. & S. Dig. 232.

(30) *Shapiro v. Yutar* 1930, C.P. D. 92 : 1930 B. & S. Dig. 212.

(31) Wille 144.

(32) *Shockman v. Ratnayaka* (1929) 30 N. L. R. 373 at 376. 10. Rec. 44.

(33) Section 2 (5) of the Nuisances Ordinance, Cap. 180.

(34) Cap. 180.

to the owner or the occupier, as the case may be, requiring him to perform it within a reasonable time. If the owner or the occupier, after due notice, does not perform it, the person entrusted with the performance of such work may notify the amount spent to the Magistrate's Court and after proof that it is a reasonable amount by the evidence of two or more witnesses the amount will be recovered as any ordinary fine imposed by the Court.(35) If the occupier executes the work on behalf of the owner the cost incurred by him should be paid by the owner.(36)

CHAPTER XIII.

WARRANTY AGAINST DEFECTS.

It is the duty of the lessor to warrant against the existence of material defects which make the subject matter unfit for the purpose for which it is let.(1) But the lessor at common law is only liable either if it can be shown that he had notice of the defective condition or if by the nature of his calling or profession such knowledge is implied.(2)

Landlord's Express Knowledge of the Defects.

Unless knowledge could be implied in law it is necessary that the landlord should have express knowledge of the defect in order to make him liable. So much so, that even where there was a special covenant to the effect that the landlord should repair, uphold, support and mend the premises with all manner of necessary reparations it was held that the landlord was not liable for the damage incurred by the collapse of a wall, whose defective condition

(35) Section 12 of the Nuisances Ordinance, Cap. 180.

(36) Section 13 of the Nuisances Ordinance, Cap. 180.

(1) V. D. L. 1. 15. 12. Henry's Translation p. 238. *Vide* 1873. Grenier Reports C. R. 11 at 15 C. R. Galle 44570 where the warranty was held to apply only to latent defects.

(2) *Martin v. Colombo Commercial Co.* (1909) 1 Curr L. R. 117 at 119. Per Wood Renton. J., Voet 19 2. 14, Berwick 203; Grotius 3. 19. 12, Lee's Translation p. 389.

the landlord was not aware of.(3) Similarly, where a landlord let a building for the purpose of storing flour and the landlord strengthened the floor but the floor gave way when some bags of flour were stored, on account of a latent defect in the subsoil of which he was not aware, it was held that he was not liable.(4) On the other hand, where the upper floor of a building was in a more defective condition than would have been apparent to the casual observer and the landlord knew that heavy goods were to be stored and the floor gave way when a reasonable amount of goods were stored, it was held that the landlord was liable for the damage caused, though the tenant had inspected the premises before he took it on lease, since it was the landlord's duty to keep the premises in such sufficient state of repair as to enable a reasonable quantity of goods to be stored therein.(5)

But a landlord who is aware of a defect in the premises is liable for any damage caused to the tenant by such defect. Thus, where the landlord knew that the roof of the building he had leased out was leaking, he was held to be liable for the damage caused by the water percolating through the roof.(6)

LANDLORD'S KNOWLEDGE OF THE DEFECT WHEN IMPLIED.

The landlord is liable if he has implied knowledge of the defects. In the following cases he will be deemed to have implied knowledge.

(a) Where the landlord is an architect or a building contractor his knowledge of the defect would be implied. The reason is that from the nature of his calling in life he ought to know the defects in the building he has leased out.(7)

(b) *A fortiori*, where the landlord was the actual builder or architect of the leased premises his knowledge of the defect will be presumed.(8)

(3) *Martin v. Commercial Co.* (1909) 1 Curr L. R. 117.

(4) *Mark v. Thompson Watson & Co.* 10 C. T. R. 516; 3 B. & S. Digest 1054.

(5) *Stewart & Co. v. Staines Executors*, (1861) 4 S. 152; 3 B. & S. Dig. 1054, 1055.

(6) *Nannucci v. Wilson & Co.* 11 S. C. 240; 3. B. & S. Dig. 1053, 1054.

(7) *Atkins v. Delpont*, 13. C. T. R. 686; 3 B. & S. Dig. 1053, 1054; Voet. 19. 2. 14; Berwick 203; 3 Maasdorp 240, (4th Edition.)

(8) 3 Maasdorp 240 (4th Edition).

(c) Where property is hired for a particular purpose it is the duty of the lessor to guarantee that it is reasonably fit for the purpose for which it has been hired and if damage occurs through it's not being so the lessor will be liable, since in such a case he places himself in the position of a person who is engaged in a trade or calling, namely, the business of letting out property for particular purposes.(9)

(d) Where the landlord expressly but recklessly warrrants that the premises are free from a particular defect or that they are suitable or sufficient for a particular purpose and it happens that they are not so suitable or sufficient he is liable in consequential damages.(10)

Cases in which the Landlord is not Liable Even when he Has Knowledge Express or Implied.

(a) If the tenant being aware of a defect enters into a lease he accepts the risk and loses his right to claim damages, unless the landlord, who also has knowledge of the defect, expressly warrants against the risk.(11)

If the tenant becomes aware of the defect only after entering into the contract, his retention and use of the premises without any protest to the landlord is, as a rule, sufficient acceptance of the risk. The principle *volenti non fit injuria* applies.(12) However, if the tenant protests but the landlord takes no steps and the tenant subsequently suffers damage when engaged in the proper use of the premises then the landlord is liable. A protest, however, is of no avail if it is clear to the tenant that it is out of the power of the landlord to remedy the defect.(13)

(b) The landlord is not liable where the damage is caused by the tenant's misuse. Thus, where a landlord employed a wooden support to remedy a defect in the arch of the window and the tenant with full knowledge of the defect and the method of repair

(9) 3 Maasdorp 241 (4th Edition.)
(10) Wille 148.
(11) Wille 149.
(12) Wille 150.
(13) Wille 150.

fixed shutters to the support and the continual use of the shutters loosened the support causing it to give way, as a result of which bricks fell on the tenant and injured him, in an action brought by the tenant against the landlord, it was held that latter was not liable.(14)

(c) The lessor is not liable if when he gave due notice to the tenant to leave the premises which had become dangerous with a view to repairing them the tenant refused to leave the premises, and was injured by a portion of the roof falling while the repairs were being done. (15)

(d) The landlord who lets a house for no particular purpose and who makes no representation as to the state of repair of the house is not liable for any damage which may be caused to the tenant by any obvious defect (patent defect) which exists at the time of the lease, especially when the tenant consents to repair it during the tenancy.(16) The landlord's warranty only extends to latent defects.(17) But the mere fact that a lessee carefully inspects the premises before hiring does not exempt the lessor from liability to pay damages in respect of a material latent defect known to the lessor and not disclosed by him.(18)

Landlord's Liability for Injury to Third Person.

The liability of a landlord for injury caused to a third person by a defect in the leased premises rests not on contract but on negligence.

The landlord is not an insurer and is not liable for the consequences of a latent defect which is not discoverable by the exercise of reasonable diligence. (19) He is liable when the defect is due to his negligence, such as failure to make external repairs reasonably necessary for the safety of the building.(20)

(14) *Jacobson v. Block*, (1906) T. S. 350; 3 B. & S.Dig. 1055.

(15) *Davids v. Mendelsohn*, 15 S. C. 367; 3 B. & S. Dig. 1055.

(16) *Henwood v. Brown*, (1869) Nat. L. R. 70; 3 B. & S. Dig. 1056.

(17) (1873) Grenier Reports C. R. 11 at 15; C. R. Galle 44570.

(18) *Watson v. Geard*, 3 E. D. C. 417; 3 B. & S. Dig. 1056.

(19) Wille 150.

(20) *Cape Town Municipality v. Paine* (1927) A. D. 7.20.

The landlord is not liable to a subtenant, there being no privity between them, for a defect in a building when he does not repair it, though he is liable for damage which may be caused to his tenant thereby. Thus, where a tenant contrary to the terms of his lease sublet the premises, it was held that the landlord was not liable to the sublessee for the damage caused to him through a defect which the landlord knew. (21)

CHAPTER XIV.

RATES AND TAXES.

Duty to Pay Taxes.

Grotius says that, in the absence of any agreement, custom, or statutory provision to the contrary, it is the duty of the landlord to pay all rates and taxes on the property. But taxes imposed by the state and towns on the fruits and profits must be borne by the tenant.(1) In Ceylon it was laid down in an old case that the tenant should pay the house tax in the absence of any statutory provision or specific agreement.(2) Our Courts have adopted this view following the English practice. In England the ordinary rate levied by local authorities is the general rate which is generally assessed upon and payable by the occupier.(3) In Ceylon the trend of legislation is to make the landlord ultimately liable for rates and taxes.

Municipal Taxes.

The Municipal Councils Ordinance (4) provides that if taxes are not paid into the Municipal office within such time as the Chairman shall direct, a warrant signed by the Chairman shall be issued

(21) *Atkinson v. Hay*, 11 C. T. R. 197; 3 B. & S. Dig. 1056.

(1) Grotius 3. 19. 15; Lee's Translation 391.

(2) *Moir v. Garsten* (1820-33) Ramanathan Reports 128.

(3) 20 Halsbury 186 (2nd Edition).

(4) Cap. 193.

to some collector or other officer of the Council named therein, directing him to levy such rate or tax and the costs of recovery by seizure and sale of all and singular movable or immovable the property of the proprietor or of any joint proprietor, of the premises on account of which such rate or rates may be due, and of all movable property, to whomsoever the same may belong, which may be found in or upon any such premises; and in the case of non-payment of any tax or taxes, to levy the same and the costs of recovery by seizure and sale of the property on account of which tax or taxes may be due, and of all and singular the immovable or movable property of the defaulter.(5) But the Council should not seize any movable property which may be found in or upon any house or land in respect of which such rates are due for two quarters next preceding such seizure, unless such property belongs to any person who was the owner, joint owner of the building, land, or tenement at the time the arrears beyond such two quarters accrued and became due; or unless such movable property belongs to any person who had occupied the said house, building, land or tenement at the time the arrears beyond such two quarters accrued and became due.(6) The property seized in virtue of such warrant shall be sold by public auction and after deducting the amount due by way of taxes and costs the balance shall be paid to the owner.(7)

The property of the Crown is not liable to be seized and sold for the recovery of any rate or taxes which may be due from any person holding, occupying or enjoying any house, buiiding, land or tenement, which is the property of the Crown, under any agreement, contract or permit, either express or implied, with or from the Crown (8)

The occupant of any house, building, land, or tenement not being the owner or joint owner thereof, whose property has been seized as aforesaid, or, who to avoid such seizure, or, after

(5) Section 135 of the Municipal Councils Ordinance; Cap. 193.
(6) Section 118 of the Municipal Councils Ordinance; Cap. 193.
(7) Section 139 of the Municipal Councils Ordinance; Cap. 193.
(8) Section 115 (3) of the Municipal Councils Ordinance; Cap. 193.

seizure to avoid a sale of such property, has paid the amount of rate or rates due in respect of such house, building, land, or tenement, and costs, may deduct the amount paid by him, from the rent due by him on account of the said house, building, land or tenement to the owner or owners thereof, unless by the terms of the lease or agreement the tenant himself is bound and liable to pay such rate or rates.(9) Thus, it is clear that in the absence of agreement the duty of paying the Municipal taxes is ultimately cast on the landlord except in the case where the property leased belongs to the Crown.

Taxes Imposed by District Councils.

The Local Government Ordinance (10) has similar provisions. Every District Council, subject to such limitations, qualifications and conditions as may be prescribed by the Council, and subject to the approval of the Governor may levy or impose in respect of (a) any immovable property or any species of immovable property, situated in any urban area within its administrative limits, a rate on the annual value of such property; (b) any land not situated in an urban area within its administrative limits and cultivated in rubber, cocoa, tea, coconuts, cardamoms, citronella, cinnamon, arecanuts, tobacco, and such other products (not being food stuffs) as may from time to time be added to the number by the State Council, a uniform acreage tax on each acre or part of an acre of such land. (11) Lands used for charitable, educational or military purposes and burial grounds and certain other lands are exempted by the Ordinance from rates and taxes.(12) All rates and taxes levied or imposed under this Ordinance, in respect of which no other method of recovery is specifically provided for under this or any other Ordinance or under regulations made thereunder, shall be recoverable in the same manner as rates and taxes are recoverable under the Municipal

(9) Section 119 of the Municipal Councils Ordinance; Cap. 193.
(10) Cap. 195.
(11) Section 171 of the Municipal Councils Ordinance; Cap. 193.
(12) Section 172 of the Municipal Councils Ordinance; Cap. 193.

Councils Ordinance [13] and all the provisions of Sections 135 to 147 of that Ordinance with the necessary modifications shall apply.[14]

Police Tax.

For the purpose of creating a fund from which the expenses of the police payable by each town not created a Municipality or an urban area are to be defrayed, a tax shall be payable on all houses and buildings of every description and on all lands and tenements whatsoever within every such town to an amount equal to such percentage of the *bona-fide* annual value of such houses as the Governor may prescribe.[15] The tax so imposed shall be payable by the owner of the land.[16] If the tax is not paid after demand, it shall be lawful for the Government Agent to seize and sell any property whatsoever belonging to the person by whom such taxes are due, wheresoever the same may be found within the Province of such Government Agent, and also to seize any movable property, to whomsoever the same may belong which shall be found in or upon any house, building or land for which such tax is due.[17] It shall not be lawful for the Government Agent to seize any movable property which may be found in or upon any house or building in respect of which the tax is due for any arrears of tax due beyond two quarters next preceding such seizure, unless such movable belongs to any person who shall have occupied the house, tenement or building at the time when the said arrears became due, or unless such movable belonged to any person who was the owner at the time such arrears accrued and became due.[18] A tenant paying tax to avoid seizure of his property may deduct it from his rent unless by the terms of his lease he has undertaken to pay it.[19]

(13) Cap. 193.
(14) Section 182 of the Local Government Ordinance ; Cap. 195.
(15) Section 32 of the Police Ordinance ; Cap. 43.
(16) Section 39 of the Police Ordinance ; Cap. 43.
(17) Section 42 of the Police Ordinance ; Cap. 43.
(18) Section 43 of the Police Ordinance; Cap. 43.
(19) Section 53 of the Police Ordinance Cap. 43.

Sanitary Rates.

The Sanitary Board of any Province or District shall make and assess, with the sanction of the Governor, any rate or rates on the annual value of houses, lands, etc. situated within any town or village brought under the operation of the Small Towns Sanitary Ordinance.[20] Similarly, it may impose a water rate.[21] The rates are to be recovered and paid in the same manner as the Police assessment tax.[22] If any District Council is established under the Local Government Ordinance, [23] then the Small Towns Sanitary Ordinance [24] has no application to such place.[25]

Rates Imposed by Local Boards of Health and Improvement.

Any Local Board of Health and Improvement can impose with the sanction of the Governor rates or taxes on the annual value of all houses and buildings of every description situated within the town for which such board was constituted.[26] The Governor may exempt any town from the police tax and withdraw the police wholly or in part.[27]

The rate imposed shall be paid and recovered in the same manner as the police tax directed to be paid under the Police Ordinance.[28] The Local Boards Ordinance does not apply to places where District Councils have been constituted under the Local Government Ordinance.[29]

Irrigation Rate.

Under the Irrigation Ordinance [30] an irrigation rate with reference to any land to which it relates is a charge in favour of the Crown imposed upon the land in respect of water supplied or

(20) Section 8 of Small Towns Sanitary Ordinance; Cap. 197.
(21) Section 13 of Small Towns Sanitary Ordinance; Cap. 197,
(22) Section 11 of Small Towns Sanitary Ordinance; Cap. 197.
(23) Cap. 195.
(24) Cap. 197.
(25) Section 239 of the Local Government Ordinance; Cap. 195, Schedule 7 of the Local Government Ordinance; Cap. 195.
(26) Section 29 of the Local Boards Ordinance; Cap. 196.
(27) Section 31, Cap. 196.
(28) Section 33 of the Local Boards Ordinance; Cap. 196.
(29) Section 239 of the Local Government Ordinance; Cap. 195, Schedule 7 of the Local Government Ordinance; Cap. 195.
(30) Cap. 312.

to be supplied to the said land. It may be imposed in one of the ways mentioned in Section 2 (4) of the Ordinance. Every such rate is a first charge on the land and the proprietor of such land is bound to pay it.(31)

Taxes by Village Communities.

It shall be lawful for the inhabitants of any sub-division brought within the operation of the Village Communities Ordinance (32) to make such rules as they deem expedient for the purpose of imposing and enforcing within the limits of the sub-division an annual tax payable in labour which may be commuted in money in respect of any or all of the purposes mentioned in certain sub-sections of Section 35 of the Ordinance.(33)

CHAPTER XV.

PERFORMANCE OF SPECIAL COVENANTS BY THE LANDLORD.

The landlord should not only perform the duties implied in law but also fulfill any special covenant which he has granted in favour of the tenant. (1)

Certainty of the Covenant.

The covenant must be such that there should be no uncertainty regarding its performance. Thus where a lessor convenanted to grant to the lessee a road to take carts to the land leased, and the lessee sued the lessor to recover damages for failing to give him a road for that purpose it was held that the covenant did not involve an obligation on the part of the lessor to give a way for carts from the land, and further that the covenant was wholly bad for

(31) Section 2 (4) of the Irrigation Ordinance ; Cap. 321.

(32) Cap. 198.

(33) Section 35 (29) of the Village Communities Ordinance ; Cap. 198.

(1) V. d. L. 1. 15. 12. Henry's Translation page 238.

uncertainty. (2) It is not within the scope of this work to discuss all possible convenants which may be entered into between the parties, but a few important covenants are considered.

Covenant to Warrant and Defend Title.

It is usual for parties to enter into an express covenant that in the event of any dispute arising in respect of the lease the lessor should warrant and defend the title and confirm the lease. If there is such a convenant it is the duty of the lessee to take proceedings against the interrupter and call upon the lessor to come in and defend the title before he could maintain an action for damages for breach of the covenant. (3) The formal notice to warrant and defend title to which the lessor of an evicted lessee is entitled need not be in writing. It is sufficient if the lessor receives actual verbal notice of the litigation coupled with a demand express or implied that he should defend the title. (4) But in another case, it was held that it is both a necessary step and a reasonable practice to give written notice along with the copy of the plaint. (5) In an action by an evicted vendee against the vendor mere service of summons on the vendor does not of itself constitute a demand to warrant and defend title, unless at the time the summons is served the vendor is informed either verbally or in writing that the object of the summons is to enable him to intervene in the action in support of the title that has been conveyed to the vendee. (6) It is submitted that the same observations apply to leases also.

A purchaser who has been evicted from the property purchased by him may sue his vendor for breach of warranty of title, although he had not given his vendor notice of the proceedings which terminated in his eviction, if he could prove that his vendor had no shadow of a title to the property sold. (7) The same principle

(2) *Mohamadu Mohideen v. Hapuwa* (1915) 1 C. W. R, 117.
(3) *Perera v. Cooray* (1906) 1 A. C. R. 32.
(4) *Tinahamy v. Nonis* (1909) 1 Curr. L. R. 216.
(5) *Baba Sinno v. Sasira* (1901) 5 N. L R. 34.
(6) *Carolis Appuhamy v. Singho* (1912) 6 S. C. D. 86.
(7) *Fernando v. Jayawardene* (1896) 2 N. L. R. 309.

applies to leases. (8) The fact that the vendor or the landlord has no title must be raised and proved in the lower Court and cannot be raised for the first time in appeal. (9)

Covenant Giving the Option for Renewal.

Sometimes in a deed of lease there may be a covenant giving the tenant the option of renewing the lease. Where a lessor covenants to renew the lease at the request of the lessee and the request is duly made, there is no want of mutuality and the lessor, cannot object to specific performance of the covenant on that ground. (10) A covenant giving the option of renewing the lease binds not only the lessor but also a purchaser from the lessor provided the deed of lease is registered. The registration of the deed constitutes sufficient notice to the purchaser of the agreement for renewal. The fact that the option of renewal was not disclosed *ex facie* on the register does not help the purchaser. (11)

Option to Purchase the Leased Property.

A special agreement or clause in a lease granting the tenant an option, before the expiration of the lease or at some earlier date, to purchase the leased property usually provides that the tenant should give notice to the landlord of his intention to exercise the option. The option must be legally binding on the landlord. If the option is granted in a written lease which is invalid for want of due formality, the option is itself invalid if it cannot be separated from the lease. (12) According to our law a promise to sell land must be notarially executed. (13) Hence even if the option could be separated from the lease it will be invalid, unless the deed containing such an option is notarially executed.

(8) *Tinahamy v. Nonis* (1909) 1 Curr. L. R. 216 at 217; *Salibu v. Fernando* (1916) 3 C. W. R. 209 at 211.

(9) *Salibu v. Fernando* (1916) 3 C. W. R. 209.

(10) *Mutu Banda v. Rosehaugh Tea and Rubber Co.* (1917) 20 N. L. R. 51 at 57, 58; 4 C. W. R. 315 at 316 Per Sampayo, J.

(11) *Summangala Thero v. Caledonian Tea and Rubber Estate; Company* (1931) 33 N. L. R. 495 8 Times 129.

(12) Wille 155.

(13) Section 2 of the Prevention of Frauds Ordinance, Cap. 57.

Covenant in Restraint of Trade.

A landlord may expressly agree not to open a shop within a certain distance from the leased farm or not to allow anyone to trade on the remaining portion of a farm or not to carry on a similar business in a shop adjoining the leased shop.[14] Under our law, contracts in general restraint of trade are void, as being opposed to public policy, but where the restraint is partial and limited, the law will enforce the agreement between the parties.[15] Thus, a condition in the lease of farms that the lessor shall not open a shop within six hours distance on horse back of the property leased is a valid condition the breach of which would support an action for damages.[16]

When Landlord is Excused From Performance.

When causes, over which the landlord has no control, intervene rendering the performance of a covenant impossible, the landlord is excused from performance. Thus a covenant by the lessor to pay a sum of money to his lessee in the event of his selling the property pending the lease does not make the lessor liable if the land is sold by the Fiscal in execution proceedings.[17] Similarly where a covenant stated that the lessee shall have free and undisturbed possession and occupation of the property leased during the term of lease and the premises were acquired by the Government under the Land Acquisition Ordinance[18] the lessor was excused from performance.[19]

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(14) Wille 155.
(15) *Krishnan Chetty v. Kandasamy* (1924) 3 Times 21.
(16) *Brinckman v. Lindt*, 3 B. & S. Dig. 1076.
(17) *Mohideen v. Isey* (1922) 24 N. L. R. 239 at 242.
(18) Cap. 203.
(19) *Sangaram et al v. Cooray et al* (1910) 4 Leader 31.

OBLIGATIONS OF THE TENANT.

CHAPTER XVI.

PAYMENT OF RENT.

The Time and Place of Payment of Rent.

The Payment of Rent.—It is the duty of the tenant to make punctual payments of rent at the time fixed by agreement, or, in the absence of agreement, according to the custom of the place.(1)

Time of Payment.—In the absence of agreement or custom fixing the time when payment should be made, the lessor is only entitled to claim his rent at the end of the period.(2) If it is agreed that the rent should be paid in advance, but the date on which it ought to be paid is not fixed, then in the case of a monthly tenancy, the rent is payable on the first day of the month, and in the case of periodical leases, like a lease for a year etc., on the date when the lease begins to operate.(3) Where there is an agreement that rent should be paid within a certain number of days, in the absence of an agreement as to the mode of computation, it has been held in South Africa that the civil mode of computation should be adopted and hence public holidays and Sundays should be excluded.(4) Whether this mode of computation will be adopted in Ceylon is doubtful.

If the rent is not paid at the proper time then the landlord can charge interest from the date it becomes due till the date of payment, as the tenant is in *mora*.(5) In Ceylon, where there is no

(1) V. d. L. ; 1. 15. 12. Henry's Translation p. 238.

(2) Grotius 3. 19. 11. Lees, Translation p. 387.

(3) *Hain v. Wigoder*, 1930 S. R. 129. 1931 B. & S. Digest 195.

(4) *National Bank of South Africa Ltd. v. Leon Levson Studios Ltd.* 1905. T. S. at p. 436. 3. B. & S. Dig. 1002, 1003. *Vide* also *Joubert v. Enslin*, 1910 A. D. p. 6.

(5) *Scott v. Holmes*, 37 Nat. L. R. 33; 3 B. & S. Dig. 1004.

agreement regarding interest but interest is claimable in law, the rate of interest that should be charged is nine per centum per annum.[6]

Place of Payment.—The rent must be paid at the place agreed upon if there is specific agreement on that point. When no place is mentioned the authorities are not agreed as to the place where the payment should be made. Voet, while dealing with payment in general, says that payment must be made at the place in which the obligation was contracted, and further states that the debtor is not bound to pay at the creditor's house or place of domicile.[7] Vanleeuwen says that it is the duty of the creditor to come and make the demand at the house of the debtor unless it is otherwise agreed.[8] In contracts governed by Roman Dutch Law, the cause of action arises, in the absence of agreement, at the place where the debtor resides.[9] An action for rent also may be brought at the place where the contract was entered into.[10]

Receipt.—The landlord is bound to give a tenant a receipt for payment.[11] Where there are two joint lessors and each of them claims the whole rent, then the money ought to be placed in consignation and deposit for the benefit of the one who proves his claim, unless one of them offers suitable security to the debtor to protect him against the other claimant.[12] In Ceylon it has been held that the proper remedy of a tenant from whom both the joint lessors claim the whole of the rent is an interpleader action.[13] An interpleader action does not lie between a landlord and the tenant [14] and hence it is submitted that such an action

(6) *Vannithamby v. Thamby Ramanathan* (1936) 15 Rec. 244 1 Ceylon Law Journal Reports 20, Section 5, the Civil Law Ordinance, Cap. 66.

(7) Voet 46. 3. 12. Swift & Payne 146.

(8) Vanleeuwen 4. 40. 6. Kotze Vol. 2 page 328. 329.

(9) *Subatheris v. Singho* (1930) 32 N. L. R. 360.

(10) Section 9 of the Civil Procedure Code Cap. 86.

(11) Voet 46. 3. 15. Translation by Swift & Payne page 149, Wille 162.

(12) Voet 46. 3. 6. Swift & Payne Trans. page 138.

(13) *Mather v. Theivapillai* (1936) 1 C. L. J. R. 141, 16 Rec. 218.

(14) Section 688 of the Civil Procedure Code.

does not lie when each of the joint lessors claims the rent from the tenant. A receipt is *prima facie* evidence of payment of rent. If a receipt is given for the last month there is a presumption that all other rents had been duly paid.(15)

The Persons who Can Sue for the Rent.

Action may be brought by a person who is the landlord at the time the action is brought. Where there are a number of landlords each may sue for a proportionate share of the rent.(16) But where the joint lessors happened to be the life-tenant and the remainder man, and the lease bond stated that the rent should be paid to "them," the Court took the view the rent must be paid to the lessor who was entitled to possession at that time.(17)

Where a person dies leaving behind an heir, though his properties devolve on the heir, yet the administrator can bring an action against the heir for rent of premises belonging to the estate and occupied by the said heir, if the income from the premises in question is necessary for the proper distribution of the deceased's estate.(18)

The person who brings the action may be the original landlord, who is still the owner of the premises, or may be a person who has succeeded to the rights of the original landlord by inheritance, purchase or otherwise.(19) Where the landlord who is a trustee dies before the expiration of the lease, his successor steps into his place.(20) The rule in Roman Law was that if after the property had been leased for a definite period the lessor sold the property during the pendency of the lease, the lease came to an end. But the maxim of the Roman-Dutch Law is "Hire goes before sale" (*Huur gaat voor koop.*)(21) The purchaser steps into the shoes of the landlord and receives all his rights and becomes subject to all his

(15) Voet 46. 3. 14. 2 Thomson p. 380; Morgan Dig. 254.

(16) *Buddharakita Terunnanse v. Goonesekera* (1895) 1 N. L. R. 206; Voet 49. 2. 21.

(17) *Thampimuttu et al v. Tillaiampalam et al* (1917) 4. C. W. R. 204.

(18) *Public Trustee v. Karunaratne* (1938) 3 C. L. J. R. 276; 13 C. L. W. 94,18 Rec. 128.

(19) Voet 19. 2. 19. Berwick page 210, 211.

(20) *Mohamadu v. Meydeen* (1916) 2. C. W. R. 93.

(21) (1877) Ram. 1877 page 164, Wille 79.

obligations so that he is bound to the tenant and the tenant is bound to him in the relation of landlord and tenant.[22] But the purchaser need not accept the lessee as his tenant. He has two courses open to him. He can either elect to take the property with the vendor's tenant or insist on the vendor giving him free and exclusive possession. In the event of the vendee adopting the latter course, the tenancy between the vendor and the tenant continues, and the vendor can take steps to eject the tenant despite the sale,[23] although he cannot bring an action for declaration of title.[24]

But it must be borne in mind that a mere sale without transfer of the property does not give the purchaser the right to sue for the rent. Wille says :[25] "When however the purchaser obtains the transfer of the property he acquires *locus standi*, by virtue of his ownership, to sue the tenant directly, and without any cession of action from the previous owner for the rent payable since the date of transfer." In a Fiscal's sale, until a Fiscal's conveyance is obtained the title to the property remains in the judgment debtor.[26] Hence it is submitted that where the property leased out is subsequently sold by the Fiscal, the purchaser cannot sue the lessee until he obtains the Fiscal's transfer. But once he gets the Fiscal's transfer his title dates back to the date of sale.[27] Hence he can recover all rents due from the date of sale from a tenant who is in occupation of the premises and who had notice of the sale by the Fiscal of his landlord's interest.[28] But, in other cases, as for instance, a sale under a mortgage decree, the title of the purchaser does not relate back to the date of sale, and in the absence of agreement, the lessee is bound to pay to his original lessor[29] all rents that accrued up to the date of

(22) *Silva v. Silva* (1913) 16 N. L. R. 315 at 316.

(23) *Wijesinghe v. Charles* (1915) 18 N. L. R. 168.

(24) *Fernando v. Appuhamy* (1921) 23 N. L. R. 476, 3 Rec. 86.

(25) Wille 166.

(26) Section 289 of the Civil Procedure Code; Cap. 86.

(27) Section 289 of the Civil Procedure Code Cap. 86.

(28) *Morris v. Mortimer* (1879) 2 S. C. C. 96.

(29) *Mohideen v. Isey* (1922) 24 N. L. R. 239.

transfer. Even if rent was paid in advance on an informal lease the lessee is not entitled to retain possession of the land against a vendee who has bought the property from the lessor.(30) If a leased property is donated and notice is given by the donee to the tenant, the tenant must pay the rent to the donee from that date.(31) Even if the rent was paid in advance the tenant is bound to pay the rent to the vendee, but he can recover whatever he has paid to the vendor, his lessor, by the *conditio indebiti*.(32) But the principle that a vendee steps into the shoes of his vendor does not apply where the property is sold for non-payment of taxes by the Municipal Council. Here the title does not pass as the result of any contract but vests absolutely in the Council free from all encumbrances. The Council may however sue for use and occupation.(33) The principle also does not apply in the case of a sub-tenancy. Hence the vendee cannot claim rent from the subtenant of the lessee.(34) Though in Ceylon a lease is regarded as a *pro tanto* alienation,(35) yet it has been held that a monthly tenant of the lessor is not liable to pay any rent to the subsequent lessee, unless there was attornment or assignment by the lessor of his right to the lessee with notice to the monthly tenant.(36) Further a tenant who held the land under lessors who had previously granted the lease of the same premises to a certain lessee who had abandoned the leased premises, is not liable to that lessee in damages where he had delivered possession of the premises to the lessors before action was brought by the previous lessee.(37)

The Person who may be Sued for Rent.

The lessee is the person who is liable to be sued for rent. Where there are more than one lessee and there is

(30) *Pemande Unnanse v. Appusingho* (1917) 5 C. W. R. 20.

(31) *Dona Agida v. Suaris* (1920) 8 C. W. R. 91.

(32) Voet 19.2.19 Berwick 210, 211.

(33) *Municipal Council Colombo v. Perera* (1928) 5 Times 170.

(34) *Udeyappa Chetty v. Goonetilleke et al* (1925) 3 Times 76.

(35) *Gunawardene v. Rajapakse* (1895) 1. N. L. R. 217.

(36) *Wijeratne v. Hendrick* (1895) 3. N. L. R. 158; *Arnolis v. Mohideen Pitche* (1907) 3 Bal. Rep. 159; *Rajapakse v. Cooray* (1924) 2 Times 209. *Kira Fernando v. Ukkuwa* (1936) 1 C.L.J.R. 96 at 99.

(37) *Cassai Marikar v. Silva* (1917) 7 C. W. R. 62.

nothing in the agreement to indicate that each lessee is bound in *solidum*, each of the lessees is only bound to pay a quota of the rent.(38) But if the tenants have expressly made themselves liable in *solidum* for the rent, or if such an agreement is implied from the construction of the lease, or if the tenants are partners, each is liable to pay the whole of the rent. Even otherwise, says Wille, a strong case could be made out to prove that the rule is that each of the co-lessees is liable in *solidum*.(39)

In the case where there has been a valid assignment with the written consent of the lessor, it is only the assignee who is liable and the original lessee is not liable.(40) But if the lessee has merely sublet the premises the lessor cannot sue the sublessee as there is no privity of contract.(41)

The Amount.

In a previous chapter we have sufficiently discussed the question whether rent should consist of money or fruits. The amount should be fixed definitely, otherwise a lease is not constituted. Once the amount is fixed the landlord cannot claim an enhanced rent unless the original contract provided for the variation of its terms.(42) The landlord has no right to enhance the rent if the tenant does not accept the notice to enhance it.(43) But the landlord may send a notice enhancing the rent and also intimating that if the tenant is not prepared to pay the enhanced rent he should quit the premises. Such a notice must be a calendar month's notice.(44) If the tenant does not quit the premises and does not express assent or dissent, it is a case either of his having assented to take the premises at the enhanced rate or of his being in the position of a tenant who is overholding.(45) In

(38) *Panis Appuhamy v. Senenchi Appu* (1903) 7 N. L. R. 16; Voet 19. 2. 21. Berwick 211.

(39) Wille 168, 169.

(40) *Goonesekera v. Ramapillai* (1933) 35 N. L. R. 309.

(41) Wille 102, 103.

(42) *De Silva et al v. Perera* (1928) 29 N. L. R. 506.

(43) *De Silva et al v. Perera* (1928) 29. N. L. R. 506 and 507. *Vide* contra *Abdul Caffoor v. Mohamed*, (1913) 16 N. L. R 383.

(44) *Jacobs v. Ebert* (1883) 6 S. C. C. 70.

(45) 29 N. L. R. 506 at 508 per Dalton J.

the latter case, the increased rent may form a fair material on which the amount due for use and occupation could be assessed.(46)

Remission of Rent.

The amount stipulated must be paid. Thus, where a Local Board leased the privilege of collecting stall rents, it was held that the lessee could not claim to pay only the sums actually received by him.(47) Under certain circumstances a tenant is justified in withholding a part or the whole of the rent. Such circumstances may arise either out of a breach of contract or by the happening of some event over which the parties have no control. Also the parties may agree that under certain circumstances there should be a remission of rent.

(a) **Breach of Contract.**—There may be various cases in which a remission of rent will be allowed. If the landlord sells the premises, then the tenant is not bound to pay any rent to the landlord. Similarly, where the commodious use of the thing has not been given, so that the occupant of the house cannot stay in it without great inconvenience, a remission would be allowed. If a tenant is expelled before the time, he is not bound to pay any rent for the rest of the term.(48) A lessor might have represented the extent of the premises to be much larger, in which case the tenant can claim a proportionate reduction. But where there is a lease of the premises *ad corpus* as distinguished from one *ad quantitatem*, and the lessee has received the whole estate which he meant to take on lease, he is not entitled to abate the rent on account of a mere error in setting forth the extent of the property, unless the quantity is a notable one.(49)

(b) **Remission for Just Cause.**—Where there was just cause for fear, as when a house was haunted, under Roman-Dutch Law the tenant was entitled to a remission of rent.(50) But in modern times,a tenant cannot claim remission on the ground that the house

(46) *Jacobs v. Ebert*, 6 S. C. C. 70.
(47) *Hodson v. Arnolis Perera* (1921) 3 Law Rec. 179.
(48) Voet 19. 2. 23. Berwick 215. Voet 19. 2. 24., Berwick 216-219.
(49) *Stork v. Orchard et al* (1893) 2 S. C. R. 1.
(50) Voet 19. 2. 23 page 215.

is haunted.(51) Similarly, where there is pestilence and the tenant cannot use the premises he is entitled to remission.(52) Voet mentions several other just causes which entitle a tenant to quit the premises and claim remission of rent.(53)

(c) **Effect of Vis Major.**—A remission of rent is claimable if the enjoyment of the leased premises is interfered with by the happening of an event which the parties could not have contemplated and could not have prevented. Such an event is known as *vis major*. Thus where crops are destroyed by locusts or by unusual floods a remission can be claimed.(54) The floods must be of unusual occurrence in the locality and must be such as are not periodically expected. (55) A remission will also be allowed if the lessee did not have the beneficial use on account of war. (56) But the loss must be due to direct military operations or orders, and remission cannot be claimed merely on the ground that due to war there has been loss of profits. (57) But if a tenant, knowing the existence of circumstances which may operate to deprive him of the full beneficial occupation, chooses of his own free will to continue the lease when he had the power to terminate it, or exercises a power of renewal which he is under no obligation to exercise, he is not entitled to any remission on the ground of want of beneficial occupation for a period for which he need not have, but for his own act, filled the position of a lessee. In such a case the maxim, "*volenti non fit injuria*", would apply. (58) Thus a person who enters into a lease during hostilities cannot ask for a remission if he is deprived of the use of the leased property. (59) A tenant is entitled to claim remission of rent when the leased premises are closed by the order of an Urban

(51) *R. V. Zillah* 1911 C. P. D. 643 at 647 Per Buchanan, J

(52) Voet 19. 2. 23. Berwick 215.

(53) Voet 19. 2. 23. Berwick 215.

(54) Voet 19. 2. 24. Berwick p 216.

(55) *Nagapper v. Eliatamby* (1916) 2 C. W. R. 219; Voet 19. 2. 24. Berwick 216.

(56) Voet 19. 2. 24. Berwick p. 216.

(57) *Wijeyasiriwardene v. Gunesekere* (1917) 20 N. L. R. 92.

(58) *Godfrey and others v. Bernberg & Co.* (1903) T. H. 372; 3 B. & S. Dig. 1014. 1015.

(59) *Foulger v. Liberman Bellstedt & Co.* 19 S. C. 15; 12 C. T. R. 24. 3 B. & S. Dig. 1015.

District Council under the Quarantine and Prevention of Diseases Ordinance [60] since the beneficial occupation was prevented by *vis major*. [61] But where a tenant undertook to be responsible for all Municipal regulations and due to the tenant's fault the Municipal Council served a closing order, it was held that the tenant could not claim any remission of rent. [62]

(d) **By Agreement of Parties.**—The parties may agree that until the happening of an event or after the happening of an event there shall be a remission of rent. In such a case oral evidence may be led to prove the event. Thus, where there was provision for payment of reduced rental so long as a certain debt due from the lessor to the lessee remained undischarged, it was held that oral evidence could be led to establish the debt. [63] Where there is an agreement that if Government orders the removal of the business to a Government store there shall be cancellation of the lease, such a lease will be deemed to be cancelled if Government orders the removal, though for a purpose other than that contemplated by the parties. [64] Where the lease is in writing, the purpose for which the building was let must appear in the document. Oral evidence cannot be led to prove that a house was let so that it might be used as a rice store and on account of certain plague regulations the lessee could not use it as a rice store. [65]

Preferent Right of Lessors for Rents Due when the Tenant is an Insolvent.

When the tenant becomes an insolvent preference is given to the landlord who has seized the goods of the tenant for rents due. Section 52 of the Insolvency Ordinance [66] states the law as follows: "No seizure or detention of the goods of any insolvent for rent made after an act of insolvency, and whether before or after

(60) Cap 173.
(61) *Punchi Singho v. De Silva* (1935) 38 N. L. R. 416.
(62) *Jeevani v. Arunachalam-Chettiar* (1939) 14 C. L. W. 86.
(63) *Fernando et al v. Cader Saibo* (1931) 9 Times 8.
(64) *Umma et al v. Arumagam* (1920) 22 N. L. R. 54.
(65) *Canthiah v. Muttiah Chetty* (1915) 18 N. L. R. 264.
(66) Cap 82.

the filing of the petition for sequestration of his estate, shall be available for more than one year's rent accrued prior to the day of the filing of such petition, but the landlord or person to wnom the rent shall be due shall be allowed to come in as creditor for the overplus of the rent due, and for which the goods seized shall not be available."

Section 253 of the Companies Ordinance, No. 51 of 1938, states what debts should be paid in priority to all other debts. Subsection 5 says : "In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof, provided that in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made."

CHAPTER XVII.

CARE OF PROPERTY.

It is the duty of the tenant to take proper care of the property leased. He should not injure it or destroy it. (1)

Standard of Care.

The contract of lease is one for the benefit of both parties and hence the standard of care expected from the lessee is that of a *bonus paterfamilias*,

Therefore the lessee is liable if there has been fraud (*dolus*), gross negligence (*culpa lata*) and ordinary negligence (*culpa levis*), but he is not liable if he was only guilty of trivial negligence (*culpa levissima*), unless he has taken upon himself this standard of care by express contract. (2)

(1) V. d. L. 1. 15. 12, Henry's Translation 239.

(2) Voet 19. 2. 29. Berwick. 224 and 225, 19. 2. 30. Berwick 226.

Care of Premises.

Care of Buildings.—The tenant must take the necessary care of all buildings on the leased property. But he is under no duty to make the repairs himself unless such repairs were necessitated by his own default or by persons for whom he is responsible or unless he has expressly undertaken to do all the repairs himself. (3) If the tenant expressly agrees to do the repairs he must hand over the buildings to the landlord in the state of repair in which they were delivered to him. There is no duty on the tenant to put them in a better condition, even if he has undertaken to keep the buildings "in good and tenantable repair," and so leave the same at the end of his tenancy. (4)

Care of Lands.—The tenant of a rural tenement is under a duty to perform the usual agricultural operations at the proper season. He should not damage the land or trees by unseasonable or unskilful cultivation. (5) Negligent cultivation in any particular case according to the circumstances may be a ground for the cancellation of a lease. In every case, it is a question for the Judge to decide whether any particular abuse of the leased property may be more appropriately dealt with by damages only or by cancellation of the lease. (6)

The lessee may by express covenant undertake to keep the property in good order. If there is a breach of the covenant, it may be agreed that the lessor is entitled to cancel the lease. Where the lessee expressly stipulates to keep the property in good order and further agrees that a failure to carry out the stipulation should entitle the lessor to the cancellation of the lease, such stipulation must be looked upon as essential, the breach of which would entitle the lessor to obtain an order of Court cancelling the lease ; the lessee is not entitled to equitable relief against forfeiture except on the ground that the penalty would be outrageous or *immanis*. (7)

(3) Wille 221.

(4) Wille 221.

(5) Voet 19. 2. 29. Berwick 224.

(6) *Silva v. Obeyasekara* (1922) 24 N. L. R. 97.

(7) *Agar v. Ranewake* (1912) 16 N. L. R. 129.

Where the lessee undertook to put up strong dams and trenches and to convert the land into a good and suitable field for paddy cultivation, and further stipulated that the lessor was entitled to cancel the lease if there was a breach, the Court ordered the lease to be cancelled when there was a breach. (8) A lease was also cancelled for the breach of a similar stipulation to put up a wire fence (9) and also for breach of a stipulation to keep the land regularly weeded. (10)

Care of Trees.—A tenant may plant forest trees on virgin soil, as such a proceeding does not prejudice the landlord but directly benefits the soil owing to the decomposition of the leaves that fall. (11) By express agreement the tenant may agree to plant trees and may further stipulate that if there is a breach the landlord is entitled to cancellation. The principles enunciated above would apply to such a case.

The tenant's right to cut down trees on the leased property is regulated by Art. 14 of the Placaat of 1658. (12) It has not been proved that this Placaat was introduced into Ceylon. Hence in Ceylon the tenant's right to cut down trees is regulated by the Common Law.

In South Africa the Courts have taken the view that in Common Law the tenant's right of cutting down trees is the same as that of a usufructuary, since a lease is a contract *de usu*. (13)

Voet says that the usufructuary is entitled to cut trees which when cut sprout up from the original stem and roots and produce fresh crops of wood, (*sylva caedua*). (14) If the wood does not come within the description of *sylva caedua*, then the tenant can cut wood if it is necessary for repairs to his house or if the wood was intended for the use of his plantations. The usufruc-

(8) *Wickramasinghe v. Wickramasinghe* (1913) 2 Bal. Notes. 25.
(9) *Silva vs. Silva* (1920) 22 N. L. R. 252,2 Rec. 161.
(10) *Karunaratne Hamine v. Fernando* (1923) 25. N. L. R. 159.
(11) Wille 224.
(12) Wille 224.
(13) Wille 225.
(14) Voet 7. 1. 22. Searle and Jouberts Translation. 29.

tuary cannot cut *grandiores arbores*, fruit trees or shade trees. (15) Adopting these principles the Courts in South Africa have held that a tenant may cut *sylva caedua*, such as a gum tree, subject to the restriction of his leaving the surface of the property in the same condition in which he found it when he entered upon the lease. He may even cut down *silvae caeduae* and sell them for his own benefit if he had planted them himself and if his object was known to the landlord. He may also cut wood for domestic purposes such as for firewood, and for farm purposes such as the repairing of outhouses, fences and agricultural implements. (16) On the other hand a tenant may not cut down ornamental trees or fruit trees or even *sylvae caeduae* if they were planted for ornamental purposes. (17)

Remedies of the Landlord.

In the absence of agreement it is in the discretion of a careful and circumspect judge to decide whether the abuse is such that the lessee should be punished by expulsion or by being cast in damages only. He can only be expelled for grave and damnifying misuse. (18) The landlord need not wait till the expiry of the term to ask for cancellation. When the tenant has abused the thing hired he is liable to be ejected where the abuse is attributable to his negligence or wilful conduct. (19)

When there is specific agreement providing for cancellation of the lease for breach of a covenant to keep the property in good order, no relief against forfeiture would be granted, unless the tenant can show that the penalty is outrageous or *immanis*. (20)

When there are several lessors, although the obligation of the lessee under the lease for the proper maintenance of the leased land is indivisible in the sense that each lessor has the right to enforce the covenants in respect of his share as well as those of his

(15) Voet 7. 1. 22. Searle and Jouberts Trans. 29.
(16) Wille 225.
(17) Wille 226.
(18) Voet 19. 2. 18. Berwick 210; *Uparis de Silva v. Abeysekere* (1922) 1 Times 74, Wille 229.
(19) *Perera v. Peiris* (1912) 15 N. L. R. 313 at 314 and 315.
(20) *Agar v. Ranewake* (1912) 16 N. L. R. 129.

co-lessors, each lessor can only claim his share of the damages caused by the breach of such covenants. (21)

Subsequent Lessee's Remedies.

Where there are two leases granted by the lessor in succession, an action lies to the subsequent lessee against the prior lessee for wasteful damage committed by the prior lessee while the prior lessee's lease was current and before the term of the subsequent lessee has commenced. The liability of the prior lessee depends upon an obligation, arising out of delict, to pay compensation to the subsequent lessee for damage committed at the time when the subsequent lessee had acquired an interest in the property. (22) Generally he is not liable unless he has acted contrary to local custom. (23)

Statutory Duty.

Apart from the obligation imposed by the Common Law there is an obligation imposed by statute on both the owner and the lessee to keep the property in good condition.

The Nuisances Ordinance (24) makes provision for the better preservation of Public Health and the suppression of nuisances. A person who is the owner or occupier of any house, building, or land in or near any road, street or public thoroughfare, whether tenantable or otherwise, and who keeps the same in a filthy and unwholesome state or overgrown with rank and noisome vegetation, so as to be a nuisance or injurious to the health of a person, shall be liable to a fine not exceeding rupees fifty. (25) A notarial lease being a *pro-tanto* alienation, a lessee is also liable if after proper notice he suffers the premises leased to him to be in a filthy state. (26) A lessee is liable, even when he has sublet the premises, provided it is proved that he had complete sanitary

(21) *Weeratne et al v. Abeyawardene* (1934) 12½ Times 3, 13 Rec. 267.

(22) *Louis v. Bale Appu* (1863) Ram. 1863-68 page 8.

(23) *Juanis v. Dissanaike* (1896) 2 N. L. R. 244.

(24) Cap. 180.

(25) Section 2 (1) of the Nuisances Ordinance, Cap. 180. Vide Ord. No. 2 of 1882.

(26) *H. E. de Silva v. Idroos* (1910) 4 Weer. 62.

control and had suffered the premises to be in a filthy condition. (27) It is open, however, to the authorities to proceed against the real owners of the premises on which the nuisance is found, even where the lessee happens to be in temporary control of the premises. (28) If the owner had let out the property and had parted with all practical control over the premises, he is not liable under the provisions of the Nuisances Ordinance, (29) unless it can be shown that he had knowledge actual or constructive of the unwholesome state of the premises. (30)

CHAPTER XVIII.

THE USE OF THE PREMISES.

Duty to use the Premises for the Purpose for Which it is Let.

It is the duty of the lessee to use the thing let for no other purpose than that for which it was let to him. (1)

Agreement Regarding the Purpose of the Lease.—The lessee sometimes expressly undertakes to use the premises only for a certain purpose and not for other purposes. If the lessee uses the property for a different purpose, then the lessor is entitled to ask for cancellation of the lease. Where he sub-leases the property and the subtenant uses the property in contravention of the covenant, the lease would be cancelled if the tenant has knowledge and has done nothing to prevent the subtenant from using it in such manner. (2) But on the other hand if it was done without his knowledge the lessee is not liable and the lessor cannot ask for cancellation of the lease. (3)

(27) *Ambrose v. Robert* (1912) 1 Bal. Notes 6.

(28) *Somahamy v. Panchara Kurukal* (1910) 4 Weer. 20.

(29) Cap. 180.

(30) *Blacher v. Aserrappa* (1911) 5 Weer. 94.

(1) V. d. L. 1. 15. 12. Henry's Translation 239.

(2) *Wood v. Mayer & Charlton G. & M Co. Ltd.* (1899) 6 O. R. 3 B. & S. Dig. 1075.

(3) *City* and *Suburban G. M. & E. Co. v. Kramer & Co.* (1899) 6 O. R. 3 B. & S. Dig. 1075, 1076.

No Agreement Regarding the Purpose of the Lease.— If the use to which the premises are to be put has not been expressly agreed upon, the tenant is under an obligation to use it for the same general purpose to which it had been previously devoted, or for which it was from its nature ostensibly intended to be used. Consequently, if a hotel is let, but the purpose of the lease is not specifically mentioned, the property must be used as a hotel only. (4) When a house and garden are let, the lessee cannot tap the coconut trees for toddy, as that is not the purpose for which it was let. If the tenant taps coconut trees an interim injunction will be granted restraining him from tapping them till the determination of the action. (5) Even in an ordinary agricultural lease, the lessee has no right to tap coconut trees. (6) The lessee cannot alter the premises in order that he may use it for a different purpose without the landlord's consent. He cannot, for instance, convert a dwelling house into a stable, pastures into arable-land, and orchards into pasture lands . If he does so, an action lies against him. (7) But the conversion is permissible if it is of such a character that the land can be reconverted to its original condition, before the expiration of the lease. Thus, pasture land may be converted into arable land during the first few years of the lease if the period of the lease is long enough for the land to revert to its original condition before the expiration of the lease. (8)

By special agreement the tenant may have the right to make alterations. Such a right was held to be impliedly granted where a stable was hired to be used as a ware-house, and the tenant was consequently held to be entitled to make the alterations necessary to turn the ware-house into a stable. (9) However, a waiver by the landlord of his right of not allowing alterations must be clearly proved. (10)

(4) Wille 220, *Fichardt Ltd. v. Leviseur* (1915) A D. at 187.
(5) *Lebbe Marikar v. Bastian Appuhamy* (1916) 4 C. A. C. 125.
(6) *James v. De Silva* (1917) 4 C. W. R. 274.
(7) Voet 19. 2. 29 ; Berwick 224, 225.
(8) Vanderkeesel Thesis 680 ; Vanderkeesel Thesis 677.
(9) Wille 222.
(10) Wille 222.

LANDLORD'S REMEDIES.

If the tenant misuses or abuses the property leased, it is, in the absence of any express agreement on the point, in the discretion of the Court to decide whether the breach is of such a nature as to merit cancellation of the lease, with or without the addition of damages, or of such a nature as to merit the awarding of damages alone, or whether the breach is to be passed over entirely, or whether in an appropriate case it should grant an interdict restraining the breach thereof. (11) The lessee cannot be expelled for every trifling matter of neglect respecting the manner of use, but he can only be expelled for notably grave and damnifying misuse. It must be left entirely to the discretion of a careful and circumspect judge to decide whether the abuse is such that it ought to be punished by expulsion or whether the lessee ought only be cast in damages. (12)

ABANDONMENT OF THE PREMISES.

The lessee is bound to use the premises for the full period of the lease. Hence he cannot unjustifiably abandon the leased property during the currency of the lease. If he abandons it without sufficient cause he clearly repudiates the lease. The landlord is not however, bound to accept such repudiation, for he has the choice or election of one of two courses. He may decide to abide by the contract and refuse to accept the tenant's repudiation, in which case he can only claim damages for breach of contract, but in this event he may institute his action at once and need not wait till the expiration of the lease. (13)

If the landlord decides to abide by the contract and to claim rent, he is not obliged to mitigate the loss. If, however, the landlord accepts the repudiation of the lease and claims damages he is obliged to mitigate the loss. (14) It is difficult to state exactly in general terms the efforts which a lessor is bound to make to

(11) Wille 229.
(12) Voet 19. 2. 18; Berwick 210 ; *Uparis de Silva v. Abeysekara* (1922) 1 Times 74.
(13) Wille 227.
(14) Wille 227.

mitigate his loss. (15) If the lessor has relet the premises, then the rent payable by the new tenant must be taken into account in fixing the amount of damages. (16)

Whether the landlord has elected to abide by the contract or to break it is a question of fact and may be inferred from the conduct of the landlord. (17)

The rule that the landlord must mitigate his loss when accepting repudiation of the lease is the same in the Law of South Africa as in English Law. It is a subject of modern development and hence is not treated by the Common Law authorities. (18) In Ceylon the principles by the aid of which damages for breach of contract are assessed are taken from the English Law. (19) Hence it is submitted that the rules governing mitigation of damages already enunciated are applicable equally in Ceylon.

CHAPTER XIX

DELIVERY OF PROPERTY ON THE TERMINATION OF LEASE.

Duty to Deliver.

It is the duty of the tenant to deliver the property leased in a good condition after the expiration of the lease. (1) The termination of the tenancy may take place by the effluxion of time, by forfeiture, or by any other recognised mode. (2)

The lessee must deliver to the lessor the whole of the property leased to him at the termination of the lease. He cannot refuse to deliver possession, on the expiry of the

(15) Wille 227.
(16) Wille 228.
(17) Wille 228, 229.
(18) Wille 228.
(19) *Narayanen Chetty v. Steven and Sons* (1880) 4 S. C. C. 2.

(1) V. d. L. 1. 15. 12. Henry's Translation p. 239.
(2) *Bennet and Tatham v. Koovarjee & Kasaw,* (1906) 27. Nat L. R. 110; 3 B. & S. Dig. 1025.

term, of even a portion of the property on the plea that he is the owner of that portion. It is his duty to quit the premises, deliver the same and then litigate. (3) But where a lessee obtains the lease of an undivided share, of a certain property and acquires the remaining undivided shares of the property during the pendency of the lease, he is bound to give up only the share of the land which he obtained on lease. (4) The rule that the lessee must deliver possession of the premises at the expiration of the lease does not apply if, during the pendency of the lease, the landlord's title has expired and he has been evicted by *title paramount*. In such a case it is not necessary that the lessee should deliver possession to his old landlord and take possession under his new landlord. (5)

The Premises.

It is the duty of the tenant to return to the landlord the whole of the property originally leased to him together with everything belonging to it, but not of course such profits as he may have made by virtue of the use of the property. (6)

Fixtures.—Before dealing with the question whether a tenant can remove fixtures which he has erected, at the termination of the lease, it is necessary to consider the meaning of the term 'fixtures'. Fixtures are articles which by being affixed to the ground or by being annexed or attached to a building acquire the character of immovables. Counters, cooking range, water tanks, electric bells, batteries and indicators, baths etc. are fixtures. (7)

Whether an article annexed to a building is to be regarded as a fixture depends not only on its degree of annexation but also on the object of annexation. (8) In the case of a tenant annexing materials to the leased property, the problem is greatly simplified by the fact that there is a presumption that his annex-

(3) *Alvar Pillai v. Karuppan* (1899) 4 N. L. R. 321.
(4) *Appuhamy v. John Sinno* (1917) 4. C. W. R. 264.
(5) *Cader v. Hamidu* (1921) 23. N. L. R. 91.
(6) Wille (1st Edition) 433.
(7) *Brodie v. Attorney General* (1903) 7. N. L. R. 81.
(8) *Abeyasundera v. Hinni Hamy* (1913) 16. N. L. R. 120.

ation is for a temporary purpose.(9) Wall paper cemented to the walls of a room is not a fixture and the tenant is entitled to remove it if he has pasted it for purposes of ornamentation, since the removal of the wall paper cannot possibly cause detriment to the premises. (10) Under the Roman-Dutch Law even doors which were made at the tenant's cost can be removed, if no detriment is thereby caused to the subject matter of the lease, though they are fixtures. (11) If the fixtures were severed and the lessor appropriates them, the lessee can recover the value of the materials and no written lease is necessary to bring such an action. (12)

Plantations.—Trees planted by a lessee in the leased premises belong absolutely to the owner of the soil. (13) This principle is based on the maxim, "*quicquid plantatur solo, solo cedit.*" But the tenant has the right to cut *silva caedua*. A lessee may, however, during his tenancy and at the termination thereof, but not afterwards, remove whatever he has sown or planted as flowers or vegetables in a garden which was let to him, subject to the condition of his handing over the property in the same state in which he received it. (14) As regards the right of the tenant to reap the crops which he has sown the general rule is that he is not entitled to sow crops which cannot reasonably be expected to come to maturity within the period of the lease; and if he does so, he is not entitled after the expiration of the term to tend and reap such crops, and the lessor may interdict his entering the premises for this purpose. (15) But if a tenant has sown or planted crops before receiving notice of the expiration of his rights in the land, or after receiving such notice, if he has reasonable grounds for believing that they will mature before his rights determine, he is entitled to claim such crops as his property and to go upon the land for the

(9) Wille 267 (2nd edition).
(10) *Davies v. Baur* (1906) 1 Leembruggen and Asirwatham, page 18.
(11) 1 Leembruggen & Asirwatham, page 18 at 19.
(12) *Sultan Pulle v. Nona Gundoon* (1880) 3. S. C. C. 23.
(13) *De Beer's Consolidated Mines v. L. and S. A. Exploration Co.*, 10 S. C. at 369 (*Obiter*) 3 B. & S. Dig. 1084.
(14) *Burrows v. McEvoy*, (1921) C. P. D. 229; 3 B. & S. Dig. 1085.
(15) *Stollreither v. Meintjes* (1907) O. R. C. 6, 3 B. & S. Dig. 1084.

purpose of reaping them when ripe. (16) In some places the succeeding or incoming tenant is entitled to the crop on the land when he takes possession, but this applies only to those cases where the last tenant has occupied the land for the full period of his term, usually, a year according to the accustomed usage. (17)

Condition of the Premises.—The tenant must on the expiration of the lease deliver the property to the landlord in the same good order and condition in which he received it. (18) This duty is cast by implication of law, though frequently an express stipulation to that effect is inserted in the lease. If a tenant fails in the fulfilment of this duty, he will be liable in damages. (19) But there is no duty cast upon the tenant to make good any damage done to the premises occupied by him in the absence of proof that such damage was due to the negligence of the tenant. (20) Sometimes the lessee expressly undertakes to keep the premises in good and tenantable repair and so leave the same at the end of his tenancy. If the premises were handed over in a bad state of repair, unless the lease otherwise provides, the lessee is only bound to maintain the premises in the condition in which he received them. (21) In certain cases the tenant undertakes to keep the property in good repair, reasonable wear and tear excepted. Such a clause saves the tenant from repairing dilapidation or depreciation by lapse of time, by action of the weather, or by any wastage incident to the normal user during the period of lease. Yet if the lessee lets time run on unduly without doing anything toward the upkeep of the place when it needs attention, he cannot rely on the exception of ' wear and tear." (22)

Exemption from Liability for Damages.—A tenant is exempted from liability for damages for injury to the leased premises in the following cases namely :—

(16) *Hansen and Latelle v. Crafford* 26. S. C. 246; 3 B. & S. Dig. 1084.
(17) Morg. Dig. 100 at 101. No. 794 (1836) D. C. Ratnapura.
(18) Voet 19.2.32; Berwick 227.
(19) Wille (1st Edition) 439.
(20) *Reid & Co. v. Federal Supply and Cold Storage Co., Ltd.*, 24 S. C. 102; 3 B & S. Dig. 1061.
(21) *Henning v. Le Roux* (1921) C. P. D. 587; 3 B. & S. Dig. 1062.
(22) *Radloff v. Kaplan* (1914) E. D. L. 357; 3 B. & S. Dig. 1062, 1063.

1. where there is no proof that the injury was caused by the negligence of the tenant, (23)

2. where the injury was caused by *vis major* or accident (*casus*), unless there is an express agreement that the tenant shall deliver the same in good condition notwithstanding the effects of *vis major* or accident. (24) But in such a case, the *onus* is on the tenant to prove that the property was destroyed by accident.(25)

LANDLORD'S REMEDIES.

(a) **When property is not handed over after the termination of the lease** :—A lessee who overholds and possesses the leased premises after the expiry of the term of the lease is a trespasser and is liable in an action for trespass. Even when there is no special damage the Court or a Jury is not restricted to assessing the actual injury inflicted but may take all the circumstances of the case into consideration in granting damages. Both under English Law and under Roman-Dutch Law a trespasser is treated as a person who may be suitably punished with vindictive damages.(26) Where a landlord gives notice asking the tenant to leave the premises unless he pays an increased rent, such increased rent is a fair material to assess the amount claimable for use and occupation.(27) But if the increased rent is double the original rent the landlord cannot recover it. An action for double rent does not lie in this colony.(28) Merely because the tenant holds over the keys for two days he does not become liable to pay a month's rent as damages.(29) But where the landlord is able to prove his damages, as where he states that he lost a tenant by such delay, the tenant has to pay a month's rent as damages.(30)

(23) *Reid & Co. v. Federal Supply & Cold Storage, Co. Ltd.*, 3 B. & S. Dig. 1061.

(24) *North Western Hotel Ltd. v. Rolfes, Nebel & Co.*, (1902) T. S. 324; 3 B. & S. Dig. 1066.

(25) *Kulatungam v. Sabapatipillai* (1908) 11 N. L. R. 350.

(26) *Abdul Rahim v. Hasamal* (1911) 1. C. A. C. 5.

(27) *Henry Jacobs v. Ebert* (1884) 6 S. C. C. 70.

(28) *Carnie v. Muncherjee* (1884) 6 S. C. C. 100 F. B.

(29) *Vangeyzel v. Vanderspaar* (1884) 6 S. C. C. 68.

(30) *Sangarapillai v. Berry* (1931) 34 N. L. R. 27, 11 Rec. 177.

(b) **When property is handed over in a state of disrepair** :—A landlord is not entitled, at the expiration of the lease, to refuse to accept possession of the leased premises until the tenant has put the place in a proper state of repair. He should accept delivery and sue for damages sustained in consequence of the condition in which the premises have been left by the tenant. But if the tenant acquiesces in the landlord's refusal to accept possession and continues in occupation while effecting the requisite repairs, he is liable for rent for the period during which he continues to occupy.(31)

The damage recoverable is generally the cost of repairs. But where a lessee agreed to keep a building in good repair but neglected to do so and allowed it to become so ramshackle that it had to be pulled down in parts, it was held that the correct measure of damages was not the cost of erecting a new building but the estimated value of the building, if, allowing for wear and tear, it had been handed over in the condition in which it had been received.(32)

CHAPTER XX

SPECIAL COVENANTS IN FAVOUR OF THE LANDLORD.

Particular Rights Granted to a Landlord.

The landlord has rights corresponding to the implied duties imposed on the tenant. Apart from these rights the landlord may acquire certain rights, and consequently, the tenant may incur corresponding obligations by express covenants. If there are such covenants, it is the duty of the tenant to

(31) *Grey Venstein v. Thompson* (1906) 16 C. T. R. 505; 3 B. & S. Dig. 1067.

(32) *Hutchinson v. Logan & Co. Ltd.* (1908) 18 C. T. R. 116; 3 B. & S. Dig. 1065, 1066.

fulfill them.[1] Not only the lessor and the lessee but their heirs, executors or administrators acquire rights and incur obligations by special covenants entered into between the lessor and the lessee where there is a stipulation to that effect. Thus, where there was a stipulation by a lessor, a Buddhist priest, to the effect that for the due performance of covenants and conditions the lessor and the lessee for themselves, their heirs, executors and administrators did bind each to the other of them, it was held, that the proper person to sue after the death of the lessor was his personal representative and not the pupil priest.[2] The covenants must not be illegal or against public policy. Illegal covenants are invalid and cannot be enforced.[3] There may be various kinds of covenants in favour of the landlord. It is not possible to discuss all of them, only some important covenants are dealt with in this chapter. Rights specially granted to landlords are of two kinds. Some rights take effect only on the happening of a certain condition, the others take effect absolutely.

Absolute Grants.—If a right granted is absolute, the landlord may exercise the right under any circumstance and at any time during the continuance of the lease, as, for instance, where the landlord is granted a free right of approach to the premises he can exercise such right at any time during the pendency of the lease.[4]

An absolute grant may also operate in favour of a third person, as where the covenant stated that the mother of the landlord should have the right to reside in a house on the farm leased.[5] In Roman-Dutch Law, unlike in English Law, a contract for the benefit of a third party is enforceable if accepted by such third party.[6]

Conditional Grants.—If a grant in favour of the landlord is conditional he may exercise it only when the condition is fulfilled.

(1) V. D. L. 1. 15. 12. Henry's Translation 239.

(2) *Sidathera Terunnanse v. Don Abraham* (1918) 5 C. W. R. 238.

(3) *Silverman v. Chandlers Ltd.* (1904) T. H. 272, 3 B. & S. Dig. 1053; D. C. Colombo 55,522 (1871) Vand. 279.

(4) *Boss v. Whyte* (1906) E. D. C. 113 Wille (2nd Edit.) 238. 3 B. & S. Dig. 1079.

(5) *Hayter v. Ford* (1895) E. D. C. 61; Wille 238. 3 B. & S. Dig. 1032.

(6) *Jinadasa v. Silva*; (1932) 34 N. L. R. 344, 12 Rec. 179.

Thus, where there was a clause in a lease which provided that if the tenant exercised an option to purchase the property the landlord should have the right of using a certain portion of the premises free for a period of five years, it was held, that on the option being exercised, the landlord was entitled to enforce the rights so reserved. (7)

Covenants Imposing a Positive Duty.

Covenant to Improve the Land or to Keep it in Good Condition.—The lessee may undertake to improve or keep the property in good condition and may further agree that if he fails to carry out the improvements the lessor shall be entitled to cancel the lease. In such a case failure to carry out the stipulation will entitle the landlord to cancel the lease, unless there are some equitable grounds for allowing relief against such cancellation. (8) Where there is a breach of the covenant to keep the property demised in good order the lessee is not entitled to equitable relief, unless the cancellation amounts to a penalty which is outrageous or *immanis*. (9)

Even if the leased property is rural property the Court can grant damages and order cancellation for a breach of such a covenant, and the Court is not restricted to granting damages only. (10) Where the lessee covenanted to put up strong dams and trenches in a field within a period of three years and convert the same into a good field suitable for paddy cultivation, and there was a breach of the covenant, the lease was cancelled. (11) If the lessee agrees to plant and tend trees but fails to plant the trees the lessor is immediately entitled to sue and claim damages. The measure of damages is the pecuniary loss which the breach has caused to the lessor, estimated by the commercial value which the trees would have had at the end of the term, if the covenant had

(7) *Pillai v. Mcdonald's Executors* (1901) 22. Nat. L. R. 292 Wille (2nd Edit.) 238.

(8) *Banda v. Fernando* (1919) 1 C. L. Rec. 9.

(9) *Agar v. Ranewake* (1912) 16 N. L. R. 129.

(10) *Karunaratne Hamine v. Fernando* (1923) 25 N. L. R. 159.

(11) *Wicramasinghe v. Wicramasinghe* (1913) 2 Mat. Cases 177, 2 Bal. notes 25.

been complied with, less deduction for contingencies and for the costs of felling and removal, and a discount for immediate payment. (12)

Covenant to Pay Rent Before a Certain Date.—The tenant may covenant that if he does not pay rent before a certain date the lessor shall be entitled to cancel the lease. If there is a breach of such a covenant a Court of Law will grant relief against the clause of forfeiture. The construction put upon such a clause of forfeiture by a Court of Equity is that it is a mere security for the payment of rent. If the breach of that covenant is capable of just compensation, a Court will award compensation and will abstain from enforcing the forfeiture. (13) Thus, where a lessee who was in arrears brought into Court the amount sued for in respect of the lease he was allowed to continue in possession of the leased premises. (14)

Covenants Imposing a Negative Duty.

Covenant Giving the Landlord, the Right to Re-enter upon the Premises for Non-payment of Rent.—In some cases the parties enter into an agreement that if the lessee does not pay the rent the lessor shall be at liberty to eject and expel the lessee from the demised premises without proceedings at law. Such an agreement is illegal and void because it is against public policy. The parties are not entitled to take the law into their own hands. (15) Though the landlord cannot re-enter upon the premises without an order of Court, yet the Roman-Dutch Law does not consider an agreement by a lessee, that if rents are not paid the lease shall be cancelled, contrary to public policy. (16) Hence, though the lessor cannot take the law into his own hands, he has the right to come to Court and enforce his rights if under the lease he has the right to enter upon the premises when the rent is not

(12) *Vander Hoven v. Transvaal Consolidated Coal Mines Ltd.*, (1904) T. H. 120; 3 B. &. S. Dig. 1080.

(13) *Sandford v. Peter* (1893) 2 S. C. R. 35.

(14) *Uduma Lebbe v. Seyudeen Marikar* (1905) 3 Bal. Rep. 215.

(15) D. C. Colombo 55, 522 (1871) Vand. 279; *Bonino v. De Lange* (1906) T.S. 120, 3 B. & S. Dig. 1078.

(16) *Silva v. Dissanayake* (1898) 3 N. L. R. 248. *Per Bonser, C. J.*

paid before the due date. (17) If the landlord re-enters upon the property under such an agreement he can have no more claim for rent but can recover damages actually suffered by such a breach. (18)

Covenant against Subletting.—A prohibition against subletting may be absolute or conditional. The effect of a breach of a covenant against subletting has already been discussed. (19)

Landlord's Remedies.

If the tenant commits a breach of any covenant agreed upon in favour of the landlord the latter's remedy will depend on whether there is an agreement or not regarding the penalty to be incurred. The usual penalty that is agreed upon is forfeiture. We have considered previously the cases where such a remedy would be granted. When there is no agreement regarding the penalty to be incurred in the event of a breach of a covenant, the landlord will be entitled to cancel the lease, or interdict the tenant from acting contrary to the conditions or claim damages, according to the nature of the breach.(20) If only damages are granted, and there are several lessors, each can claim only a *pro-rata* share of the damages. (21)

The landlord may acquiesce in the breach of a covenant. But even if he does so on one occasion he is not debarred from bringing an action for cancellation on a subsequent breach. (22)

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(17) *Hunter v. Goldberg* (1916) J. D. R. 48, 3 B. &. S. Dig. 1078.
(18) *Bawa Saibo v. Cooray* (1892) 1 S. C. R. 233.
(19) *Vide* ante Chapter IX.
(20) Wille (1st Edition) 446, 447.
(21) *Weeraratne v. Abeyawardene* (1934) 36 N. L. R. 139, 13 Rec 267.
(22) *Salieh v. Othuman* (1917) 4 C. W. R. 92.

SPECIAL RIGHTS OF PARTIES.

CHAPTER XXI.

COMPENSATION FOR IMPROVEMENTS

The duties of the landlord have been previously discussed. Corresponding to these duties the tenant has corresponding rights. Apart from these rights there are some special rights and powers to which the tenant is entitled. The most important of these is the right of compensation given to the tenant for improvements effected by him to the leased premises.

The Law of Compensation Applicable in Ceylon.

In Roman Law and in the earlier Roman-Dutch Law a lessee was placed on the same footing as a *bona-fide* possessor so far as the right of compensation for improvement was concerned. (1) But the Placaat of 1658 which was inimical to the interests of lessees has altered the law in many respects. (2) It is a vexed question as to how far this Placaat is applicable to Ceylon. It is for those who assert and rely upon the operation of a placaat enacted since the date of the Dutch occupation of the Island in 1656, to show beyond all doubt that it has been adopted in Ceylon. (3) In the case of *Goonesekara v. John Sinno,* (4) the Court while considering the question whether a lessee could assign a right under a lease without the lessor's consent considered also the question whether certain Placaats, which prohibited the lessee from assigning his rights under a lease of rural property without the consent of the landlord, had been introduced into Ceylon. The most important of all Placaats referred to was the Placaat of 26th September 1658. (5)

(1) Lee 307, 308.

(2) Placaat of 26th Sept, 1658; Lee. 308.

(3) *Karonchihamy v. Angohamy* (1904) 8 N. L. R. I.

(4) (1922) 4 C. L. Rec. 133.

(5) *Vide* Wille 95, 96.

In considering the question whether these Placaats were introduced, Ennis, J., in the case of *Goonesekara v. John Sinno*, said: "It would seem that in South Africa in certain portions of it, it had been held that a lease of rural property cannot be assigned without the consent of lessor, and this was decided on certain Placaats which, it was held, had been introduced into the law of South Africa. The counsel for the appellant was unable to assure us that these Placaats had been introduced into Ceylon."(6) Therefore it has to be assumed, till the contrary is proved, that the Placaat of 1658 was not introduced into Ceylon. Hence in considering the right of the lessee to claim compensation for improvements, the Roman-Dutch Law as it was prior to the passing of this Placaat and as modified later by the decisions of our Courts has to be considered. Our Courts, following the view of the later Roman-Dutch Jurists, do not regard the lessee as a *bona-fide* possessor. (7) In considering the right of compensation for improvements, three different kinds of improvements have to be distinguished, namely, necessary improvements (*impensae necessariae*), useful improvements (*impensae utiles*) and luxurious improvements (*impensae voluptuariae*).

Different Kinds of Improvements.

Necessary Improvements.—Necessary improvements are such as are necessary to be made in order to preserve the property in the state in which the possessor found it, or if it was found in an impaired state, to restore it to such condition as would render it available for the purpose for which it was originally intended or was commonly used. (8)

Although ordinarily a lessee is not entitled to compensation for improvements, in the absence of an agreement he is always entitled to recover the necessary expenses incurred by him for the protection or preservation of the property held by him in order to

(6) (1922) 4 Ceylon Law Rec. 133 at 134.

(7) *Soysa v. Mohideen* (1914) 17 N. L. R. 279 at 286; 3 Burge 16; Voet 41. 3. 6; 2 Vanleeuwen 112; See. 17 Law Rec. Civ

(8) Walter Pereira on Compensation, page 16.

enable him to occupy the property and carry on his trade or business in it. (9) In the case of necessary improvements though the Placaats are silent, yet there is ample authority for saying that compensation must be paid for such improvements in the same way as if the lessee had acted as a *negotiorum gestor*. (10) But it has been held in Ceylon that a tenant at will, if he could have communicated with his landlord, cannot, in the absence of agreement, make a claim for improvements effected by him which merely amount to repairs to the property. (11)

Useful Improvements.—Useful improvements are such as have rendered the property more valuable, or such as ordinarily serve or are intended to serve some useful purpose. (12) Installing electric lights to a boutique must be regarded as a useful improvement. In most countries, shops and boutiques are brilliantly lit, and it is a great advantage to the lessor to have the boutique well lit, as good lighting would attract tenants and thus lead to an enhancement of rent. (13) The improvements must be of such a kind as will permanently enhance the value of the land. Thus, where the improvements which the lessee had made consisted of preparation of a field for cultivation during a particular season, compensation was not allowed, as the improvements did not permanently enhance the value of the land. (14)

When Compensation for Useful Improvement is Claimable.—In the case of claim for compensation for useful improvements the question whether the consent of the landlord is necessary in order to succeed in it is not free from difficulty. In Roman Law, a lessee was entitled to compensation for necessary and useful expenses, (15) the lessee being in this respect assimilated to the *bona-fide* possesor. (16) Grotius, following the Roman

(9) *Abdul Rahiman v. Mudaliyar* (1913) 1 Bal. Notes 83.
(10) Per Villiers, C. J., in De Beer's Case, 10 S. C. 373; Wille 260.
(11) *Dimbula Valley Tea Co. v. Antho Appu* (1900) 1 Br. 343.
(12) Walter Pereira Law of Compensation, page 17; Walter Pereira's Laws of Ceylon 352; 3 Burge 52.
(13) *Chinnyah v. Mohamadutamby* (1932) 1. C. L. W. 228.
(14) *Madanayake v. Marikar* (1919) 6 C. W. R. 7.
(15) Digest 19. 2. 55. 1; Lee 307, 308.
(16) Lee 308.

Law, makes no distinction between the *bona-fide* possessor and the lessee. He says: "Again, if any one builds upon another's ground with his own timber or stone, he loses the ownership, which lapses to the owner of the land. But the owner of the land is bound to compensate him, if he built thinking that he was the *owner or a lessee*, unless the building was erected not for need or profit but for pleasure, in which case the landowner has the option of keeping the building after paying compensation or of permitting the builder to remove it". (17) In the case of *Muttiah v. Clements*, (18) the Court took the view that a person who entered into possession of a property under a promise of lease and made permanent improvements was entitled to compensation. In the case of *Mudiyanse v. Sellandyar*, (19) Grenier, A. J., cites the case of *Muttiah v Clements* for the proposition that a lessee is, under certain circumstances, entitled to claim compensation for improvements. Referring to the case of *Mudiyanse v. Sellandyar*, Walter Pereira says that the Supreme Court went perilously near declaring, if it is not deemed to have actually declared, that as regards the right to compensation for improvements a lessee was and is supposed to be entitled to the right of not merely a possessor but a *bona-fide* possessor of the land. (20) This eminent jurist says that the principles enunciated in the case of *De Beer's Consolidated Mines v. London and South African Exploration Co.* (21) should be followed in Ceylon. In the case of *Punchirala v Mohideen*, (22) the Court adopting the ruling in *De Beer's* case and the view of Vanderkeesel, held that a lessee who had planted trees on the lessor's land was only entitled to compensation if he did it with the consent and acquiescence of the lessor, otherwise he was entitled to nothing. But the ruling in *De Beer's* case and also the opinion of Vanderkeesel are based on the Placaat of 26th September 1658. As observed previously, it has not been proved that this Placaat was

(17) Grotius 2. 5. 8; Lee's Translation, page 119.
(18) (1900) 4 N. L. R. 158.
(19) (1907) 10 N. L. R. 209 at 212.
(20) Walter Pereira Laws of Ceylon 376.
(21) 10 S. C. 295.
(22) (1910) 13 N. L. R. 193.

introduced into Ceylon. In Roman Law and early Roman-Dutch Law no distinction was made between the *bona-fide* possessor and the lessee so far as the right to compensation for improvements was concerned. Hence the question whether the consent of the landlord is necessary or not in order that a tenant may claim compensation for useful improvements made by him is still a debatable one. But it must be stated on the authority of *Punchirala v. Mohideen* that the consent of the landlord is necessary to claim compensation. It is not necessary that express consent should have been given. A claim for compensation may be founded upon either express or tacit consent. (23)

Luxurious Improvements.—Luxurious improvements are those which merely contribute to the adornment of the property, but do not increase its profits or permanently enhance its value. These are improvements which serve purposes of pleasure or which are made on occasions of festivity. (24) Ornamental improvements such as planting of trees which serve merely as an ornament in suitable localities come under the category of useful improvements. (25) In order that the lessee may claim compensation for luxurious improvements the express or implied consent of the landlord is necessary. (26)

Quantum of Compensation.

Where necessary improvements have been effected, the tenant can recover the value in excess of the original value of the land or at least the actual cost of improvement in the same way as a *negotiorum gestor* can recover. The Placaats are silent on this point. (27) Regarding other kinds of improvements the Placaat of the 26th September 1658 lays down that account shall be taken only of the bare materials, without sand and lime and workmen's wages, such as they shall actually be worth at the time of the said assessment

(23) *Helena Perera Hamine v. Silva* (1910) 4 Weer. 34.

(24) Walter Pereira on the Law of Compensation, 18; Walter Pereira Laws of Ceylon, 353.

(25) Walter Pereira on the Law of Compensation, 64; Walter Pereira on Laws of Ceylon, 353.

(26) Wille 260.

(27) Wille 260.

if they were removed from the grounds. (28) In other words, as Professor Lee puts it, the lessee gets what the materials would be worth to a house breaker after destruction and removal. (29) Also where the lessee has planted trees at the instance of the lessor he can only recover the cost of the trees at the time of planting. (30) In Ceylon, as observed previously, it has not been proved that this Placaat was introduced, and our Courts seem to have adopted a more liberal basis in some cases.

In the case of *Mudiyanse v. Sellayander* (31) where a person entered into a lease for 10 years and agreed to plant the land, Grenier, J., said that the rules laid down in *De Silva v. Shaik Ali* should be followed. (32) The rules with regard to the extent to which *impensae utiles* can be recovered from the owners, as laid down in this case, are as follows :—

(1) When the outlay has exceeded the permanent advantage to the property, the owner is only liable to the extent to which the property has been rendered more valuable by the improvement.

(2) Even the amount stated above cannot be recovered if the outlay has been very much greater than the owner himself would have made, in which case, it is left to the judge to determine, on a consideration of all the circumstances, how much should be recovered.

(3) If at the time of the suit the increase in the value of the property caused by the expenditure exceeds the amount laid out, only the sum actually expended can be recovered from the owner.

(4) When a claim is made for compensation an account has to be taken of the mesne profits received, and only so much of the expenditure, whether incurred in the production of the fruits or in improving the property, as exceeds the amount of these profits will be allowed, subject, however, to the preceding rules.

(5) In taking this account, fruits which have been consumed, as well as those which are still extant, must be set off against the

(28) Wille 261.

(29) Lee 308.

(30) Lee 309.

(31) (1907) 10 N.L.R. 209 at 213.

(32) (1895) 1 N. L. R. 228 ; *Vide* also Ram. 1877 page 333 at 336, 337 ; D. C. Badulla 20541.

claim for expenditure. The fruits of the expenditure itself however (*fructus ex ipsa melioratione percepti*) are to be excluded from the accounting and are not to be set off against the claim.

However, in *Punchirala v. Mohideen* it was held that where trees were planted with the consent and acquiescence of the landlord, the tenant was entitled to claim only the mere cost of planting at the time of planting. (33) This case merely followed the ruling in *De Beers* case where the judgment was based on the provisions of the Placaat of 1658. It has already been shown that this Placaat was not introduced into Ceylon. Therefore, it appears that there is no justification to adopt in Ceylon this niggardly basis of assessing compensation.

In the case of luxurious improvements a *bona-fide* possessor or a *mala fide* possessor can only remove them if the removal can be effected without injury to the property unless the owner is prepared to pay as much as the things, when removed, would be worth to the possessor. (34) It is submitted that the lessee's right cannot be greater unless there is express agreement by which the landlord has undertaken to pay a certain sum. (35)

A lessee may, however, expressly stipulate that he will not claim anything for the improvements he makes, but such a stipulation must be unconditional. If, for instance, he agrees not to claim any compensation from the lessor on account of any alleged expenses but at the same time stipulates that in the event of his putting up any additional buildings of a permanent nature he shall have an option to renew the lease for 10 years, and the lessee is not given the option although he has put up additional buildings, then compensation is payable by the lessor. (36)

Persons Who are Entitled to Claim Compensation.

When the lessee makes improvements he is entitled to the right to be compensated under certain circumstances. His right

(33) *Punchirala v. Mohideen* (1910) 13 N. L. R. 193.

(34) Walter Pereira 358; Voet 6. 1. 36.

(35) *Vide* Wille 261 regarding the Law in South Africa.

(36) *Silva v. Banda* (1924) 26. N. L. R. 97.

is an inchoate one and is neither assignable nor seizable on a writ against him. (37) Where the lessor and the lessee are sued together by a third party, who disputes the lessor's title, the lessor may claim compensation for the improvements made by the lessee. (38) The heirs of the lessee can claim compensation for improvements effected by the lessee. The mere fact that the lessee has lost his *jus retentionis* does not bar his heirs from claiming compensation. (39) When the tenant is adjudicated an insolvent the right to compensation for improvements made by the tenant vests in the assignee if he elects to abide by the contract. (40)

Persons from Whom Compensation is Claimable.

The right to compensatien for improvements can be claimed not only aginst the lessor but also against a person who claims title to the land by a conveyance from the lessor. (41) But such a right cannot be claimed from a person who claims title to the land independently of the lessor. Thus a tenant under the fiduciary cannot claim compensation from a fideicommissary who has become the owner on the death of the fiduciary. (42) Again where a Kandyan widow had leased out her husband's property, over which she had only a life-interest, and the lessee had made certain improvements, it was held that the lessee could not claim compensation against the lessor's child who brought an action to vindicate his share. (43) Also the lessee, who has made improvements in terms of his lease, is not entitled to claim compensation for these improvements against a person who establishes a right to the property superior to that of the lessor. (44)

(37) *Humbold v. Andiappu Chetty* (1887) 8 S. C. C. 61; *Welaïden Chetty v. Kangany* (1913) 6 Bal. Notes 36.

(38) *Appuhamy v. Doloswala Tea and Rubber Co.* (1921) 23 N. L. R. 129; *Appuhamy v. Doloswala Tea and Rubber Co.* (1923) 25 N. L. R. 267.

(39) *Fernando v. Wickremasinghe* (1922) 24 N. L. R. 31.

(40) Section 72 of the Insolvents Estate Ordinance, Cap. 82.

(41) *Appuhamy v. Silva* (1891) 1 S. C. R. 71.

(42) *Soysa v. Mohideen* (1914) 17 N. L. R. 279; *Mendis v. Dawood* (1920) 22 N. L. R. 115.

(43) *Lebbe v. Christie*, (1915) 18 N. L. R. 353 F. B. *Vide* also *De Silva et al v. Perusinghe* (1939) 14 C L. W. 137; 18 Rec. 206.

(44) *Dharmadasa et al v. Marikkar et al.* (1926) 4 Times 46; 7 Ceylon Law Recorder 117.

The Jus Retentionis.

The earlier view was that a tenant who improved the leased premises with the consent of the owner was entitled to a *jus retentionis* or the right to retain possession of the property till his claim was paid. (45) The later and better view is that a lessee who makes such improvements is not entitled to a *jus retentionis* till his claim is paid. (46) But if such a right is reserved by express or implied agreement the tenant can exercise such a right. (47) The fact that a person has lost his *jus retentionis* does not, however, bar him from making a claim for compensation. (48)

Tacit Hypothec.

Although a lessee has no *jus retentionis* till his claim for compensation is satisfied yet he has a tacit hypothec over the leased property. (49) Vanleeuwen limits this to necessary improvements, and a great number of authorities are in favour of this view. In any event it does not cover *impensae voluptuariae* except when the value of the house is actually enhanced. (50)

The Right of Removal.

In the case of useful or luxurious improvements the tenant has the right of removing such improvements if they were effected without the consent of the landlord. This right will depend upon, whether, at the expiration of the lease, his property is still a movable or is so annexed to the land as to be regarded as a fixture. (51) In considering this question three elements have to be taken into account namely, (52)

(45) *Hambold v. Andyappa Chetty* (1887) 8 S. C. C. 61; *Appuhamy v. Silva* (1891) 1 S. C. R. 71.

(46) *Saboor v. Appuhamy* (1916) 2 C. W. R. 186 at 187; *Punchirala v. Mohideen* (1910) 13 N. L. R. 193; *Silva v. Banda* (1924) 26 N. L. R. 97. *De Silva et al v. Perusinghe* (1939) 14, C. L. W. 137, 8 Rec. 20.

(47) *Coste v. Abeyakoon* (1908) 4 Bal. Rep. 25 at 26.

(48) *Fernando v. Wickramasinghe* (1922) 24 N. L. R. 31.

(49) *Saboor v. Appuhamy* (1916) 2 C. W. R. 186 at 187; *Punchirala v. Mohideen* (1910) 13 N. L. R. 193.

(50) Lee 191 Foot Note 7.

(51) *Brodie v. Attorney Ganeral* (1903) 7 N. L. R. 81, Wille 264.

(52) Wille 264.

(1) the nature of the thing annexed,

(2) the degree and manner of its annexation,

(3) the intention of the person annexing it.

In the case of the tenant annexing materials, the problem is greatly simplified by the fact that there is a presumption that the annexation is for a temporary and not for a permanent purpose. Consequently, in the absence of evidence to rebut this presumption, a tenant does not lose his ownership in the property annexed, for it remains a movable unless it has been so incorporated in the land or structure as to become *ipso facto* an immovable. (53) Wall paper cemented to the walls of a room is not a fixture. Under Roman-Dutch Law even a fixture could be removed if it could be done without causing detriment to the property. (54) If the lessee has planted trees he may not, in general, cut them and remove them during the continuance of the lease. (55) The exceptional cases in which he could cut the trees which he has planted have been already discussed. (56)

CHAPTER XXII.

LANDLORD'S HYPOTHEC.

The duties of the tenant have been sufficiently considered. Corresponding to these duties there are correlative rights vested in the landlord. Apart from these rights there are certain special rights of the landlord some of which have been discussed in the previous chapter. The most important of these rights is the landlord's right of hypothec over the goods on his premises for the rent due to him and for waste committed by the tenant.

(53) Wille 267.
(54) *Davies v. Baur* (1906) Lemb & Asirwathan 18 at 19.
(55) Wille 224, 225, 226.
(56) *Vide* Ante. Chap. xvii.

Nature and Origin of Right.

Nature of the Right.—The lessor of a house has a tacit hypothec over the *invecta et illata* brought on to the leased premises for the rent due to him and for the waste to the property committed by the tenant. The lessor of a land has the same right over the fruits for his rent. (1) Though the security is commonly known as the landlord's lien, the word "lien" is a misnomer. This security is in fact a hypothec and not a lien. (2) Professor Lee says: "A tacit hypothec is not the same as a lien..Liens last only so long as possession is retained, and are not assignable, whereas a tacit hypothec does not depend upon possession, and like other hypothecs may be ceded to a third party." (3) Wille, commenting on the so called landlord's lien, says: "A lien owes its existence entirely to the fact that the creditor is in possession of the property which is the subject of the security. Whereas an essential feature of the landlord's hypothec is that the subject of the security is on the leased premises and consequently in the possession of the debtor." (4)

Origin of the Right.—The landlord's hypothec has a dual origin, De Villiers, J. P., in the case of *Webster v.Ellison*, says:—"In dealing with the landlord's lien in the Roman-Dutch Law, it is well to bear in mind its double origin, for it is derived from what has been called the *pandingsrecht* of the Dutch Law, upon which has been grafted the tacit hypothec of the Roman Law. In Holland by virtue of this *pandingsrecht*, the lessor had the right to attach the *invecta et illata* for the arrears of rent due (which process was called *pandneming*), and after due notice to the lessee to have them sold in execution without having previously obtained a judgment against the lessee." (5)

Debts Secured.

Voet says: "The *invecta et illata* are bound by the rights of *pignus* to the landlord for the rent due and for

(1) Introduction to Roman Dutch Law by R. W. Lee, 3rd Edn. p. 191.
(2) Wille, (2nd Edn.) p. 181.
(3) Lee 197.
(4) Wille 181.
(5) *Webster v. Ellison, Per Villiers C. J.*, 1911 A. D. 73 at 106.

the deterioration of the premises." (6) Wille, on the authority of the case of *Woodrow & Co. v. Rothman* (7), states the law as follows: "In *Woodrow v. Rothman* it was expressly held that the landlord's hypothec covered rent only and not a debt due by the tenant for repairs which he has failed to make. Further, the Insolvency Act confers a preference on the landlord in the insolvency of the tenant in respect of rent only, consequently, it may be safely concluded that in South Africa the *invecta et illata* are not bound for any debts of the tenants other than the rent." (8) It may be noted that in Ceylon the Insolvents' Estate Ordinance (9) contains a similar provision. (10) Merely because the Legislature prefers the landlord to other creditors, in the event of the tenant's insolvency, in respect of the debt due to him by way of rent only, it cannot be concluded that the tacit hypothec over the *invecta et illata* of the tenant is confined to rent only and does not extend to the debt due to the landlord on account of the deterioration of the property, and that a right conferred by the Common Law is by implication taken away from him. It is submitted that Professor Lee's statement of the law is the better view. He says: "The lessor of the house has a tacit hypothec for *rent and for waste* to the property, over movables and animals brought on to the premises by the hirer. The lessor of the land has the same right over the fruits for the payment of rent due to him. (11) This hypothec applies equally to urban and rural tenements." Voet says: "As respects our own usages the *invecta* in rural as well as urban tenements and also animals put into the higher pasture for the purpose of grazing are affected by the right of tacit pledge." (12) So that, so far as the operation of the tacit hypothec is concerned, there is no difference now between urban and rural tenements as it once existed under the Roman Law. (13)

(6) Voet 20.2.2. Berwick page 299, 300.

(7) (1884) 4 E. D. C. 9.

(8) Wille 182 Section 52 of the Insolvency Ordinance.

(9) Cap. 82.

(10) Section 52 Cap. 82.

(11) Lee 191.

(12) Voet 20. 2. 3. Berwick's Translation page 301.

(13) Voet 20. 2. 3. Berwick 301.

Properties Subject to Hypothec.

By the words *invecta* and *illata* are meant those things which are driven or carried on to the leased property, that is to say, movables and animals brought on to the premises. (14) The lessor of a land also has this right over the fruits. (15) The question whether property protected by statute from seizure for debt is subject to the landlord's lien was considered in the case of *Harris v. Tomlinson*. (16) In this case, a landlord in the exercise of his lien retained certain wearing apparel and bedding under the value of £5 belonging to his tenant, which articles were exempted from seizure for any debt by statute. Searle, J., in his judgment says: "I know of no authority for the motion in its present form. Applicant may have some other remedy, but I know of no authority by which I can order the landlord to hand up these goods. He is exercising his lien and in the circumstances detailed here, it cannot be said that he is in default for not taking out judgment. The application must therefore be dismissed with costs." (17) This decision is of interest to us in Ceylon since Section 218 of the Civil Procedure Code (18) enacts that certain properties are not seizable for debt. But supposing these goods are hypothecated by the tenant to the landlord, then clearly the landlord can seize and sell them despite the provisions of section 218 of the Civil Procedure Code. It is submitted that there is no difference between a hypothec that comes into existence by operation of law and that which comes into operation by act of parties so far as the principle enunciated is concerned. Voet says that clothes and personal effects of the tenant are subject to this lien. He says:—"It does not matter what kind of goods the *invecta et illata* consist of, e.g., they may consist of household furnishings, property so-called, gold, and silver, ornaments, clothing, arms, gems, *universitas*

(14) Wille 183.
(15) *Vide* Lee 191 Footnote.
(16) 1912 C. P. D. 821.
(17) 1912 C. P. D. at 823.
(18) The Civil Procedure Code, Cap. 86.

of merchandise, goods for sale, money, oxen and slaves and whatever that has been brought into the premises by the tenant. (19) Although Voet says that money found on the premises is subject to this hypothec, (20) in *Sugarman and S. A. Breweries v. Burrows*, (21) the Court held that the landlord's hypothec did not attach to the proceeds of the sale of goods which were subject to the hypothec. Referring to this case, Wille says (22) that tnis is sufficient authority for the proposition that money in the tenant's hands is not subject to the hypothec. Voet says that if the fruits have already been sold by the cultivator the price realised is not tacitly bound and much less lands which have been purchased with the price realised by the sale of the fruits. (23) Voet, however, draws a distinction and says that the hypothec attaches to the money if the goods are sold by a creditor. (24) Our Courts have held that the tacit hypothec which a landlord has over the *invecta et illata* in the house given on rent attaches, in the case of movable property, to the proceeds of the sale of such property in the hands of a creditor who knowingly had the property sold in execution of a decree in his favour and had drawn the money himself. (25)

PERSONS WHOSE PROPERTIES ARE SUBJECT TO THE HYPOTHEC.

(a) **Tenants.**—The goods of the tenant are subject to the hypothec. When there are two co-tenants the landlord has no lien on the goods of one tenant for the rent due by the other co-tenant. (26) The case may be different where the liability of the co-tenants is joint and several. A strong presumption exists that movables found on the leased property are those of the tenants. (27)

(b) **Sub-Tenants.**—A landlord has no tacit hypothec on the goods of *bona-fide* sub-tenants beyond the amount due for rent by such

(19) Voet 20. 2. 4. Berwick 303.
(20) Ibid.
(21) 1916 W. L. D. 73. 3 B. & S. Dig. 1123.
(22) Wille 184.
(23) Voet 20. 2. 2. Berwick 300.
(24) Voet 20. 2. 2. Berwick 300.
(25) *Marikar v. Mohamed*, (1913) 17 N. L. R. 191.
(26) *Jordan v. Manota*, (1883.) 4 Nat. L. R. 103. 3 B. & S. Dig. 1116.
(27) *Bushing v. Kinnear* 5 H.C.G. 254; 3 B & S. Dig. 1121.

subtenants to the tenant. (28) If, however, the sub-tenancy is not *bona-fide* the sub-tenant's *invecta* and *illata* are subject to the landlord's hypothec as if they belonged to the tenant, for the full amount of the rent due by the tenant to the landlord. (29) A tenancy can only be said to be *bona-fide* when the tenant has knowledge of the conditions of the lease. Thus, where an urban tenement had been sublet without the lessor's consent and in defiance of a clause in the lease against sub-letting without such consent, there being no proof of knowledge on the part of the sub-tenant of the conditions of the lease or that he owed any rent to the tenant, the Court refused to grant an interdict restraining the removal of his goods pending settlement of an overdue account for rent due by the lessee, for *prima facie* an urban tenement could be sublet without the consent of the landlord. (30) The tenant also has a similar right over the goods of his subtenant. Even if the sub-tenant is dead the Court can grant an order, at the instance of the tenant, attaching stock brought on to the land by the deceased sub-tenant pending an action for rent due to the tenant by the estate of the sub-tenant. (31)

(c) **Persons other than Sub-Tenants** :—Voet says: "Only such *invecta et illata*, however, are bound by tacit mortgage, as are the tenant's own property, unless they have been taken to the hired premises *with the consent* of the owner and with a view to being kept there *permanently or for the use* of the tenant." (32)

Consent May be Express or Implied.—Consent of the owner may be either express or implied. (33) Consent may be express. Thus, where the cattle of a third party were brought by a tenant to a farm leased by him, and were

(28) *Smith v. Dierks*, (1883) 3 S.C. 142, 3 B. & S. Dig. 1116; Wille 158.

(29) *Friedlander et al v. Croxford*, (1867) 5 S. 395; 3. B. & S. Dig. 1116.

(30) *Exparte Aegis Assurance Co., and Trust Co. Ltd.*, 1909, E.D.C. 363; 3 B. & S. Dig. 1116.

(31) *Exparte Alder*, 1911, E. D. L. 106; 3 B. & S. Dig. 1116.

(32) Voet 20. 2. 5. Berwick page 304.

(33) *Rosen v. Manolidas* (1916) J. D. R. 107, 3 B. & S. Dig. 1117.

kept there for an indefinite period with the owner's consent and without notice to the landlord, it was held that the cattle were liable to the tacit hypothec for arrears of rent. (34) If the owner of the goods wishes that his goods should not be subject to this hypothec he must give notice to the landlord, otherwise they become subject to this hypothec. Thus, where a tenant bought a piano on the hire purchase system and took it to the premises with the intention of keeping it there permanently, and it was a term of the purchase that the piano should not be subject to the landlord's lien, but the landlord had no notice of such terms, the Court held that the piano was subject to the landlord's lien even though all the instalments were not paid. (35) But where the seller gave notice to the landlord of the terms of the purchase, the Court held that until the last instalment was paid the landlord had no *jus rententionis* over the piano for arrears of rent. (36) It is necessary that the owner should have knowledge that his properties are in the tenant's premises, unless he has such knowledge he cannot be said to have consented, either expressly or impliedly, to the goods being kept on the leased premises. Where the owner of furniture who let it on a hire-purchase agreement gave notice of the terms of the contract to the landlord and the latter transferred the premises to another person but the owner was not aware of this transfer, the Court took the view that the furniture was not subject to the landlord's lien inasmuch as the owners had done everything in their power to show that they did not consent to the furniture being subject to the lien. Since they did not have knowledge of this transfer they could not be deemed to have consented either expressly or tacitly to the property being kept on the premises. (37) Also where the owner of furniture let the

(34) *Leech v. Gardener* (1898) 15 C. L. J. 206; 3 B. & S. Dig. 1117.

(35) *The Standard and Diggers News Co. v. Esterhuizen*, (1893) H. 22, 3 B. & S. Dig. 1119.

(36) *Mackey Bros v. Cohen* (1884) 1. O. R. 142, 3 B. & S. Dig. 1119.

(37) *Bradlow & Co. v. Lucas* (1917) T. P. D. 310; 3 B. & S. Dig. 1120.

same to the lessee on a hire-purchase agreement and the lessee removed the furniture to some other premises without the knowledge of the owner, it was held that, although the lessor of the new premises had no notice that the furniture did not belong to the lessee, yet he had no tacit hypothec on the same. (38)

The Property Must be Kept for the Use of the Tenant :— The property should be kept there permanently for the use of the tenant. The landlord has an hypothec on the property of a third party, where such property was deposited in the house occupied by the tenant for the permanent use of the latter. (39) The movable property of the third party brought on to the premises for a temporary purpose and not for the benefit or use of the lessee is not subject to the landlord's hypothec for rent. Thus, where goods were sent to the premises rented by an auctioneer for sale by public auction, and they remained unsold on the premises, it was held that they were not liable to the landlord's hypothec. (40) But furniture which is bought on a hire-purchase agreement is intended for the permanent use of the tenant. In *Anglo Oriental Furnishing Co,. v. Samarasinghe,* Grenier, A. J., said : "Now looking at the character of the articles there can be no doubt that they are such as are of permanent use, and the law, I think, is perfectly clear that the landlord's tacit hypothec does attach to this property." (41) Where such property is purchased by the landlord under sale in execution against the tenant, the landlord's title is not limited to the interest of the tenant in the property. (42)

Legal Effect.

The landlord has a tacit hypothec which when perfected by seizure becomes privileged and is entitled to preference

(38) *Heugh's Trustee v. Heydenrych et al* 12, S. C. 318 ; 3 B. & S. Dig. 1118.

(39) *Gooneratne v. Annamalai Chetty* (1902) 3 Brown 211.

(40) *Moller & Co. v. Levy* (1892) 13 Nat. L. R. 118; 3 B. & S. Dig. 1120.

(41) (1903) 7 N. L. R. 12 at 15.

(42) *Singer Sewing Machine v. Hanifa* (1925) 27 N. L. R. 257, 7 Rec. 51.

over all unprivileged claims, whether secured by hypothec or not. (43) When once the landlord has made his lien effective by seizure of the goods followed by sale, the lien cannot be defeated even by a prior attachment in execution of a mortgage decree. (44) The fact that a landlord has accepted from his tenant a promissory note for the amount of rent due does not make him lose the legal hypothec he has over the *invecta et illata*. (45) The lessor, however, cannot take the law into his own hands, enter the premises and exclude the lessee with the object of preventing the removal of goods, and so preserve his lien. Such an entry and exclusion would amount to an interruption by the lessor of the enjoyment of the demised premises which would discharge the lessee from liability for future rent and would entitle him to the annulment of the lease and to damages. (46)

Doctrine of Quick Pursuit.

The landlord's hypothec is effectual as against the other creditors of the tenant so long as the goods remain in the possession of the landlord under a judicial sequestration obtained by him. Grotius, (47) and, following him, other Roman-Dutch Jurists propound what is known as the doctrine of "*quick pursuit*". Voet says: (48) "We must remember, however, that now with us and in many other countries the right of tacit pledge in the *invecta et illata* of a tenement, whether rural or urban, has no force unless they are sequestered by public authority while they are still in the tenement; or unless when the tenant removes them they are seized by a vigilant creditor in the very act of removal, in which case the things which have begun to be transferred but had not reached the place of destination for concealment are to be taken back to the land." In *Webster v. Ellison*, (49) the South African

(43) Gren. 1874 D. C. 33 at 34.
(44) *Peiris v. Sinnamuttu* (1926) 28 N. L. R. 449.
(45) *Re-Ledward ex-parte Austin*, (1872) Ram (1872-76) page 18.
(46) *Marikar v. Bell* (1892) 2 C. L. R. 94.
(47) *Vide* Grotius 2. 48. 17. Lee's Translation (2nd Edit.) 283,285.
(48) Voet 20. 2. 3; Berwick 301, 302.
(49) 1911 A. D. 73.

Courts adopted the principle stated by Voet, namely, that the goods can only be seized in the course of removal or while in transit to the new destination, and overruled the decisions which stated that in applying the doctrine of quick pursuit the Courts could grant an attachment within a reasonable time after the removal of the goods was complete. In *Perera v. Silva,* (50) it was held that the landlord could not detain the tenant's goods without judicial process and if he did so he would be liable in damages. Hence, it is submitted that even in the course of removal the goods can only be seized by judicial process.

ATTACHMENT.

In the case of *Perera v. Silva,* (51) a Divisional Court discussed the law pertaining to the manner in which the landlord's lien should be exercised and came to the conclusion that the lien could only become effective by means of judicial process and that the landlord was not entitled to exercise his lien without obtaining judicial process. Poyser, J., said: "The preponderance of authorities, in my opinion, leaves no doubt that under the Roman-Dutch Law a landlord's lien on his tenant's property can only become effective by means of judicial process;" and Koch, J., took the view that the lien could only become effective after obtaining sequestration by public authority or judicial process. Soertsz, J., also concurred with this view. As rightly remarked by Innes, J., in *Webster v. Ellison,* "the tacit hypothec over so undefined a subject matter is of little practical value save in a *concursus creditorum* without some special machinery to enforce it." (52)

Under the Roman Law the hypothec was enforced by a public officer who after proceeding to the leased premises, made an inventory and put a mark or seal on the tenant's goods and closed the doors of the premises. The Roman-Dutch Law adopted a similar procedure, and no order of Court was necessary,

(50) (1935) 4 C. L. W. 33, 37 N. L. R. 157, 15 Rec. 30.

(51) (1935) 4 C. L. W. 33, 37 N. L. R. 157, 15 Rec. 30.

(52) 1911 A. D. 73 at 86.

the goods being sequestered or attached by public authority. (53) In South Africa, apart from the remedies under the Common Law, Wille says, there are two statutory remedies. First, the landlord may obtain an automatic rent interdict when he takes out summons in an action for the rent of any house by including in such summons a notice prohibiting any person from removing any of the furniture or other movables which are subject to the landlord's hypothec. Every person who disobeys or neglects to comply with such notice lawfully endorsed is guilty of contempt of Court and, upon conviction, is liable to fine or imprisonment. Any person who is affected by the notice may apply to Court to have it set aside. (54) The other remedy available to the landlord is to obtain an order for attachment in the Magistrate's Court upon an affidavit by the landlord that the rent has been demanded in writing for the space of seven days and upwards or that the tenant is about to remove the movable property in order to defeat and avoid payment of rent. Upon security given by the landlord for any damages the tenant may suffer, the Court may, upon application, issue an order to the messenger authorising and requiring him to seize and arrest the movables in the house which may be sufficient to satisfy the amount of rent due. (55)

In Ceylon there are no remedies granted by statute similar to those available in South Africa. In appropriate cases an order of sequestration may be granted, but this can only be granted to a landlord whose claim is over Rs. 200, if it is proved to the satisfaction of the Judge that the tenant is alienating his property with a fraudulent intent. (56) But where a tenant removes his furniture to another house, there cannot be any alienation on his part and hence this remedy is not available at all in such cases.

In certain cases an injunction may be granted if it is proved that the tenant during the pendency of the action for rent is

(53) Wille 196 (2nd Edition.)
(54) Wille 196, 197, 198.
(55) Wille 198.
(56) S. 653 Civil Procedure Code, Cap. 86.

threatening or is about to remove or dispose of his property with intent to defraud the plaintiff. (57) But these remedies are not available in all cases, and will only be granted in appropriate cases.

We have to consider whether the Roman-Dutch Law remedy known as *praeclusio* is available in Ceylon. In considering this question it would be profitable to refer to the case of *Seyadoris v. Hendrick* (58) where Burnside, C.J. and Lawrie, J., (Dias, J. dissenting) took the view that the Roman-Dutch Law remedy of sequestering goods *pendente lite* was not available in Ceylon. Burnside, C.J., took the view that the District Courts were the creatures of the Charter and the Ordinance succeeding it, and there was nothing which gave them authority to administer the Dutch Law generally, and that it was not enough to state that because the right existed, therefore the District Court had the power to enforce it. But Dias, J., took the view that the Court had inherent power to issue the order for sequestration or a mandatory injunction. That the Courts have the inherent power is the statute law of this country. (59) But it has been held recently that a Court cannot grant an order for sequestration by the exercise of its inherent power on an application by the landlord to have the tenant's goods on the premises attached for non-payment of rent. (60) As Innes, J., observed, unless there is some special machinery to enforce this right, the landlord's tacit hypothec may be of little value. The tenant may with impunity remove his property from the premises even after his landlord has obtained judgment, provided it is done before attachment or seizure. In such a case he does not commit a penal offence in Ceylon. (61) In an action for rent and ejectment filed in the Court of Requests judgment was entered of consent against the tenant, and one of its terms was an undertaking given by the tenant not to

(57) S. 81 Courts Ordinance, Cap. 6.

(58) (1892) 1 S. C. R. 152.

(59) S. 839 Civil Procedure Code, Cap. 86.

(60) *Kotalawala v. Perera et al* (1936) S. C. Int. 125 ; D. C. Col. 5277 ; (1937) 8 C. L. W. 61 ; 2. C. L. J. R. 58.

(61) (1934) *King v. Fernando*, 2. C. L. W. 406.

remove the furniture from the premises till the amout was settled; the tenant defaulted and the landlord took out writ and an order of consent was subsequently made by Court, but the order did not contain an undertaking not to remove the furniture, and the tenant removed the furniture; it was held that, as the tenant believed that the undertaking not to remove the furniture was not a term of the second consent order, his act was not fraudulent or dishonest within the meaning of section 407 of the Penal Code. (62) It is hoped that the Legislature would soon supply a machinery by which the hypothec could be made effective.

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(62) *Sheriff v. Karunaratne*, 1. C. L. J. R. 198.

PART III.

THE TERMINATION OF THE CONTRACT.

CHAPTER XXIII.

THE TERMINATION OF THE LEASE.

Under the Roman-Dutch Law a lease may be terminated by the expiration of the term fixed or implied for its duration, by the determination of the landlord's title, by the insolvency of the lessor or the lessee, by merger, by destruction of the property, by renunciation by either party for a just cause and by mutual agreement of the parties. (1) We may consider these events in greater detail with reference to the law of Ceylon.

Expiration of the Term.

Leases for a Fixed Term.—Where a lease is entered into for a specific term the lease terminates at the expiration of the term. In computing the term, the ordinary method of computation should be applied, namely the first day should be included but the last day should be excluded. Thus, a lease for three years commencing on the 16th of December 1892 was held to terminate at midnight on the 15th of December 1895.(2) Where a lease is for a fixed or specified term, no notice is necessary asking the tenant to quit at the end of the term. (3)

Periodic Leases.—A periodic lease is one which runs for a definite period terminable by notice on either side. The most important type of periodic lease is the monthly tenancy. A monthly tenancy is terminated by a calendar month's notice.

Notice to Quit.

Persons Who Can Validly Give Notice to Quit.—A notice terminating the tenancy may be given either by the landlord or by the tenant. (4) Where there are several landlords the notice must

(1) Lee 312. VanderLinden, 1. 15. 12. Henry 240.

(2) *Andris Appu v Silva* (1896) 2 N. L. R. 175. *Rossouw v. New Bethsada Municipality* (1910) E. D L. 367; 3 B. & S. Dig. 1026.

(3) *Umdwebu v. Freeman*, 1885,. 6 Nat. L. R. 246; 3 B. & S. Dig. 1027.

(4) *Sahul Hamid v. De Silva* (1932) 1 C. L. W. 354 at 356.

be given by all of them, and a notice given by one is insufficient. (5) It is necessary that the person who purports to be the owner and who gives the notice to quit must have an interest in the property at the time he gives the notice. Thus, a notice given to an occupier of a house by a person who subsequently acquired the property but had no interest in it at the time he gave the notice, was held to be invalid in law. (6) When a property is leased informally to a certain person and later the same property is leased out on a notarial document, the notarial lessee can in certain circumstances validly give notice asking the informal lessee to quit. However, if there is no assignment or attornment, the notarial lessee cannot validly give notice asking the informal lessee to quit the premises as there is no privity of contract between these two parties. (7) Similarly where two notarial leases are granted, one to take effect after the termination of the other, and the previous lessee overholds and is in possession of the property, the subsequent lessee cannot, unless there is attornment, validly give notice asking the previous lessee to leave the premises as the latter has not attorned to the former and there is no privity of contract between the parties. (8) On the strength of his lease only a notarial lessee cannot claim rent from, or validly serve notice to quit to, the monthly tenant of his lessor. There must be either attornment or assignment by the lessor of his interest with notice to the tenant. (9) Not only should the above requisite be satisfied but also the subsequent lessee should have title to the leased property at the time the notice is given. Hence he cannot give notice to quit on a date when his lease has not commenced. (10) But it would appear that a notarial lessee can validly serve notice asking a tenant at will to leave the premises, and also that a demand

(5) *Edirisinghe v. Dissanayake* (1929) 30 N. L. R. 447, 6 Times 154, 10 Rec. 69.

(6) *Supramanien Chetty v. Supramanien Chetty* 1872, 75, 76 Ram. 267, 16 Rec. 78.

(7) *Kira Ukkuwa v. Fernando* (1936) 1 C. L. J. R. 96; 38 N. L. R. 125.

(8) *Rajapakse v. Cooray* (1924 2 Times 209.

(9) *Wijeratne v. Hendrick* (1895) 3 N. L. R. 158.

(10) *Arnolis v. Mohideen Pitche* (1907) 3 Bal. Rep. 159.

by the notarial lessee amounts in law to a demand by the lessor. (11) A vendee seems to be in a different position. As it has been shown, he steps into the shoes of the landlord and by operation of law the relationship of landlord and tenant is established between the vendee and the tenant of the vendor. This proposition is based on the rule of the Roman-Dutch Law, namely, "*hire goes before sale.*"

Notice to quit may be given by an accredited agent of the landlord. Where the landlord is a corporation valid notice can be given by the agent of the corporation even without the written authority under the seal of the corporation, especially, where the act of the agent is expressly or impliedly ratified by the corporation. If the corporation follows the notice given by the agent with an action, it amounts to ratification. (12)

Person to Whom Notice Could be Given.—If notice is given by the landlord it must be served on the tenant. If it is given by the tenant it must be served on the landlord. Even a tenant under an informal lease is entitled to a calendar month's notice. (13) Where the tenant gives notice it has to be served on the landlord. But where the landlord has appointed a manager during his absence and has authorised him to effect repairs and recover rent, the tenant may serve him with notice of his intention to quit. (14)

Commencement and Duration of Notice.—The duration of the notice and the last date on which a valid notice could be served are vexed questions both in South Africa and in Ceylon. In *Fonseka v. Jayawickreme,* (15) Withers, J. says: "The Law laid down by the late Sir Edward Creasy in the case cited to me, (16) I understand to be as follows and as so understood I

(11) *De Silva v. Goonewardene* (1901) 2 Br. 202.

(12) *The Incorporated Trustees of the Church of England in Ceylon v. Wijesekara* (1935) 4 C. L. W. 127; *Rœ ex d Dean and Chapter of Rochester v. Pierce,* (1809) 2 Campbell Reports 96.

(13) *Ukkuwa v. Fernando* (1936) 1 C. L. J. R. 96 at 96; 38 N. L. R. 125 at 129, *Vide* Contra *Auneris v. Aralis* (1928) 30 N. L. R. 363, 10 Rec. 15.

(14) *Abeysekara v. Macnamara* (1905) Lemb. 92.

(15) (1892)2 C. L. R. 134 at 135.

(16) *Vide* (1873) Grenier C.R. 23, C. R. Colombo 87694.

adopt it. In the case of monthly tenancies the parties must have a complete calendar month..... To ensure this a notice to quit must be given before the commencement of the month at the expiry of which the tenancy is to determine, so that the party noticed shall have from midnight of the last day of the month immediately preceding the month at the end of which the tenancy is determined by the notice, to midnight of the last day of the expiring month of the tenancy as thus determined for the purpose of making fresh arrangements. If I am not mistaken, this law expresses the prevailing custom of the country." This view has been followed in a number of cases (17) despite the contrary view of Bonser C. J. in the case of *Weera Perumal v. Davood Mohamed* (18) where he says: "As I understand the law, no notice of any definite length of time is required. It must be reasonable notice—reasonably sufficient in the opinion of the judge to admit of a tenant having an opportunity of securing another house." In case of *Imperial Tea Company v. Aramady* (19) Jayawardene A. J., considers all the cases on this question. After discussing the English cases he says:—"The judgment of Creasy C. J. was based on certain English cases, but recently the cases on which Creasy C. J. relied have been referred to and commented on by a Divisional Bench of the High Court in England. (Swift and Action J. J.) in *Simmons v. Crossley.* (20) There Swift J. said: "In this conflict of judicial opinion it seems to me that the view held by Wright J. is the more correct. I think that to determine a monthly or weekly tenancy reasonable notice must be given, and that such notice if in other respects reasonable, is not rendered unreasonable and invalid merely because it expires on some day other than the last day of the month or week calculated from the commencement of the tenancy..... The English authority, in my opinion, throws considerable doubt on the judgment of Creasy C. J. and the

(17) *Warwick Major v. Fernando* (1917) 4 C. W. R. 221; *Loku Menike v. Charles Sinno* (1918) 5 C. W. R. 281.

(18) (1898) 3 N. L. R. 340.

(19) (1923) 25 N. L. R. 327 at 329, 5 Rec. 138.

(20) (1922) 2 K. B. 95.

judgments based on it, and shows that the view taken by Bonser C. J. is the more correct one".

In this state of authorities the judgment of Lyall Grant J., in the case of *Shahul Hamid v. de Silva,* (21) seems to throw considerable doubt on the view held by *Withers J.* regarding the last day on which the notice could be validly given. "The only point" says Lyall Grant, J., "which remains for decision is whether a notice given on the first of the month that the defendant is going to leave at the end of the month can be considered sufficient notice. It is certainly on the double line but on the whole I am of opinion that in the circumstances it ought to be considered as sufficient provided that rent is paid in respect of a full month from the date on which it is given." (22) In the South African case of *Tiopaizi v. Bulawayo Municipality,* (23) the question whether notice given on the 1st of a month by a master to his servant asking him to quit at the end of the month was sufficient in law was fully considered. It was held in this case that a month's notice given at any time on the 1st of the month was sufficient in law. Their Lordships deduced this principle by considering the law of leases.

Where the tenancy runs from the 15th of one month to the 15th of the succeeding month the date from which the month should be calculated would depend on the commencement of the tenancy. Though the premises were let on the 15th the parties may be able to lead evidence to show that the agreement was that the tenancy should run from the 31st of one month to the 31st of the succeeding month. (24) If a tenant disclaims to hold from his landlord, the landlord need not aver or prove any notice to quit. (25)

Waiver of Notice.—After notice has been served the landlord may either expressly or impliedly waive the notice. Thus, if

(21) (1932) 1 C. L. W. 354.
(22) 1 C. L. W. 354 at 357.
(23) (1923) A. D. 317.
(24) *Warwick Major v. Fernando* (1917) 4 C. W. R. 221 at 222.
(25) *Sundara Ammal v. Jusey Appu* (1934) 36 N. L. R.. 400; *Muthunatchiar v. Pathuma Natchia* (1895) 1 N. L. R. 21.

the landlord gives notice to quit but receives rent for a subsequent period he will be deemed to have waived the notice by implication unless there is a specific agreement not to waive the notice. (26)

Extinction of Landlord's Title.

Since the interest of the lessee is derived from that of the lessor, extinction of the landlord's title extinguishes the title of the tenant. Thus, where a usufructuary or a person who has a life interest leases the property for a specified term, but dies before the expiry of the term of the lease, the lease is extinguished. (27) Similarly when a fiduciary leases out the property the lease is terminated on the happening of the event which divests the title from the fiduciary and invests it in the fideicommissary. (28) Again when the leased property is sold for non-payment of taxes by the Municipal Council the property vests in the Council free from encumbrances, and the lease comes to an end. Therefore the Municipal Council cannot maintain an action for rent against the tenant on the basis of a monthly tenancy. (29) Where a property is leased out by a co-owner and a partition action is brought in respect of that property and partition is ordered, then section 13 of the Partition Ordinance (30) enacts that the lease of an undivided share shall apply exclusively to the portion allotted in severality to the lessor. But if sale is ordered the purchaser gets the property free of all encumbrances, and hence the lease comes to an end. But the lessees can intervene, and it is competent to the Court, when it decrees a sale under the Partition Ordinance, to order that the interests of such lessees be appraised separately, and that the amount be deducted from the proceeds of the sale. (31) Also where the land leased is compulsorily acquired by Government

(26) *Fonseka v. Naiyan Ali* (1920) 22 N. L. R. 447.

(27) Voet 19. 2. 16. Berwick 204.

(28) Voet 19. 2. 16. Berwick 204, 205.

(29) *Municipal Council v. Perera* (1928) 5 Times 170.

(30) Cap. 56.

(31) *Peiris v. Peiris* (1906) 9 N. L. R. 231 F. B. See Section 51 of the Draft Ordinance for Partition and Sale of Land (Gazette of 3 June 1938).

under the Land Acquisition Ordinance, (32) the lease is at an end, but the lessee is entitled to a part of the compensation paid by the Government. (33) Where the property leased is sold, the lease is not extinguished, the rule in Roman Dutch Law being, *"hire goes before sale"*. (34) This has been previously discussed. Death of the landlord does not terminate the lease, the heirs can step into the shoes of the landlord except where the landlord is a usufructuary, fiduciary or where the tenancy is one at will. (35) Where there is a covenant in the lease binding the parties their heirs, executors and administrators, the proper person to sue on the covenant after the death of one of the lessors is the legal representative of the deceased lessor. (36) Where the landlord is a trustee, the death of the trustee during the pendency of the lease does not terminate the lease, the lease is valid for the remainder of the term. (37)

Insolvency of the Tenant.

Under the common law the insolvency of the tenant terminates the lease. It does not extend beyond the usual period of giving up the occupancy. (38) In Ceylon the Insolvency Ordinance makes specific provisions. If the assignee of the estate and effects of any insolvent having or being entitled to any land under a conveyance to him, or under an agreement for any such conveyance subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance, agreement, or such lease or agreement for a lease, as the case may be, the insolvent shall not be liable to pay any rent accruing after the filing of the petition for sequestration of his estate against him, or to be sued in respect of any subsequent non-observance or non-performance of the

(32) Section 3, subsection (3) Cap. 203.

(33) *Deonis Appu v. Amarakoon* (1897) 1 Matara Cases 196.

(34) V. d. L. 1. 15. 12. Henry's Translation 240.

(35) Wille 244. V. d. L. 1. 15. 12. Henry 240.

(36) *Sidathera Terrunanse v. Don Abraham* (1918) 5 C. W. R. 238.

(37) *Mohamedu v. Meyedeen* (1916) 2 C. W. R. 93.

(38) V. d. L. 1. 15. 12. Henry 240

conditions, covenants, or agreements in any such conveyance or agreement, or lease, or agreement for a lease. If the assignees decline to take such land or the benefit of such lease or agreement for lease, the insolvent shall not be liable if within 14 days after he has had notice that the assignees have declined he shall deliver up such conveyance or agreement, or lease or agreement for lease to the person who is then entitled to the rent or who has so agreed to lease, as the case may be. If the assignees do not elect, they may be compelled to do so by the persons entitled to the rent or those who have so conveyed or agreed to convey or lease. An application has to be made by such persons to the District Court which will order the assignees to elect. (39) Therefore in Ceylon the insolvency of the lessee puts an end to the lease if the assignee declines to take the benefit of the lease and the insolvent gives notice terminating the lease. When a person becomes an insolvent any interest to which he is entitled in any land in this Colony shall vest in the assignee for the benefit of the creditors. (40) Hence the interest of the landlord would vest in the assignee.

Merger.

A lease comes to an end when there is a merger. Merger occurs when the interest of the landlord and the interest of the tenant vest in the same person. This occurs when the tenant acquires the ownership by purchase, usufruct, donation, legacy or some other recognised mode of acquisition. When there is merger the lease ceases. (41)

Destruction of the Property.

Under the Roman-Dutch Law if the thing leased out is destroyed by unforeseen misfortune the lease is terminated. (42)

(39) Section 72 Cap. 82, *Vide* Section 251 of Ordinance 51 of 1938 as to the effect of Liquidation of Companies.

(40) Section 71 of the Insolvency Ordinance (Cap. 82.)

(41) Voet 19. 2. 4. Berwick 193. V. d. L. 1. 15. 12. Henry 240.

(42) V. d. L. 1. 15. 12. Henry 240.

But where the property is not completely destroyed the lease is not at an end if the tenant can still exercise many of his rights, despite the partial destruction of the property. In such a case the tenant may claim a remission of rent. (43) But where the lessee was negligent, as where the fire which damaged the property was caused by the negligence of the lessee or his agent, but the whole of the subject matter of the lease was not destroyed, the lessee not only must make good the damages without waiting for the expiration of the lease, but also cannot claim remission of rent. (44) The rights of the parties may be governed by special agreement. A special agreement providing that in the event of the destruction of the leased premises by fire the landlord should rebuild the premises within a reasonable time, and meanwhile the tenant should continue to pay rent, is binding on the parties and the lease is not terminated. (45)

Mutual Agreement.

A lease may be terminated by mutual agreement or consent of the parties. (46) However, there must be clear proof of an unconditional offer by one of the parties to terminate the lease and a definite acceptance by the other party. (47) If the parties agree that the lease should be terminated by the happening of an event, it shall be terminated even where the event is caused by circumstances other than those contemplated by the parties. Thus where there was a provision as follows: "if all the rice boutiques along with the said premises, situated at 2nd Gabos Lane were to be shifted to Government Granary Stores at Colombo during the lease, the lease shall be considered null and void," and during the pendency of the lease, the lessee was directed by the Government to remove his business to a place built by the Government called Manning Market for a different purpose, it was held that the lease shoud be considered as cancelled. (48) If a

(43) Wille 240.
(44) *Daly v. Chisholm & Co. Ltd.* 3 B. & S. Dig. 1036, 1916, C. P. D. 562.
(45) *Ruphael v. Clutterbuck* (1900) 10 C. T. R. 320; Wille 240.
(46) Wille 244, *Tooch v. le Roux* (1904) 21 S. C. 438.
(47) Wille 244.
(48) *Umma v. Arumugam* (1920) 7 C. W. .R. 297 ; 22 N.L.R. 54.

deed of lease contains a provision reserving to the lessor the power of releasing the lease after amicably settling the amount due to the lessee, should the lessor find it necessary to sell the land, such a provison cannot be carried out otherwise than by consent, or by appropriate judicial proceedings in the course of which it would be competent to the lessee to set up, as against his lessor or any one claiming under him, all equitable rights to compensation. (49) During the pendency of a lease notarially executed, if the parties agree to put an end to the lease, the surrender need not be effected by a notarial agreement. (50)

Renunciation for a Just Cause.

The landlord may claim cancellation of a lease prematurely if the tenant commits a breach of his obligations under the lease, that is to say, if he fails to pay the rent, misuses, or abuses the property, or does not carry out any covenant which he has entered into, provided the breach is of such a nature as to merit cancellation. (51) This has been sufficiently discussed.

Similarly the tenant can ask for cancellation if the landlord fails to carry out his obligations under the lease. For example, if he fails to give vacant possession, or does not guarantee his quiet enjoyment, or refuses to make repairs or fails to carry out his special covenants, then cancellation will be ordered, provided however that the breach is of such a nature as to merit cancellation. (52) This too has been sufficiently dealt with in the previous chapters.

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(49) *Perera v. Perera* (1907) 2 A. C. R. 40.

(50) *Isohamy v. Appuhamy* (1920) 7 C. W. R. 290.

(51) Wille 245. Voet 19. 2. 23. Berwick 215.

(52) Wille 245, Voet 19. 2. 23. Berwick 215.

CHAPTER XXIV.

PROCEDURE.

In the previous Chapters the substantive law relating to leases was considered. In this Chapter the law governing matters of procedure with particular reference to leases is discussed. Fuller treatment on these matters is beyond the scope of this book. It will be found in books that deal with procedure.

For the sake of convenience the subject is discussed under the following headings: jurisdiction, actions, appeal, costs and decree. The speedy machinery by which tenants could be ejected under the Small Tenements Ordinance is discussed in the next chapter.

JURISDICTION.

The jurisdiction of a court will depend mainly on two matters. First, it has to be decided whether the courts in a particular place can inquire into the dispute; then, the grade of the court which has jurisdiction has to be determined.

Forum.—Under our law an action may be brought, subject to the pecuniary or other limitation, in the court within the local limits of whose jurisdiction, (1)

(a) a party defendant resides,
(b) the land in respect of which action is brought is situated,
(c) the cause of action arose,
(d) the contract sought to be enforced was made,

These will be considered in greater detail on account of their importance.

(a) Where a Party Defendant Resides—A person is said to reside in a place where he has his family establishment and home, (2) and not in a place where he merely resides for purposes of business. (3)

(1) Section 9 of the Civil Procedure Code, Cap. 86; also Courts Ordinance, Cap. 6, Sections 62, 75.

(2) *In-re Goonewardene* (1923) 24 N. L. R. 431 at 434, 43 5 F. B, 4 Rec. 215.

(3) *Kanappa Chetty v. Saibo & Co.* (1891) 2 C. L. R. 37.

When there are several defendants it is sufficient if one of them resides in a particular place. (4) A person may have more than one place of residence. (5)

(b) **Where the Land in Respect of which Action is Brought is Situated.**—The mere fact that a land is situated in whole or part in a certain place does not give jurisdiction to the courts in that place unless the action is brought in respect of the land. Thus an action by a lessee to compel his lessor to accept rent is not an action brought in respect of land. Hence such an action cannot be maintained in the court within whose jurisdiction the land is situated if the defendant lives outside the jurisdiction and if the lease was entered into outside the jurisdiction of that court. (6)

(c) **Where the Cause of Action Arises.**—Cause of action is defined as the wrong for the prevention or redress of which an action is brought, and includes the denial of a right, refusal to perform an obligation, neglect to perform a duty and the infliction of an affirmative injury. (7) This definition is not exhaustive as the word "includes" is used. (8) The cause of action is the act which brings the plaintiff to Court and hence in an action to set aside an improvident lease, the Courts of the place where the improvident lease was executed have jurisdiction despite the fact that the land is situated outside and the defendant too resides outside. (9) The cause of action may be described as the data upon which the plaintiff asks for a conclusion in his favour and not the defence or the relief claimed, (10) and is not identical with the transaction out of which the right to relief is claimed. (11) Where the cause of action is non-payment of rent, if the lease was entered into outside the jurisdiction of the Court, in the absence of a specific agreement, the proper place in which the action should be brought is where the defendant resides ; for under the

(4) *Hussan v. Pieris* (1932) 34 N. L. R. 238 at 244, 12 Rec. 184.

(5) *Cassim v. Saibo* (1936) 1 C. L. J. R. 14.

(6) *Appuhamy v. Goonesekere* (1909) 2 Lead. 155.

(7) Section 5 of the Civil Procedure Code, Cap. 86.

(8) *Vide Ludovici v. Nicholas Appu* (1900) 4 N. L. R. 12 at 14 for meaning of the word "includes."

(9) *Ranhami v. Kirihamy* (1903) 7 N. L. R. 357.

(10) *Dingiri Menika v. Punchi Mahatmaya* (1910) 13 N. L. R. 59.

(11) *Abeyadeera v. Hami*, 4 Bal. Notes 89 at 90.

Roman-Dutch Law it is the duty of the creditor to seek the debtor unless a specific place of payment was agreed upon. (12)

(d) Where the Contract Sought to be Enforced is Made.—An action may be brought at the place where the lease was executed though the land leased may be situated within the jurisdiction of a different District Court. In such a case both District Courts have concurrent jurisdiction. (13) In the case of an agreement entered into in one place to grant lease in another place an action may be brought in the latter place, for the breach of contract is to be regarded as the whole cause of action, and the agreement and the breach need not be in the same place. (14) The action may also be brought in the former place. (15) Where the parties are in different places the contract is entered into at the place where the offer is accepted. (16) When contracts are entered into by post the modern tendency is to regard the place where the letter of acceptance was posted as the place where the contract was made. (17) Voet, however, maintains that the contract was concluded when and where the letter fo acceptance reached the offeror. (18)

The Court.—If the debt, damage or demand or the right of possession does not exceed Rs. 300 the Court of Requests will have jurisdiction. (19) If it exceeds this amount the District Court has jurisdiction. (20) Consent of parties cannot give jurisdiction to a Court. (21) An action for rent and ejectment can be brought in the Court of Requests though the value of the tenement is beyond the monetary limits, provided the rent and damages fall within its jurisdiction. (22) When the right to possession does not exceed Rs. 300 an action may be brought in the Court of Requests. In an action for ejectment the matter in dispute is the value of the premises for the

(12) *Subatheris v. Singho* (1930) 32 N. L. R. 360; *Appuhamy v. Goonesekera* (1904) 2 Leader 155.
(13) *Siman v. Elias* (1867) Ram (1863-68) 294.
(14) *Pless Pōll v. Lady de Soysa* (1911) 15 N. L. R. 57 P. C.
(15) *Kittoni v. Fernando* (1916) 2 C. W. R. 187.
(16) *Lalyett v. Negris* (1911) 14 N. L. R. 247.
(17) Lee 222.
(18) Voet 5. 1. 73.
(19) Section 75 of the Courts Ordinance, Cap. 6.
(20) Section 62 of the Courts Ordinance, Cap. 6.
(21) *Jusey Appu v. Ukkurala* (1859) 3 Lorenz Reports 280.
(22) *Mudiyanse v. Rahman* (1896) 2 N. L. R. 235.

period during which the tenant says he is entitled to hold the premises. If the rental exceeds Rs. 300 the parties by waiving a part cannot confer jurisdiction on the Court of Requests, because if a claim is merely for damages a plaintiff may waive a part but where the damages are a measure of the value of possession a waiver is not permitted.(23) In an action for ejectment and damages a month's rent should not be added to the continuing damages claimed for the purpose of determining the pecuniary limit which confers jurisdiction on the Court of Requests. (24) The continuing damages which a Court of Requests may grant are not restricted to Rs. 300. (25) Where a lessee sues the lessor for ejectment and damages, the value of the subject matter for the purpose of determining the monetary limit of jurisdiction is the value of the leasehold interest and not the value of the land. (26(The leasehold interest of a lessee is not the value of the land but the interest he has in the leasehold secured by the lease. (27) In an action for declaration of forfeiture of a lease the value of the unexpired term would determine the jurisdiction of the Court. The value is the amount of the rent secured by the lease and not the probable value of the produce the lessee may derive from the leased premises. (28) But in a possessory action by a lessee the value of the land is the test and not the value of the unexpired term. (29)

In an action in a Court of Requests for rent and ejectment, where the defendant claims in reconvention an amount that exceeds the monetary relief claimable in a Court of Requests, the Supreme Court may transfer the case to the District Court on an application by either party. (30) But the Supreme Court has a discretion in the matter and if the plaintiff's claim is urgent and the order for trans-

(23) *Hewawitarana v. Marikar* (1916) 19 N. L R. 239 at 241, 242; *Vengadasalam Chetty v. Supramaniam Chetty* (1902) 2 Br. 391.

(24) *Usoof v. Zainudeen* (1918) 21 N. L. R. 86.

(25) *Pedris v. Mohideen* (1923) 25 N. L. R. 105, 5 Rec. 21.

(26) *Appuhamy v. Agidahamy* (1921) 23 N. L. R. 473.

(27) *John Sinno v. Julis Appu* (1907) 10 N. L. R. 351.

(28) *Podi Fernando v. Siman Fernando* (1910) 3 Weer 88, 4 Lead 41.

(29) *Lebbe v. Banda* (1918) 20 N. L. R. 343.

(30) *Vide* Section 79 of the Courts Ordinance Cap. 6.

fer would involve delay the Supreme Court will not allow such a transfer. (31)

There is no monetary limit to the jurisdiction of the District Court and an action for rent and ejectment or for either of them, whatever may be the value of the subject matter, may be brought in the District Court. If a plaintiff brings in the District Court an action for any debt or demand which could have been brought in a Court of Requests the action itself is not bad, and he will be entitled to judgment but not to the costs, though it is competent to the judge to make such order as to costs as justice may require. (32)

ACTIONS.

Parties to the Action.—In an action brought by a landlord against his tenant for rent the court must try the simple issues that arise between the parties to the lease. Intervention by a third party claiming title is irregular. (33) Even after the Civil Procedure Code came into operation it is irregular to join in a tenancy action a third party who claims title.

The landlord must himself bring the action and not his caretaker, though the latter often appears in Court and gives evidence on behalf of the landlord. (34) Where the landlord's title is derivative he should state in the plaint and prove how and from whom he derived it. (35) When a house is let by a person, in a representative capacity, for instance as an executor, an action cannot be brought by him in a personal capacity. If he does, the tenant is not estopped from denying his landlord's title. (36) When the landlord brings an action against the tenant the latter is estopped from denying the former's title during the pendency of the lease. (37) But the tenant can plead that the landlord's title has been superseded by title paramount, and that he has been

(31) *Veera Vaku v. Supramaniam* (1902) 6 N. L. R. 52.

(32) *Johannes v. Mohamedu* (1916) 2 C. W. R. 240; Section 72 of the Courts Ordinance, Cap. 6.

(33) *Senewiratne v. Fernando* (1858) 3 Lor. 97, *Vide* Sections 14 and 15, Cap. 86.

(34) *Peiris v. Laisahamy* (1916) 3 C. W. R. 86.

(35) *Vythilingam v. Muttiah* (1898) 3 N. L. R. 252.

(36) *Silva v. Arumugam* (1921) 23 N. L. R. 204.

(37) S. 116 of the Evidence Ordinance, Cap. 11.

evicted by an agent or a lessee of the holder of the title. Actual, physical dispossession is not necessary ; the eviction may also be constructive or symbolic. (38)

Procedure on Default.—If the defendant does not file answer, *ex parte* evidence should be led by the plaintiff in an action for ejectment. (39) For the sake of convenience sometimes an affidavit is filed by the plaintiff instead of the plaintiff being examined orally. In an action for cancellation brought by two lessees, if one of them becomes a lunatic during the pendency of the action and disappears, and does not appear the other lessee should withdraw the action and bring a fresh action. (40)

PRESCRIPTION

A lessor may acquire prescriptive title if he possesses the property for over ten years after leasing it, if there was no act on the part of the lessee from which an acknowledgment of the lessee's right can be inferred. (41) A lessee, who has had continuous possession for over the prescriptive period on a succession of leases, can by prescription acquire the right to remain in possession until the expiration of the term of the lease. (42) A lessor can acquire prescriptive title through his lessee's possession. Thus where a person leased out his undivided share and his lessee took the produce of the whole land and gave to the heirs of the lessor the land owner's share, it was held that the lessor had acquired title to the whole of the land and that the lessee had acquired prescriptive title to the lease of the whole land. (43) In an earlier case, however, the Court took the view that possession by a lessee under a lessor who had no title did not enure to the benefit of the lessor so as to create a prescriptive title. (44) But where a lessee possessed a strip of land adjoining the leased premises under

(38) *Tillekeratne v. Coomarasingham* (1926) 8 Law Rec. 13. 4 Times 108.

(39) *Meedin v. Meedin* (1909) 5 A.C.R. 42; *Vide* also Section 823 of the Civil Procedure Code, Cap. 86.

(40) *Appuhamy v. William Singho* (1922) 24 N. L. R. 472.

(41) *Fernando v. Fonseka* (1908) 4 A. C. R. 5.

(42) *Arunachalam Chetty v. Bilindu* (1922) 1. Times 68.

(43) *Podisingho v. Jaguhamy* (1923) 26 N. L. R. 87 at 88.

(44) *Punchirala v. Andris Appuhamy* (1894) 3 S. C. R. 149.

the impression that it formed part of the leased premises and later agreed to buy it and a deed of conveyance was executed by the executor of the lessor, it was held that the lessee could not count any period prior to the date of conveyance for the purpose of claiming prescriptive title to the said land, since his possession prior to that date was *qua* lessee and not *ut dominus*. (45) A claim for rent reserved under a lease notarially executed falls under section 6 and not under section 7 and 5 of the Prescription Ordinance, and six years' rent only can be recovered. (46) Similarly an action to recover damages arising from a breach of a covenant contained in a lease falls under section 6 of the Prescription Ordinance and not under section 9. (47) In the case of rent not reserved under a notarial lease no action can be brought to recover the same unless it is commenced within three years from the date of the cause of action. (48) Where a lessee has been evicted, his cause of action for damages against his lessor continues during the term of the lease, and his action is not prescribed if brought within two years of the date when damages were still accruing ; but damages which occurred over two years prior to the institution of action would be prescribed. (49)

Appeal.

There is no right of appeal from any final judgment or order having the effect of a final judgment, pronounced by the Commissioner of a Court of Requests in any action for debt, damage, or demand, unless upon a matter of law or upon the admission or rejection of evidence, or with the leave of the Commissioner. (50) An action for rent and ejectment is an action involving an interest in land (51) and hence no leave of the Commissioner is necessary. But an action merely for rent and not one for rent and ejectment is not an action affecting an interest in land and hence leave is necessary. (52)

(45) *De Silva v. Sumathipala* (1938) 12 C. L. W. 146.

(46) *De Silva v. Don Louis* (1881) 4 S. C. C. 89.

(47) *De Silva v. Manis Appuhamy* (1926) 4 Times 97.

(48) Section 7 of the Prescription Ordinance, Cap. 55, Gren. 1873 C. R. 54.

(49) *Wijedeen v. Marikar* (1903) 1 Matara cases 199.

(50) Section 833A of the Civil Procedure Code, Cap. 86.

(51) *Meedin v. Meedin* (1909) 5 A. C. R. 42.

(52) *Marikar v. Ismail* (1913) 16 N. L. R. 362.

Where, in an action brought for rent and ejectment, all the questions were raised in the issues and were before the Court for decision and the claim for rent was upheld, but the claim for ejectment and possession was dismissed, it was held that no leave was necessary before appealing. (53) If the Commissioner refuses to hear further evidence the proper remedy is not to apply for leave to appeal but to appeal on the ground of improper rejection of evidence. (54) The policy of the Ordinance is to make the decisions of the Commissioner final on questions of fact. It is only when he has any doubt as to his jurisdiction or if he thinks that other persons might take a different view of the case that he should grant leave to appeal. (55) If the Commissioner refuses to grant leave, an application for leave to appeal should be made to the Supreme Court.

Costs.

Under the denomination of Costs are included all expenses necessarily incurred by either party on account of the action and in enforcing the decree. (56) In the case of a monthly tenancy the value of the suit for ejectment is the monthly rental and for purposes of taxation the same rule should be observed. (57)

Decree.

When the landlord brings an action for ejectment and gets a decree for it, he has to make an application for the execution of the decree; and if the Court on such application is satisfied that he is entitled to obtain execution of the decree it shall direct a writ of execution to issue to the Fiscal. (58)

Upon receiving the writ, the Fiscal or his officer shall go to the spot and deliver possession to the judgment creditor (the landlord) or to some person appointed by him to receive delivery on his behalf, and if need be by removing *any person bound by the decree*, who refuses to

(53) *Ranasinghe v. Silva* (1930) 32 N. L. R. 46, 11 Rec. 67.

(54) *Wettachi v. Alwis* (1900) 4 N. L. R. 126.

(55) *Siyadoris Appuhami v. Grigoris Appuhamy* (1900) 4 N. L. R. 76.

(56) Section 208 of the Civil Procedure Code, Cap. 86.

(57) *Vengadasalam Chetty v. Suppramaniam* (1902) 2 Br. 391.

(58) Section 323 of the Civil Procedure Code, Cap. 86.

vacate the property ; provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment debtor (tenant), and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom tom or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property ; and provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served on him, and in such case no proclamation need be made.(59)

The cost of proclamation should be paid by the judgment creditor (the landlord). (60)

If in the execution of the decree for the possession of the property the officer charged with the execution of the decree is resisted or obstructed by any person, or if after the officer has delivered possession the judgment creditor (the landlord) is hindered by any person from taking complete and effectual possession, the judgment creditor may at any time within one month from the time of such resistance or obstruction complain thereof to Court by a petition in which the judgment debtor and the person resisting and obstructing shall be made respondents. (61)

If the Court after inquiry is satisfied that the obstruction or resistance was occasioned by the judgment debtor (tenant) or by some person at his instigation it may commit the judgment debtor or such other person to jail for a term which may extend to 30 days, and direct the judgment creditor (the landlord) to be put into possession of the property. (62) In proceedings under this section the fact that the judgment debtor is not a party respondent to the petition is fatal to conviction. (63) If the resistance was made by a bona fide claimant in possession, the Court shall direct

(59) Section 324 of the Civil Procedure Code, Cap. 86.

(60) Section 324 (2) of the Civil Procedure Code, Cap. 86.

(61) Section 325 of the Civil Procedure Code, Cap. 86.

(62) Section 326 of the Civil Procedure Code, Cap 86.

(63) *Perera v. Silva* (1928) 31 N. L. R. 94, 10 Rec. 4.

the petition of complaint to be numbered and registered as a plaint in an action between the decree holder as plaintiff and the claimant as defendant. (64) So too if a bona fide claimant is disposed of the property by the judgment creditor he can apply to Court by way of petition, and the application will be numbered and heard in a similar manner. (65)

Persons Bound by the Decree.—The question whether a subtenant is bound by a decree against the tenant where the subtenant was not a party to the case has not been settled authoritatively. There is however a *dictum* of Porter J. in *Mohamed Haniffa v. Dissanayake* (66) to the effect that a decree against a tenant does not bind the subtenant. This was a criminal case, and the case seems to have been decided on other grounds. The *dictum* of Porter J., therefore, appears to be *obiter*.

Wille says :—" An order of Court obtained by the landlord, directing the tenant to vacate the leased premises, is inoperative against a subtenant who holds under the tenant with the landlord's knowledge and who has no notice of the proceedings in ejectment, for such judgment cannot be pleaded as *res judicata* against the subtenant." (67) It is well settled law in Ceylon that a judgment *in personam* or a decree other than a decree *in rem* binds only the parties and privies. (68) To make a man privy to an action he either must have acquired an interest in the subject matter of the action by inheritance, succession or purchase from a party subsequently to the action or must hold property subordinately. As an illustration of the former class an assignee or a grantee is mentioned, but an assignee or a grantee is not estopped by a judgment against the assignor or grantor obtained after the assignment or grant. The case of landlord and tenant is cited as an illustration of privity by subordination. (69) There seems to be no distinction bet-

(64) Section 327 of the Civil Procedure Code, Cap. 86.

(65) Section 328 of the Civil Procedure Code, Cap. 86.

(66) (1922) 4 Times 94.

(67) Wille 252.

(68) *Gunaratne v. Punchi Banda* (1927) 29 N. L. R. 249 at page 251.

(69) Casperz on Estoppel section 723 (4th Edition) Bigelow (5th Edition) 142-146, (6th Edition) 158-169.

ween the law of Ceylon and that of England on this point namely, that a matter is *res adjudicata* only as between the parties and privies to the litigation. (70) Section 324 of the Civil Procedure Code (71) enacts that the Fiscal, in delivering possession of an immovable property to the decree holder, can remove any person bound by the decree who refuses to vacate the property. Now the question that arises for determination is whether a subtenant is a person bound by the decree.

Rule 34 order 21 of the Indian Civil Procedure Code (Act 5 of 1908) enacts thus: "When a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property." It would thus appear that this provision of the Indian Code is substantially the same as that of section 324 of the Civil Procedure Code. (72) In *Yusuff v. Jyotischandra Banerji*,(73) the Calcutta High Court in interpreting rule 34 order 21 of the Indian Code took the view that when a landlord obtains a decree for ejectment or forfeiture against his tenant, the latter's subtenants, licensees, or servants in actual possession of the premises are "persons bound by the decree within the meaning of rule 35 of order XXI of the Civil Procedure Code."

In England a similar question came up for consideration in *Geen v. Herring* (74) where the plaintiff had made all the sub-tenants parties to an action for the recovery of certain houses. The Court disallowed the costs of serving all the subtenants with writs or notices, on the ground that it was not necessary to make the subtenants parties to the action. In delivering the judgment of the Court of Appeal Stirling L. J. observed: "It was not disputed, and I think rightly so, by the counsel for the plaintiff that the action for the recovery of these houses could have been well brought against Herring (the lessee)

(70) *Gunaratne v. Punchi Banda* (1927) 29 N. L. R. 249 at 251.
(71) Cap. 86.
(72) Ibid.
(73) (1931) A. I. R. Mad. 534.
(74) (1905) 1 K. B.152 at 158.

alone without joining his weekly tenants." One may apply these principles in dealing with the question whether a decree against the tenant binds a subtenant.

An entire stranger who is neither a party nor a privy is not bound by the decree. If after decree a third person who gave evidence in the tenancy action claiming title in himself is in possession when the landlord tries to obtain possession under the decree, he cannot be convicted of the offence of house trespass, inasmuch as the house cannot be said to be in the occupation of the landlord at the time he entered it. (75)

CHAPTER XXV.

THE SMALL TENEMENTS ORDINANCE.

PURPOSE AND SCOPE OF THE ORDINANCE.

In the case of a monthly tenancy we have observed that a landlord who wishes to eject his tenant has to be scrupulous in giving a calendar month's notice at the proper time. Even if due notice is given it would take some time to eject the tenant on account of the delay in serving summons and other causes. Consequently great hardship was experienced by landlords who rented their tenements to the poorer class of tenants. To remedy these evils and to grant a speedier and more effectual relief to landlords who let out their tenements at a rental of rupees twenty or less, the Small Tenements Ordinance* was passed. This ordinance is substantially based on the Small Tenements Recovery Act of 1838 (1 and 2 Vict. c 74).

(75) *Kiribanda v. Kumarasinghe* (1938) 12 C. L. W. 160.

*Cap. 87.

Meaning of the Word "Tenement".—The term "tenement" is defined by section 2 as follows: "'The tenement' shall mean a house or other building or any part thereof rented, or which may be rented exclusively of all taxes, rates and assessments, at a sum not exceeding twenty rupees a month other than a tenement held or occupied under a tenure registered under the provisions of the Service Tenures Ordinance." When the word "means" is used the definition is meant to be exhaustive. (1)

A small tenement under the Ordinance need not consist of a single house or room occupied by one person, but would include any number of houses or rooms provided that the tenants therein do not pay more than Rs. 20. Where a tenement included 13 rooms, 11 of them were occupied by tenants paying in all twenty rupees a month and the remaining two, the rent of which was estimated to be Rs. 5, were occupied by the defendant who had the lease of the entire tenement, it was held that the landlord could not proceed under the Small Tenements Ordinance. (2) The Ordinance is only applicable to certain places. The term "town" means the Town of Colombo, Kandy or Galle within the Municipal limits, any Urban area within the administrative limits of a District Council, any town brought under the operation of the Local Boards Ordinance and such other town as shall be determined upon by the Governor and the limits of which, for the purposes of this Ordinance, shall, by Proclamation be published in the Government Gazette. (3)

Procedure in Ejectment.

Where the term or the interest of a tenant in any tenement is ended or duly terminated by notice to quit, and such tenant or occupier refuses or neglects to give up possession the landlord may file an application supported by an affidavit, in the Court of Requests, and obtain a *rule nisi* on the tenant

(1) *R. V. Nagalakala*, 22 Bomb. 235 at 237; *Bhadur v. Mallick*, 37 Calcutta 643.

(2) *Freudenberg v. Kristnam* (1901) 5 N. L. R. 186, 2 Br. 175.

(3) Section 2 of the Small Tenements Ordinance, Cap. 87.

or occupier to show cause why he should not deliver up possession of the tenement to the applicant. (4) Proceedings under the Small Tenements Ordinance can be instituted by an agent of the landlord. In such a case it is not necessary that the power of attorney should be filed in Court. Section 25 (b) of the Civil Procedure Code has no application to proceedings under the Small Tenements Ordinance. (5) No notice to quit of any definite length of time is required. But the notice must be reasonably sufficient to give a tenant an opportunity to secure another house. Thus, where a monthly tenancy commenced on the 15th, a notice dated 12th February giving time to quit on 15th March was considered sufficient and reasonable. (6)

When the application is made, a *rule nisi* is issued on the tenant or occupier to appear on a day named by the Court, not less than 3 or more than 7 days after the service of such rule, and to show cause why he should not deliver up possession of the tenement to the applicant. In case of default on the part of the tenant or occupier to show cause, the Court may make the rule absolute and issue writ of possession to the Fiscal authorising him within a period named, therein, not less than 3 or more than 7 days from the date of issue or reissue of such writ, to give possession of the tenement to the landlord or his agent. (7)

Even if resistance is offered the Fiscal is bound to give possession to the landlord unless the tenant avails himself of the procedure laid down in section 6. But it is not competent to the landlord to adopt the procedure laid in section 325 of the Civil Procedure Code. Sections 325-330 of the Civil Procedure Code are not applicable to enforcement of writs under the Small Tenements Ordinance. (8) In proceedings under the Small Tenements Ordinance where a *rule nisi* which had been served on an alleged tenant is made absolute a writ of possession issued in pursuance of the rule is not operative

(4) Section 3 of the Small Tenements Ordinance, Cap. 87.

(5) *Sinan Chettiar v. Sorimuttu* (1938) 13 C. L. W. 40 at 41.

(6) *Weeraperumal v. Davood Mohamed* (1898) 3 N. L. R. 340.

(7) Section 3 of the Small Tenements Ordinance, Cap. 87.

(8) *Perera Hamine v. Saibo* (1900) 2 Br. 76.

against an occupier who was no party to the proceedings. (9) But where the co-occupier who refused to vacate the premises was served with a *rule nisi* and proceedings were begun *de novo* it was held that the decree bound him. (10) Where cause is shown by the tenant, the Court should hear and record the issues that arise between the parties, and try and determine the same on a day appointed for that purpose. (11) The tenant may arrest execution of the writ of possession by giving security to sue for trespass within 2 months, in a Court of competent jurisdiction, the person who has taken out the writ of possession. (12)

Appeal.—Any party aggrieved by a final judgment or order may appeal to the Supreme Court within 5 days of the order or judgment complained of. (13) In reckoning the period of five days within which an appeal should be preferred from a judgment under the Small Tenements Ordinance the appellant is not entitled to exclude both the date of the judgment and the day on which the appeal is filed. The ordinary rule of excluding the day on which the petition is presented should not be followed. (14)

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(9) *Sundram Pillai v. Ambalam* (1929) 30 N. L. R. 358, 10 Rec 40.

(10) *Arunasalem Chettiar v. M. C. Fernando et al* (1938) 2 C. L. J. R. 361; 14 C. L. W. 58.

(11) Section 5 of the Small Tenements Ordinance, Cap. 87.

(12) Section 6 of the Small Tenements Ordinance, Cap. 87.

(13) Section 7 of the Small Tenements Ordinance, Cap. 87.

(14) *Kandiah v. Velupillai* (1925) 27 N. L. R. 58.

APPENDIX I.

STAMPS.

The provisions governing the stamping of indenture of leases are contained in schedule A to the Stamp Ordinance.* In determining the question whether an instrument has to be stamped as an indenture of lease or as some other document, it is necessary to consider whether the essential and distinguishing features of a lease are present. If all the essential features of a lease are present then such an instrument is liable to stamp duty as an indenture of lease. Thus, where an instrument provided that the lessees should have power to dig for gems as they chose on the soil of a land within a period of five years and that a tenth of the gems so dug out or its equivalent should be given to the lessor as ground share, it was held that it should have been stamped as an indenture of lease and not as a deed granting a license. (1) But where an instrument headed "deed of agreement" was to the effect that the party of the first part, who had advanced money already to the owner of a plumbago pit, should dig the pit, work off his debt, clear his expenses, and should then be allowed to develop the pit, extract plumbago to the value of Rs. 20,000 and then hand the pit as a fully developed pit back to the owner; and the owner in consideration of the advantage he derived from having the pit so developed should pay to the other party a small sum on every ton of plumbago he might extract from the pit so developed, the Court took the view that the instrument was neither a conveyance, nor a lease, nor an agreement and therefore should have been stamped under section 27 of the Stamp Ordinance (2) as a deed not specially provided for. (3)

As to the calculation of duty an indenture of lease or agreement is subject to the same conditions as those which govern a bond or mortgage of immovable property. The duty is the same as that on a bond or mortgage of property for an amount which is equal to

* Cap 189.

(1) *Panditatilleke v. The Commissioner of Stamps* (1909) 12 N. L. R. 59.

(2) Cap. 189.

(3) (1920) 22 N. L. R. 165; *In Re J. E. de Saram Notary Public regarding stamp duty on deed No.467.*

the aggregate rent payable for the whole term comprised in the lease, provided that the duty does not exceed that on a lease for six years, and provided that the lease does not contain a mortgage of property, in which case the mortgage shall be chargeable as a separate instrument, provided also that no duty is leviable in respect of any additional lands. (4) But the last proviso has been held to apply only to leases and not to mortgages. If mortgages affecting more than one land are embodied in a lease then they are chargeable with full duty including the duty leviable in respect of additional lands. (5) Where a property donated by a deed of gift is subject to a lease under which the donor has recovered rent in advance, and is also subject to a mortgage, in assessing the value of the property for purposes of stamp duty a deduction should be made in respect of the lease but not in respect of the mortgage. (6) In every lease, transfer, or assignment thereof where the consideration is partly in produce and the value of such produce is not stated in the instrument, a duty of Rs. 2·50 shall be charged in addition to the duty due upon the stated pecuniary consideration. (7) The following instruments are exempted from the preceding stamp duties. All indentures of lease or agreements for lease of any property entered into by His Majesty or by any person for or on behalf of His Majesty are exempted from stamp duty. (8) A lease which is executed in pursuance of a duly stamped agreement to lease is chargeable only with a duty of Rs. 2·00 on production of such an agreement to the Commissioner of Stamps. (9) In the case of surrender of a lease when the duty with which the lease is chargeable does not exceed Rs. 10·00 the duty on the surrender will be the same as that with which the lease is chargeable but in any other case a duty of Rs. 10·00 will be charged. (10)

(4) Item 33 (1) of Schedule A to the Stamp Ordinance, Cap. 189.

(5) *Wijesuriya v. Samarasinghe* (1922) 24 N. L. R. 91.

(6) *Croos v. Attorney General* (1930) 32 N. L. R. 78.

(7) Item 33 (2) of Schedule A to the Stamp Ordinance, Cap. 189.

(8) Item 33 of Schedule A to the Stamp Ordinance, Cap. 189.

(9) Item 34 of Schedule A part 1 to the Stamp Ordinance, Cap. 189.

(10) Item 35 of Schedule A to the Stamp Ordinance, Cap. 189.

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