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Legal Aspects of Farm Tenancy in Texas

ERLING D. SOLBERG

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Digest

Only a relatively small part of Texas tenancy law is statutory. Most of the remainder consists of rules of law found in court decisions. Not to be overlooked is the common law, which, together with the Constitution and statutes, has been made the rule of decisions, and continues in force. The common law is always in the background to fill in the gaps. Tenancy law, therefore, is a composite of constitutional provisions, statutory law, common law, Supreme Court rulings and decisions of the Courts of Civil Appeals. This law is scattered through several volumes of Texas statutes and numerous reports containing the decisions of appellate courts.

Among the topics discussed in this bulletin are laws relating to the creation of various types of tenancy and sharecropping agreements, and the rights and duties of landlords, tenants and croppers thereunder; laws relative to homestead rights in leased premises; laws regarding repairs, improvements, payment of rent, rights in crops and priority of liens thereon; chattel mortgage laws; and laws defining the rights of the various parties on transfer of leased premises, on breach of rental agreements and on termination of the lease contract. Included also is a discussion of arbitration, distress and eviction procedures.

Although the same tenancy law frequently applies to both rural and urban situations, decisions arising out of rural controversies have been favored throughout. Where urban cases are cited, it is generally so indicated. Emphasis has been on substantive rather than procedural law. The law collected herein is as of January 1, 1950.

As has been indicated, decisions of the Supreme Court of Texas and also of the Courts of Civil Appeals have been used. The latter courts have had a marked influence on the development of tenancy law in Texas. Their number alone (there are 11) has resulted in a detailed development of the law. In the aggregate, they have ruled on hundreds of tenancy questions. Their geographical distribution also has had an important influence. For example, in one judicial district a certain type of farming may prevail; in another it is ranching; in a third, urban activities; and so on. No one economic group is predominant throughout. Decisions of the Courts of Civil Appeals establish the legal rules, unless amended or reversed by the Supreme Court. The judicial determinations of these intermediate courts had and still have a marked influence on the growth of tenancy law in Texas.

In this bulletin technical terms are usually defined where first used. In place of a glossary, terms defined are listed alphabetically in the index under the subtitle "Definitions of Terms."

For many years research workers and others dealing with the problems of Texas farmers have felt the need for a legal source book for finding the law pertaining to subjects under consideration in the field of farm tenancy. It is our hope that this bulletin may serve that purpose.

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5071	127	sec. 51	45
5073	127	8 U.S.C.A. sec. 56	130
5222	58	18 U.S.C.A. sec. 444	130
5223	133	18 U.S.C.A. sec. 445	130
5225	132		

[1] Source unless otherwise indicated TEX. ANN. REV. CIV. STAT. (Vernon, 1925 and Supps.)

[2] TEX. ANN. PEN. CODE (Vernon, 1925, Supp. 1949.)

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Legal Aspects of Farm Tenancy in Texas

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A tenancy is a holding, or a mode of holding, an estate. In the broadest sense, tenancy embraces every manner of holding or possession of "lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise." In a more restricted sense, the term includes only the relationship arising out of use and occupancy of real property of another (called the landlord) under lease by another (called the tenant). See WEBSTER, NEW INTERNATIONAL DICTIONARY, (2d. ed.), and BLACK, LAW DICTIONARY, 1711 (3rd ed. 1933). The term tenancy as used herein, unless otherwise indicated, is used in the restricted sense.

PART I. CREATION OR CONTINUATION OF TENANCY RELATIONSHIP

Creation and Nature of the Relation

A tenancy is created when one occupies the land or premises of another in recognition of or "in subordination to that other's title and with his assent, express or implied."[1] The payment of rent or other consideration is not necessary to create the relationship of landlord and tenant; it is necessary only that the tenant take possession as such with the consent of the landlord.[2] When a tenant subleases to another, the head tenant becomes the landlord of the subtenant.[3]

A lease contract creating a tenancy relationship may be in any one of various forms. A lease memorandum may be a formal document; it may consist merely of informal letters;[4] it may be an express oral agreement;[5] or it may be implied[6]

1 Francis v. Homes, 54 Tex. Civ. App. 608, 118 S.W. 881, 883 (1909). See generally 27 TEX. JUR. 45 (sec. 2).
2 Philadelphia Trust Co. v. Johnson, 257 S.W. 280, 284 (Tex. Civ. App. 1923) (Beaumont).
3 Mathews v. First State Bank of Richland, 250 S.W. 460, 463 (Tex. Civ. App. 1923) (Dallas). See additional discussion under subtitle "Assignment or subletting of leasehold," infra p. 173.
4 See Willson v. Riley, 240 S.W. 626 (Tex. Civ. App. 1922) (Beaumont).
5 See Emporia Lumber Co. v. Tucker, 103 Tex. 547, 131 S.W. 408, 409 (1910), reversing 129 S.W. 1082 (Tex. Civ. App. 1909).
6 See Shiner v. Abbie, 77 Tex. 1, 13 S.W. 613 (1890).

where there exist "such facts as to the acts, conduct, and intention of the parties as will properly give rise to one by implication."[7]

Tenancy Distinguished from Other Contractual Relationships

Since a tenancy is only one of several types of contractual relationships involving use of land, a few general differentiations may be clarifying.

A tenancy involves an interest in the land passed to the tenant and a right to possession for some term exclusive even of the landlord except as the lease permits his entry.[8]

A license, on the other hand, is a privilege or authority given or retained to do some act on the land of another but which does not amount to an interest in the land itself.[9] For example, the right to hunt and fish on the land of another may be only a personal license.[10] Permission to enter upon the land to dig and remove gravel may be merely a license,[11] and so also may be the right to cut and remove timber, where no interest in the land was conveyed.[12] Similarly, mere permission to graze one's cattle upon another's land where no greater interest in the land is conferred may be only a license.[13]

"An easement is a liberty, privilege, or advantage without profit which the owner of one tract of land may have in the lands of another."[14] Although incorporeal, it is an interest in land, a right attached to the land itself.[15] The right reserved to build a drainage and irrigation system across another's land is an example of an easement.[16] So also is a right-of-way to the county road over the land of another.[17]

Many jurisdictions in the United States have held that a farm hand who is furnished a house as part of his compensation is not in possession of the dwelling as a tenant but is in possession as a servant whose possession is regarded as that of his employer; and when the farm

7 Dolen v. Lobit, 207 S.W. 143, 145 (Tex. Civ. App. 1918) (Galveston).
8 See Tips v. United States, 70 F.2d 525, 526 (C.C.A. 5th 1934) (urban).
9 Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014, 1016 (1925) (urban). See Tips v. United States, 70 F.2d 525, 527 (C.C.A. 5th 1934) (urban).
10 See Kibbin v. McFaddin, 259 S.W. 232, 234 (Tex. Civ. App. 1924) (Beaumont).
11 See Sutton v. Wright and Sanders, 280 S.W. 908 (Tex. Civ. App. 1926) (San Antonio).
12 See Merriwether v. Shadrach Dixon, 28 Tex. 15 (1866).
13 See Sabine and East Texas R'y. Co. v. Johnson, 65 Tex. 389 (1886).
14 Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014 (1925) (urban).
15 Miller v. Babb, 263 S.W. 253 (Tex. Sup. Ct. 1924).
16 See VanDePutte v. Cameron County Water Control & Improvement Dist. No. 7, 35 S.W.2d 471 (Tex. Civ. App. 1931) (San Antonio).
17 See Bowington v. Williams, 166 S.W. 719 (Tex. Civ. App. 1914) (El Paso).

hand is discharged, even though wrongfully, his right to occupy the dwelling ceases, and it is his duty to leave the premises.[18]

A farmer working a crop "on shares" legally may be and often is a tenant with a tenant's customary right to exclusive possession of the farm.[19] This is not always the relationship however. He may be a cropper with the status only of an employee, of one hired to work the land, without any estate therein.[20] The right to exclusive possession of the land has been held to be a most important element in determining whether the cultivator is a tenant or an employee-cropper.[21]

Leases Created by Agreement

The lease contract may be the result of express agreement of the parties, or the landlord-tenant relationship may be implied from conduct of the parties and created by operation of law. Express leases are both oral and written.

Oral Leases

"Oral leases of land for a term not exceeding one year are valid and enforceable."[22] Leases for a term longer than one year are unenforceable unless in writing.[23] Such oral leases for terms longer than one year are legally unenforceable.[24] One court considering a three-year oral lease stated that the "lease" for three years, being verbal, was void and unenforceable for any period so long as it remained executory.[25] A recent decision held that an oral lease to cultivate land to wheat for another year, with an option to plant to cot-

18 See 35 A.L.R. 580 for decisions in other jurisdictions. Also see 1 TIFFANY, LANDLORD AND TENANT, secs. 9 and 48 (1910).

19 Cry v. Bass Hardware, 273 S.W. 347 (Tex. Civ. App. 1925) (Texarkana); Daugherty v. White, 257 S.W. 976 (Tex. Civ. App. 1924) (Amarillo). See additional discussion under subtitle "Tenant's Right to Possession of Leased Premises," infra p. 29. See generally 27 TEX. JUR. 389 (sec. 234).

20 Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543 (Tex. Comm. App. 1929); see Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881 (1896); Ellis v. Bingham, 150 S.W. 602 (Tex. Civ. App. 1912) (Texarkana). See additional discussion under subtitle "Possession when Farming on Shares," infra p. 31.

21 Cry v. Bass Hardware, 273 S.W. 347, 350 (Tex. Civ. App. 1925) (Texarkana).

22 Wafford v. Branch, 267 S.W. 260, 264 (Tex. Sup. Ct. 1924), affirming 254 S.W. 389 (Tex. Civ. App. 1923) (Ft. Worth, urban); see Dickinson Creamery Co. v. Lyle, 130 S.W. 904 (Tex. Civ. App. 1910).

23 TEX. ANN. REV. CIV. STAT. art. 3995 (Vernon, 1945). "Writing required. No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:—
"4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,
"5. Upon any agreement which is not to be performed within the space of one year from the making thereof."

24 Long v. Collins, 12 S.W.2d 252 (Tex. Civ. App. 1928) (Amarillo). See Ellis v. Bingham, 150 S.W. 602 (Tex. Civ. App. 1912) (Texarkana). But see discussion in Wafford v. Branch, 254 S.W. 389, 390 (Tex. Civ. App. 1923) (Ft. Worth), affirmed, 267 S.W. 260 (Tex. Comm. App. 1924) (urban).

25 Poindexter v. Hicks, 260 S.W. 206 (Tex. Civ. App. 1924) (Texarkana, urban). See generally 20 TEX. JUR. 295 (Sec. 87).

ton the following year if the wheat failed, could not be concluded within the term of one year, and that the oral lease, therefore, was unenforceable as to the extended period because not in writing.[26]

An oral lease of indefinite duration the term of which could possibly but may not end within a year, depending upon the occurrence of some contingency, is enforceable.[27] Under this rule, a lease of a farm for the duration of the landlord's life,[28] or an agreement for possession pending sale of the farm,[29] or until a controversy involving another farm is settled, is for a term depending on the happening of a contingency, which may be completed within a year, and is enforceable even though oral.[30] Similarly, a lease under which the landlord let the tenant occupy and cultivate a farm in exchange for taking care of it and paying the taxes until such time as the owner demanded possession, could have been fully executed within a year and was, therefore, enforceable though not in writing.[31]

A lease that is to commence in the future, for a term not longer than one year, may be made by verbal contract and is binding.[32] Early Texas decisions explained that the time between the making of the lease and the commencement of the tenant's possession was no part of the lease term.[33] Under this rule, oral farm leases, for a term not exceeding a year, generally made one, two or three months before the commencement of the term, are held enforceable.[34]

Effect of part performance of oral leases.[35] The statute of frauds,[36] which denies use of the courts for bringing actions to enforce claims arising out of oral leases where the lease term exceeds one year, was enacted by the Texas Legislature to prevent fraud and perjury. Although the statutory purpose is generally achieved by denying the right to bring action to enforce such claims involving leases resting solely on oral testimony, the courts sometimes find that to deny enforcement of an oral lease will effect a fraud and bring about

26 Bacon v. Nelson, 81 S.W.2d 287, 289 (Tex. Civ. App. 1935) (Amarillo).
27 Rainwater v. McGrew, 181 S.W.2d 103, 105 (Tex. Civ. App. 1944) (Waco, urban); Betts v. Betts, 220 S.W. 575 (Tex. Civ. App. 1920) (Texarkana). See generally 20 TEX. JUR. 299 (Sec. 90).
28 Betts v. Betts, 220 S.W. 575, 576 (Tex. Civ. App. 1920) (Texarkana).
29 Rainwater v. McGrew, 181 S.W.2d 103, 105 (Tex. Civ. App. 1944) (Waco, urban).
30 See Bostick v. Haney, 209 S.W. 477 (Tex. Civ. App 1919) (El Paso).
31 New York & Texas Land Co. v. Dooley, 13 Tex. Civ. App. 336, 77 S.W. 1030 (1903); Hintze v. Krabbenschmidt, 44 S.W. 38, 40 (Tex. Civ. App. 1897).
32 Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban); Street-Whittington Co. v. Sayres, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban). See generally 20 TEX. JUR. 259 (Sec. 47).
33 See Styles v. Rector, 1 White & W. Civ. Cas. Ct. App. sec. 957 (1880); Randall v. Thompson Bros., 1 White & W. Civ. Cas. Ct. App. sec. 1100 (1881).
34 See Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban).
35 See 20 TEX. JUR. 344 (sec. 129) for further treatment of this subject.
36 TEX. ANN. REV. CIV. STAT. art. 3995 (Vernon, 1945).

the very thing it was the object of the statute to prevent. In such instances the statute is not enforced.[37] The general doctrine was stated by one court to be that where either party, in reliance upon a verbal contract unenforceable under the statute, has so changed his position by acts or forbearance that he would be defrauded by failure of the other party to carry out the oral agreement, the courts will enforce the contract.[38] The equitable doctrine of part performance is applied by the courts in these cases.[39] Just what facts will be sufficient to establish such fraud and relieve an oral lease from the effect of the statute of frauds must be determined upon the particular circumstances of each case.[40]

Possession of the premises alone apparently is not sufficient part performance by the tenant to render enforceable an oral lease that is voidable on account of its duration, but there has been required by the courts, in addition to possession, payment of rent or the making of improvements with the landlord's consent or both.[41] A very early decision held that possession and payment of part of the rent was sufficient part performance to make the lease capable of enforcement.[42] This case has been followed by other later cases involving urban situations; one decision holds that possession by the tenant plus payment of one or more installments of rent constitutes such part performance as will make the contract enforceable "in accordance with its terms."[43]

Possession and payment of only the back rent due on a plantation for the term for which it was rented and occupied, even though it involved borrowing the money, was held not such part performance as would make enforceable an oral lease for a future term, voidable because the term exceeded one year.[44]

A verbal or oral lease of land extending beyond a year, when regarded retrospectively, that is, when the lessee has occupied the premises for the term, is valid, since the statute of frauds applies to such leases only for years to come. The lessee, in such case, must pay the rent.[45]

37 See discussion in Halsell v. Scurr, 297 S.W. 524, 528 (Tex. Civ. App. 1927) (Ft. Worth, urban).
38 See Halsell v. Scurr, 297 S.W. 528 (Tex. Civ. App. 1927) (Fort Worth, urban); Ward v. Etier, 113 Tex. 83, 251 S.W. 1028 (Tex. Comm. App. 1923).
39 Halsell v. Scurr, 297 S.W. 524 (Tex. Civ. App. 1927) (urban).
40 See Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth).
41 See Note, Periodic Tenancies Created by Unenforceable Oral Leases, 19 TEX. L. REV. 340 (1941) and Note, Hardship as Taking a Parol Contract out of the Statute of Frauds, 2 TEX. L. REV. 353 (1924) for discussions of part performance as grounds for specific performance of an oral lease.
42 Randall v. Thompson Bros., 1 White & W. Civ. Cas. Ct. App. sec. 1101 (1881).
43 Sorrells v. Goldberg, 34 Tex. Civ. App. 265, 78 S.W. 711, 712 (1904). Also see Adams v. Van Mourick, 206 S.W. 721 (Tex. Civ. App. 1918) (El Paso).
44 Hill v. Hunter, 157 S.W. 247, 253 (Tex. Civ. App. 1913) (Austin).
45 See Robb v. San Antonio St. Ry., 82 Tex. 392, 18 S.W. 707, 709 (1891) (urban).

Possession of the premises by the tenant, plus the making of valuable improvements with the consent of the landlord, has been held such part performance of an oral lease, otherwise voidable due to its duration, as to render it enforceable.[46] Improvements that are insignificant compared with the value of the property involved, are not enough.[47] "Improvements, to constitute part performance . . . need not necessarily consist of erections on the land but may arise from skill and labor bestowed in cultivation, which, however, must enhance the land in value."[48] Possession by the tenant, plus clearing 10 acres and erecting a fence, was held to constitute sufficient part performance to cause an oral lease, under which the tenant was to have the use of 20 acres for three years for clearing and grubbing it, to be enforceable.[49]

In other decisions in which the enforcement of oral leases for terms longer than one year was an issue, the courts have indicated that a prerequisite for such enforcement, in addition to possession by the tenant referable to the contract and some payment of rent, is the making of valuable and permanent improvements on the faith of the contract[50] or, without such improvements, the presence of such facts as would make the transaction a fraud if the lease were not enforced.[51]

An allegedly invalid written lease for a term of several years obligated the tenant to clear, fence and cultivate 200 acres, to dig four wells and erect four tenant houses; the terms of this lease had been complied with by the landlord and partly complied with by the tenant who took possession, partially cleared 180 acres, began construction of buildings and fences, and received benefits from the contract. This lease was held enforceable; and the tenant was not permitted to escape liability by asserting its invalidity when executed.[52]

Oral agreements to modify, extend, assign, or surrender a lease. Oral agreements to modify, extend, assign, or surrender valid oral leases of a duration not longer than one year are enforceable. The rule is that such agreements when re-

46 See Wanhscaffe v. Pontoja, 63 S.W. 663 (Tex. Civ. App. 1901); Anderson v. Anderson, 13 Tex. Civ. App. 527, 36 S.W. 816, 817 (1896).
47 Lechenger v. Merchants' Nat. Bank of Houston, 96 S.W. 638, 640, 643, 644 (Tex. Civ. App. 1906) (urban).
48 See Anderson v. Anderson, 13 Tex. Civ. App. 527, 36 S.W. 816, 817 (1896).
49 Wanhscaffe v. Pontoja, 63 S.W. 663 (Tex. Civ. App. 1901).
50 See Lechenger v. Merchants' Nat. Bank of Houston, 96 S.W. 638, 640 (Tex. Civ. App. 1906); Walker Avenue Realty Co. v. Alaskan Fur Co., 131 S.W.2d 196, 198 (Tex. Civ. App. 1939) (Galveston, urban); Medical Professional Bldg. Corp. v. Ferrell, 131 S.W.2d 683, 686 (Tex. Civ. App. 1939) (San Antonio, urban); Edwards v. Old Settlers Ass'n, 166 S.W. 423, 426 (Tex. Civ. App. 1914) (Austin).
51 Ward v. Etier, 113 Tex. 83, 251 S.W. 1028, 1030 (Tex. Comm. App. 1923) (urban); Urban v. Crawley, 206 S.W.2d 158, 161 (Tex. Civ. App. 1947) (Eastland, urban); Roberts v. Griffith, 207 S.W.2d 443, 446 (Tex. Civ. App. 1947) (Eastland). See Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth, urban).
52 Folmar v. Thomas, 196 S.W. 861 (Tex. Civ. App. 1917) (Austin).

lating to written leases for a term of more than one year must be in writing.

A subsequent contract or agreement, modifying the terms of a written lease for a term longer than one year that was required to be in writing, is not enforceable unless also in writing.[53] Under this rule, a later parol agreement to permit sale of certain wood on the leased farm, which right was denied in the written lease, was held unenforceable;[54] as were also subsequent oral agreements to reduce or change the amount of future rent.[55] However, "it has been held that, where a written lease for more than a year was terminable by the landlord for failure to pay rent, it was permissible to prove by parol that it was so terminated by him and month-to-month tenancy at a less rent substituted; but if there was only an agreement in parol to reduce the amount of rent without abrogating the lease it would be ineffective."[56] Moreover, the parties to a contract, written by requirement of the statute of frauds, may by oral agreement lawfully change the medium of payment (lessor accepted payment otherwise than in money), and waive strict performance of the method of payment, without violating the statute of frauds.[57]

An oral agreement giving the lessee an option to renew the terms of a written lease for a renewal period not longer than one year is enforceable. When exercised, it is only an oral lease of land for a term not exceeding one year, the term to begin in the future.[58] A one-year oral lease with a privilege therein to the lessee to extend the lease term for a further period, since it makes the entire term longer than one year must be reduced to writing to be enforceable for the extended term;[59] but if the tenant remains in possession with the lessor's consent, and pays rent, there is an implied renewal and he obtains a tenancy for one additional year on the same terms as under the original lease.[60] An oral agreement to lease a plantation for as long as the tenant paid the annual rent was held a tenancy at will and, where there was a holding over with the lessor's consent under a former yearly ten-

53 Beard v. Gooch & Son, 62 Tex. Civ. App. 69, 130 S.W. 1022, 1023 (1910). See generally 20 TEX. JUR. 213 (sec. 6).
54 See Beard v. Gooch & Son. 62 Tex. Civ. App. 69, 130 S.W. 1022, 1023 (1910).
55 Parrish v. Haynes, 62 F.2d 105, 107 (C.C.A. 5th, 1932) (urban). See Wafford v. Branch, 267 S.W. 260, 265 (Tex. Sup. Ct. 1924), affirming 254 S.W. 389 (Tex. Civ. App. 1924) (Fort Worth).
56 See Parrish v. Haynes, 62 F.2d 105, 107 (C.C.A. 5th, 1932); citing Wafford v. Branch, 267 S.W. 260, 264 (Tex. Sup. Ct. 1924), affirming 254 S.W. 389 (Tex. Civ. App. 1924) (Fort Worth, urban).
57 Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 164 S.W.2d 488, 491 (1942), superseding opinion of Supreme Court in 132 S.W.2d 553, and affirming 61 S.W.2d 185 (Tex. Civ. App. 1933) (Texarkana, oil).
58 See Texas Co. v. Burkett, 225 S.W. 763, 765 (Tex. Civ. App. 1927) (El Paso), affirmed, 117 Tex. 16, 296 S.W. 273 (1927). See also 20 TEX. JUR. 297 (sec. 89).
59 Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban).
60 Bateman v. Maddox, 26 S.W. 51, 53 (Tex. Sup. Ct. 1894) (urban).

ancy, the tenancy was held terminable at the end of that or any year. The tenancy was construed to be from year to year, terminable at the end of any year at the will of either party.[61]

A one-year lease with an agreement for a *renewal* is a demise for the shorter period with a privilege of a new lease for the additional term. It is enforceable whether oral or written.[62] However, a one-year lease, with a provision for *extension* at the option of the lessee, is, upon exercise of the option, a present demise for the full term to which it may be extended; and, the whole term being for more than one year, if the lease is oral it is unenforceable as to the future or extension period unless reduced to writing.[63]

An assignment of a lease, for more than a year and required to be in writing, or a contract to assign such a lease, must also be in writing to be enforceable.[64] The conveyance of an estate in land for more than a year is involved.[65] This same rule applies to assignments of oil and gas leaseholds,[66] or of parts thereof,[67] or of rights thereunder.[68] A parol agreement, however, waiving or modifying as to the time for performance a written agreement to assign a lease was held in one case not invalid through failure to be in writing. It was stated in this case that a parol agreement waiving or modifying a provision not essential to the validity of the written contract was not invalid.[69]

An oral agreement to surrender back to the landlord a portion of the leased premises[70] or the entire leasehold, when the unexpired term to be surrendered exceeds one year, is unenforceable because it is not in writing. Therefore, it would be no defense to an action for rent.[71] However, where the tenant, in reliance on such parol agreement to surrender, has acted to his material disadvantage, thereby rendering it inequitable and fraudulent not to enforce it, such oral agreement to surrender is enforceable.[72]

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61 Hill v. Hunter, 157 S.W. 247, 253 (Tex. Civ. App. 1913) (Austin). See Hamlett v. Coates, 182 S.W. 1144, 1146 (Tex. Civ. App. 1916) (Dallas, urban).

62 See additional discussion under subtitle "Options for renewal or extension of written leases," infra p. 18.

63 See Hill v. Brown, 225 S.W. 780, 784 (Tex. Civ. App. 1920) (Dallas, urban), reversed on other grounds, 237 S.W. 252 (Tex. Sup. Ct. 1922); Dees v. Thomason, 71 S.W.2d 591, 592 (Tex. Civ. App. 1934) (Waco). Also see 20 TEX. JUR. 297 (sec. 89).

64 Lewis Bros. v. Pendleton, 227 S.W. 502, 504 (Tex. Civ. App. 1921) (Texarkana, urban). See 20 TEX. JUR. 297 (sec. 88).

65 See TEX ANN. REV. CIV. STAT. arts. 1288, 3995 (Vernon, 1945).

66 Priddy v. Green, 220 S.W. 243, 250 (Tex. Civ. App. 1928) (Amarillo, oil).

67 Little v. Stephenson, 1 S.W.2d 353, 354 (Tex. Civ. App. 1928) (San Antonio, oil).

68 See Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App. 1941) (Galveston, oil).

69 Lewis Bros. v. Pendleton, 227 S.W. 502, 504 (Tex. Civ. App. 1921) (Texarkana, urban).

70 See Ellison v. Charbonneau, 101 S.W.2d 310 (Tex. Civ. App. 1936) (Fort Worth, urban).

71 Gardner v. Sittig, 188 S.W. 731, 733 (Tex. Civ. App. 1916) (Galveston), affirmed, 222 S.W. 1090 (Tex. Sup. Ct. 1920) (urban).

72 Shaller v Allen, 278 S.W. 873, 876 (Tex. Civ. App. 1925) (Amarillo, oil). See Gardner v. Sittig, 188 S.W. 731, 733 (Tex. Civ. App. 1916) (Galveston), affirmed, 222 S.W. 1090 (Tex. Sup. Ct. 1920) (urban); 20 TEX. JUR. 297 (sec. 88).

Written Leases

Generally,[73] as previously stated, a lease of real estate for a term longer than one year to be enforceable must be in writing.[74] Under this rule, an oral lease of a farm for three years was declared unenforceable because not in writing.[75]

Sufficiency of writing. The lease, memorandum or writing, may be a formal document or only an informal written statement.[76] It may consist of a series of letters;[77] or a single letter setting forth the essentials of the agreement may be sufficent, when it names the parties, identifies the property leased, the period of time the lease is to run and the rental to be paid, and it is plainly inferable from the letter that an agreement to so lease has been made.[78] The lease memorandum must identify the parties to the agreement, and a proposed writing that fails to identify the landlord is unenforceable.[79]

To constitute a tenancy or lease there should always be a definite, certain place demised or rented,[80] and the written memorandum or proposal, within itself or by reference to other writings and without recourse to parol evidence, must contain all the elements of a valid contract including a description of the premises to be leased of sufficient certainty to render them capable of indentification.[81] Lease contracts that merely stated that the written agreement was "with reference to the lease which we have been discussing"[82] or that simply referred to the land involved as "parts of sections 15 and 16 . . . and consisting of 215 acres, more or less . . ." located in a certain county, were held not to adequately describe the premises.[83] However, where an instrument purported to lease 200 of the uncultivated 300 acres of a 470-acre farm of which 170 acres were in cultivation, and the tenant took possession and partially improved 180 of these acres, the parties were held by their action to have construed the contract as to that particular portion and to have cured the uncertainty of description upon 180 acres of it at least.[84]

73 See additional discussion under subtitle "Effect of part performance of oral leases," supra p. 10.
74 See TEX. ANN. REV. CIV. STAT. art. 3995 (Vernon, 1945).
75 See Long v. Collins, 12 S.W.2d 252 (Tex. Civ. App. 1928) (Amarillo).
76 See Allen v. Koepsel, 77 Tex. 505, 14 S.W. 151 (1890) second appeal; 4 S.W. 856 (Tex. Sup. Ct. 1887) first appeal (where an informal writing was recognized as a lease).
77 See Willson v. Riley, 240 S.W. 626 (Tex. Civ. App. 1922) (Beaumont).
78 Halsell v. Scurr, 297 S.W. 524, 527 (Tex. Civ. App. 1927) (Fort Worth).
79 Walker Avenue Realty Co. v. Alaskan Fur Co., 131 S.W.2d 196, 198 (Tex. Civ. App. 1939) (Galveston, urban). Also see 20 TEX. JUR. 316 (sec. 106).
80 Tips v. United States, 70 F.2d 525, 527 (C.C.A. 5th 1934).
81 Walker Avenue Realty Co. v. Alaskan Fur Co., 131 S.W.2d 196, 198 (Tex. Civ. App. 1939) (Galveston, urban).
82 Walker Avenue Realty Co. v. Alaskan Fur Co., 131 S.W.2d 196, 197, 198 (Tex. Civ. App. 1939) (Galveston, urban).
83 Stovall v. Finney, 152 S.W.2d 887, 888 (Tex. Civ. App. 1941) (Amarillo).
84 Folmar v. Thomas, 196 S.W. 861, 864 (Tex. Civ. App. 1917) (Austin).

On the other hand, a written contract granting the right to "cup" the pine timber for turpentine (between 50,000 and 75,000 cups) on the "entire tract of timber owned" by the landowner (10,700 acres of pine in Polk county, Texas) was not intended, it was held, to pass any interest in the land, but merely permitted the taking of turpentine for a period of time, and was not void for lack of description of the timber to be cupped or the exact land upon which it was growing, since the strict rules of description which apply to contracts for the sale or conveyance of real estate have no application. But a reference to "additional timber to be turpentined . . . the amount for each season to be fixed later," was too indefinite to bind either party.[85]

It is not necessary that the written memorandum concerning a transfer of an interest in realty recite all the terms of the agreement. It is not required that the consideration be stated,[86] as this may be proved by parol.[87]

Signature, acknowledgement, delivery, recording. Where the lessors have fully executed their part of the contract, a lease signed by the landlord only, delivered to and kept by the tenant, has been held binding on both parties.[88]

A lease, for a term longer than one year, of the husband's separate property[89] or of community property,[90] requires only the signature of the husband;[91] but a lease, for a term longer than one year, of the separate property of the wife requires the joint signature of the husband and wife[92] and, in addition, must be acknowledged by the wife before a proper officer.[93] A lease of the family homestead also requires the signature of both the husband and wife[94] and, in addition, her separate acknowledgement.[95]

Before a written lease becomes operative there must be a

85 Saner-Ragley Lumber Co. v. Spivey, 255 S.W. 193, 198 (Tex. Civ. App. 1923) (Beaumont), modified, 284 S.W. 210, 214 (Tex. Sup. Ct. 1926).
86 Leverett v. Leverett, 59 S.W.2d 252, 254 (Tex. Civ. App. 1933) (Texarkana); Adkins v. Watson, 12 Tex. 199 (1854); Fulton v. Robinson, 55 Tex. 401 (1881); Simpson v. Green, 231 S.W. 375, 377 (Tex. Sup. Ct. 1921), reversing 212 S.W. 263 (Tex. Civ. App. 1919) (Fort Worth, all sale cases). See generally 20 TEX. JUR. 315 (sec. 105).
87 Kistler v. Latham, 255 S.W. 983, 985 (Tex. Sup. Ct. 1923), reversing 235 S.W. 938 (Tex. Civ. App. 1921) (Fort Worth, sale).
88 Texas & Pacific Coal and Oil Co. v. Patton, 240 S.W. 303, 304 (Tex. Comm. App. 1922), former opinion 238 S.W. 202 (oil); Reeves Furniture Co. v. Simms, 59 S.W.2d 262, 264 (Tex. Civ. App. 1933) (Texarkana, urban). See generally 20 TEX. JUR. 322 (sec. 112).
89 TEX. ANN. REV. CIV. STAT. art. 4613 (Vernon, 1940).
90 TEX. ANN. REV. CIV. STAT. art. 4619 (Vernon, 1940).
91 See 23 TEX. JUR. 59, 107, 259 (secs. 40, 87, 225a).
92 TEX. ANN. REV. CIV. STAT. art. 4614 (Vernon, 1940) and TEX. ANN. REV. CIV. STAT. art. 1299 (Vernon, 1945); Dority v. Dority, 96 Tex. 215, 71 S.W. 950, 953 (1903), affirming 30 Tex. Civ. App. 216, 70 S.W. 338 (1902). See generally 23 TEX. JUR. 259 (sec. 225a).
93 TEX. ANN. REV. CIV. STAT. art. 1299 (Vernon, 1945).
94 Dykes v. O'Connor, 83 Tex. 160, 18 S.W. 490, 491 (1892); Ellis v. Bingham, 150 S.W. 602, 603 (Tex. Civ. App. 1912) (Texarkana).
95 TEX. ANN. REV. CIV. STAT. art. 1300 (Vernon, 1945).

delivery. This may involve a manual transfer of possession of the instrument from one of the parties to the other, along with an intention that it should take effect. The landlord may prescribe any condition, such as signing of the lease by the tenant and return of a copy, or he may prescribe even frivolous conditions, subject to which the lease is to be delivered.[96] Where the parties contemplated duplicate copies of the lease, one of which by express agreement was to be returned to the tenant, signed by him and left with the landlord's agent for execution by the landlord, there is no delivery of the lease so long as the landlord or his agent retains both copies.[97]

Neither acknowledgement (except by the wife either on lease of her separate property or of the family homestead)[98] nor recordation are essential to the validity of the lease as between the parties.[99]. Possession of the leased premises by the tenant operates as notice to third persons, equivalent to constructive notice afforded by registration,[100] of the tenant's rights in the premises[101] and of the landlord's title.[102]

Modification of written leases.[103] Subsequent agreements modifying the terms of a written lease required to be in writing because it is for a term of more than one year and thus within the provisions of the statute of frauds, must also be in writing if the provision modified is one required by that statute to be written in the original lease.[104] Such written modification agreement also must be supported by consideration.[105] However, it has been held that a landlord may waive, so as to estop him from thereafter insisting upon its performance, a stipulation inserted in the lease for his benefit, against assignment without his written consent. Such waiver could be manifested by his conduct by implication. This waiver of the provision against unauthorized assignment would not release the original lessee from his obligation to pay the rent, however, if the assignee defaulted.[106]

96 Woods v. Osborn, 113 S.W.2d 636, 638 (Tex. Civ. App. 1938) (Eastland, oil).
97 Radford Grocery Co. v. Noyes, 293 S.W. 653, 654 (Tex. Civ. App. 1927) (Austin, urban).
98 TEX. ANN. REV. CIV. STAT. art. 4614 (Vernon, 1940); TEX. ANN. REV. CIV. STAT. arts. 1299, 1300 (Vernon, 1945).
99 TEX. ANN. REV. CIV. STAT. art. 6627 (Vernon, 1948).
100 Watkins v. Edwards, 23 Tex. 443, 450 (1859).
101 Howell v. Denton, 68 S.W. 1002, 1003 (Tex. Civ. App. 1902); 87 S.W. 221 (Tex. Civ. App. 1905), 2nd appeal, 113 S.W. 314 (Tex. Civ. App. 1908), 3rd appeal. See generally 31 TEX. JUR. 379 (sec. 8).
102 Dallas Land & Loan Co. v. Sugg, 237 S.W. 955, 957 (Tex. Civ. App. 1922) (Austin, urban); Collum v. Sanger Bros., 98 Tex. 162, 82 S.W. 459, 460 (1904), on rehearing, 83 S.W. 184, reversing 78 S.W. 401 (Tex. Civ. App. 1904). See generally 27 TEX. JUR. 50 (sec. 5).
103 See additional discussion under subtitle "Oral agreements to modify, extend, assign or surrender a lease," supra p. 12.
104 Beard v. Gooch & Son, 62 Tex. Civ. App. 69, 130 S.W. 1022, 1023 (1910). Roberts v. Griffith, 207 S.W.2d 443 (Tex. Civ. App. 1947) (Eastland). See generally 20 TEX. JUR. 283 (sec. 73).
105 Liebreich v. Tyler State Bank & Trust Co., 100 S.W.2d 152, 154 (Tex. Civ. App. 1936) (Texarkana, urban).
106 Gaddy v. Rich, 59 S.W.2d 921, 922 (Tex. Civ. App. 1933) (San Antonio, urban).

An agreement modifying the length of term of a lease, if the lease is required to be in writing, also must be in writing if it is to be enforceable,[107] whether the modification is for extension of the lease term,[108] or for its surrender where the unexpired term exceeded on year.[109] Similarly, an agreement modifying a written contract to assign or transfer an oil lease must be in writing.[110] Where the statute of frauds requires a lease to be written, and the parties have reduced their entire agreement to writing, there is great force to the proposition that any later modification of it is, in reality, a new contract, and to be enforceable must be in writing.[111]

Options for renewal or extension of written leases.[112] Clauses in leases providing that the tenant at the end of the current certain lease term shall have the right to remain in possession of the premises for a further period have been classified by the courts according to the wording in the particular lease as being either options for an "extension" or options for a "renewal," and a distinction is made between the two classifications in construing the lease.[113] Where the lease contains a covenant or option for an "extension" the courts treat the lease upon exercise of the privilege by the lessee as a present demise for the full period (original plus additional term) to which it may be extended.[114] On the other hand, a covenant or option for "renewal" is considered a present demise for the shorter period, the original term only, with a privilege of making a new lease for the extended term.[115] The application of these rules has not always been uniform and free from confusion. For example, one court, where the five-year written lease contained an option for an additional period of five years upon the same terms and conditions except as to amount of rent, referred to the provision as "an option of renewal," but applied the extension rule. It was held that when the privilege was exercised, the lease and its renewal

107 Burgher v. Canter, 190 S.W. 1147, 1148 (Tex. Civ. App. 1916) (Dallas, urban).
108 Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783, 784 (1941), modifying 134 S.W.2d 710 (Tex. Civ. App. 1939) (Eastland, oil).
109 Gardner v. Sittig, 222 S.W. 1090 (Tex. Comm. App. 1920), affirming 188 S.W. 731 (Tex. Civ. App. 1916) (Galveston, urban).
110 See Kistler v. Latham, 255 S.W. 983, 985 (Tex. Sup. Ct. 1923), reversing 235 S.W. 938 (Tex. Civ. App. 1921) (Fort Worth, oil).
111 See Kistler v. Latham, 255 S.W. 983, 985 (Tex. Sup. Ct. 1923), reversing 235 S.W. 938 (Tex. Civ. App. 1921) (Fort Worth, oil); Lewis Bros. v. Pendleton, 227 S.W. 502, 504 (Tex. Civ. App. 1921) (Texarkana); 20 TEX. JUR. 213 (sec. 6).
112 See additional discussion under subtitle "Oral agreements to modify, extend, assign or surrender a lease." supra p. 12.
113 Bailey v. Willeke, 185 S.W.2d 456, 458 (Tex. Civ. App. 1945) (Austin) affirmed as reformed, 144 Tex. 157, 189 S.W.2d 477 (1945). See statement in Street-Whittington Co. v. Sayers, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban) and text writers there cited. See generally 27 TEX. JUR. 305 (sec. 177).
114 Bailey v. Willeke, 185 S.W.2d 456, 458 (Tex. Civ. App. 1945) (Austin), affirmed as reformed, 144 Tex. 157, 189 S.W.2d 477 (1945); Hill v. Brown, 225 S.W. 780, 784 (Tex. Civ. App. 1920) (Dallas), reversed on other grounds, 237 S.W. 252 (Tex. Sup. Ct. 1922).
115 Street-Whittington Co. v. Sayers, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban). See discussion in Hill v. Brown, 225 S.W. 780, 784 (Tex. Civ. App. 1920) (Dallas), reversed on other grounds, 237 S.W. 252 (Tex. Sup. Ct. 1922).

constituted one entire contract for the term of 10 years.[116] A later court, after stating that the distinction between the terms extension and renewal, as used in a lease, is too refined and theoretical to be real, as a matter of law, in practical affairs, applied the extension rule to a lease providing for an option for renewal.[117]

An option for extension contemplates no new contract but, instead, the extended period of the agreement under consideration is fixed by and is a part of the original lease; and on the tenant's exercise of the option by giving notice or its equivalent, the parties are bound for the extended term.[118] On the other hand, an option for "renewal" is an option to the lessee which entitles him to make a new lease for the additional term.[119] The law will require proof of election to exercise the option, and merely holding over, unless intended by the parties to renew the lease, is not conclusive proof of the exercise of the option of renewal.[120]

Covenants for renewal or extension of a lease are not required to be in any particular form.[121] A clause that the tenant shall have the "refusal" of the property for another 12 months at the termination of the original lease term has been construed to be an option for a renewal.[122] "A covenant to renew which fails to fix the rental for the renewal term is void for uncertainty unless the contract, expressly or by reasonable implication, provides a method whereby the rent may be fixed."[123]

The tenant cannot insist upon more than one renewal when he exercises his privilege to renew on the same terms. He cannot insist that the renewal provision be incorporated again; otherwise a perpetuity would be created which the law does not favor.[124]

116 Springfield Fire and Marine Ins. Co. v. Republic Ins. Co., 262 S.W. 814, 817 (Tex. Civ. App. 1924) (Dallas, urban).
117 Haddad v. Tyler Production Credit Ass'n., 212 S.W.2d 1006, 1008 (Tex. Civ. App. 1948) (Texarkana, urban).
118 Bailey v. Willeke, 185 S.W.2d 456, 458 (Tex. Civ. App. 1945) (Austin), affirmed as reformed, 144 Tex. 157, 189 S.W.2d 477 (1945).
119 See discussion in Hill v. Brown, 225 S.W. 780, 784 (Tex. Civ. App. 1920) (Dallas). Also see Street-Whittington Co. v. Sayers, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban); and Cammack v. Rogers, 32 Tex. Civ. App. 125, 74 S.W. 945, 948 (1903), on certified question, 96 Tex. 457, 73 S.W. 795 (1903).
120 Street-Whittington Co. v. Sayers, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban). See generally 27 TEX. JUR. 307 (sec. 179).
121 Pickrell v. Buckler, 293 S.W. 667, 668 (Tex. Civ. App. 1927) (El Paso), error denied, 116 Tex. 567, 296 S.W. 1062 (1927). Also see 35 C. J. 1008.
122 Street-Whittington Co. v. Sayers, 172 S.W. 772, 775 (Tex. Civ. App. 1915) (Amarillo, urban). See generally 27 TEX. JUR. 306 (sec. 178).
123 Pickrell v. Buckler, 293 S.W. 667, 669 (Tex. Civ. App. 1927) (El Paso), error denied, 116 Tex. 567, 296 S.W. 1062 (1927). (The Supreme Court was not inclined to the view that the covenant to renew the original lease in this case was void for uncertainty, but upheld the decision on other grounds.)
124 Pickrell v. Buckler, 293 S.W. 667, 668 (Tex. Civ. App. 1927) (El Paso), error denied, 116 Tex. 567, 296 S.W. 1062 (1927). See 27 TEX. JUR. 310 (sec. 180).

Where the covenant for renewal of a lease requires the tenant to give notice in a certain manner of intention to exercise the option, the tenant must conform with the requirement, but the landlord may waive the giving of written notice and accept it orally.[125] An option to prolong the rental period may by the terms of the agreement be exercised by giving of notice and continued possession;[126] by the making, as agreed, of certain specified alterations;[127] or, under some circumstances, by merely holding over. "The extension of a lease by holding over under an option to extend," in its last analysis, "is one of intention—an intention which the law implies from an unqualified holding over." Such intention, of course, cannot be implied where the landlord knew that the tenant did not so intend.[128] It is not an exercise of an option to renew a lease for a term of two additional years for a tenant to hold over for 13 days after having given written notice of intention not to renew;[129] nor is holding over for two months after notifying the landlord of intention not to exercise the option to rent for another year unless certain repairs were made as agreed, which repairs had not been made;[130] nor is holding over under a new month-to-month contract which was negotiated after the tenant notified the landlord of his intent not to renew for an additional five years an exercise of such option.[131]

A tenant, by his conduct in offering to make a new agreement at a higher price, may waive his right to exercise an option to rent under the renewal clause of the expiring lease;[132] but, having given notice to hold under his exercise of his option to renew, the tenant has been held liable for the rent due according to the lease terms.[133] Similarly, a landlord who refused to renew after notice by the tenant of exercise of the option under the lease and, instead, rented to another, has been held liable in damages.[134]

An assignee of a lease can exercise the option to renew

125 Dockery v. Thorne, 135 S.W. 593, 596 (Tex. Civ. App. 1911); McCue v. Collins, 208 S.W.2d 652, 655 (Tex. Civ. App. 1948) (Eastland, urban). See 27 TEX. JUR. 308 (sec. 179).
126 Ewing v. Miles, 33 S.W. 235, 238 (Tex. Civ. App. 1895) (urban).
127 See Farmers Life Ins. Co. v. Foster Building & Realty Co., 272 F. 864, 870 (C.C.A. 5th 1921) (urban).
128 See Campbell Paint & Varnish Co. v. Ladd Furniture & Carpet Co., 83 S.W.2d 1095, 1098 (Tex. Civ. App. 1935) (Fort Worth, urban).
129 Racke v. Anheuser-Busch Brewing Ass'n, 17 Tex. Civ. App. 167, 42 S.W. 774, 775 (1897) (urban).
130 Williams v. Houston Cornice Works, 46 Tex. Civ. App. 70, 101 S.W. 839 (1907), motion for rehearing overruled, 101 S.W. 1195 (1907) (urban).
131 Campbell Paint & Varnish Co. v. Ladd Furniture & Carpet Co., 83 S.W.2d 1095, 1098 (Tex. Civ. App. 1935) (Fort Worth, urban).
132 Mowery v. Rivero, 223 S.W. 290 (Tex. Civ. App. 1920) (Galveston).
133 Jones v. James, 4 Willson Civ. Cas. Ct. App. sec. 311, 19 S.W. 434 (1892).
134 Walcott v. McNew, 62 S.W. 815 (Tex. Civ. App. 1901).

or extend the terms of a lease contract as fully as if he had been the original lessee therein.[135]

Specific Performance of Leases

Specific performance of certain contracts, or legally compelling the unwilling person to go through with the contract, is an equitable remedy available at times in the courts as a substitute for compensation in damages on breach of those contracts where the latter remedy is inadequate or incomplete.[136] One Texas court stated, where a sale of land was involved, that "by compelling the parties to a contract to do the very things they have agreed to do, more complete and perfect justice is attained than by giving damages for a breach of the contract."[137] However, as another court stated, the granting of "specific performance is not a matter of absolute right, but is within the discretion of the court, and may be granted or rejected according to the circumstances of each particular case."[138]

Texas decisions involving actions for specific performance of leases are rare. In an action for rent involving a partly executory oral lease for a term exceeding one year,[139] the court said that substantial part performance of the contract, here consisting of possession by the tenant and payment of one or more installments of rent, made the lease enforceable "in accordance with its terms."[140] In a later decision, the court ruled that the making of valuable and permanent improvements by the tenant or the presence of such facts as would make the transaction a fraud upon the tenant if it was not enforced, when added to payment of rent and possession of the premises by the tenant, was enough to entitle the tenant to specific performance of the oral lease.[141]

In an action by the landlord involving a written lease, to collect back rent on premises vacated by the tenant, the court said that the landlord "may accept the breach by the tenant, retake possession, and sue for his damages, or demand specific performance in the payment of the rent."[142]

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135 Springfield Fire & Marine Ins. Co. v. Republic Ins. Co., 262 S.W. 814, 818 (Tex. Civ. App. 1924) (Dallas). See additional discussion under subtitle "Assignment or subletting of leasehold," infra p. 173.

136 Burnett v. Mitchell, 158 S.W. 800, 801 (Tex. Civ. App. 1913) (Fort Worth, sale). See generally 38 TEX. JUR. 671 (sec. 20).

137 Witte v. Barry, 16 S.W.2d 548, 549 (Tex. Civ. App. 1929) (Waco, sale).

138 Clegg v. Brannan, 190 S.W. 812, 814 (Tex. Civ. App. 1916) (Austin), affirmed, 111 Tex. 367, 234 S.W. 1076 (1921) (land exchange).

139 See additional discussion under subtitle "Effect of part performance of oral leases," supra p. 10. Also see Note, Periodic Tenancies Created by Unenforceable Oral Leases, 19 TEX. L. REV. 340 (1941).

140 See Sorrells v. Goldberg, 34 Tex. Civ. App. 265, 78 S.W. 711, 712 (1904) (urban).

141 Ward v. Etier, 113 Tex. 83, 251 S.W. 1028, 1031 (Tex. Comm. App. 1923) (urban).

142 Marathon Oil Co. v. Rone, 83 S.W.2d 1028, 1031 (Tex. Civ. App. 1935) (Fort Worth, urban).

Leases Created by Operation of Law— Effect of Holding Over

In addition to the oral and written tenancies previously discussed created by express agreement of the parties, the landlord-tenant relationship may also be legally implied from conduct of the parties and created by operation of law. Implied tenancies include tenancies at sufferance and some periodic tenancies. Tenancies at will and common law tenancies in Texas appear to be created only by express agreement, although some American jurisdictions hold otherwise.

Tenancies at Sufferance and Tenancies at Will

A tenancy at sufferance is created when a tenant holds over without the consent of the lessor after expiration of a lease term.[143] A tenant at will is one who enters into possession of the land of another lawfully, but for no definite term, and whose possession may be terminated by the landlord or by himself at any time upon notice to the other party.[144] The distinction between a tenancy at will and a tenancy by sufferance is said to be that in the former the entry and occupancy are lawful; in the latter, the entry is lawful but the occupancy is not.[145]

A right of action accrues to a tenant by sufferance to recover for injuries caused by third persons to the property in his possession only to the extent of damage done to his possession; and, in an 1891 decision where the tenant was using land for grazing purposes and it was wrongfully burned by the railroad, such recoverable damages were held to include the value of the grass for grazing purposes between the date of its destruction and the date of the commencement of the dispossessory action against him by the landowner, but did not include damages for injury to the turf.[146] The tenant at sufferance has no estate that he may assign, and if he attempts an assignment his assignee, upon entry into possession, becomes a trespasser.[147]

The agreement creating a tenancy at will may be oral, or it may be written.[148] The tenant at will may enter into possession of the land by express permission of the owner, at will.[149] A tenancy at will may arise when the tenant holds

143 Steele v. Steele, 2 Willson Civ. Cas. Ct. App. sec. 345 (1884). See 27 TEX. JUR. 51 (sec. 6).
144 Robb v. San Antonio St. Ry., 82 Tex. 392, 18 S.W. 707, 708 (1891) (urban). See generally 27 TEX. JUR. 51 (sec. 7).
145 Robb v. San Antonio St. Ry., 82 Tex. 392, 18 S.W. 707, 708 (1891) (urban).
146 Texas & Pac. Ry. Co. v. Torrey, 4 Willson Civ. Cas. Ct. App. sec. 256, 16 S.W. 547 (1891).
147 Griffin v. Reynolds, 107 S.W.2d 634, 637 (Tex. Civ. App. 1937) (Texarkana).
148 Robb v. San Antonio St. Ry., 82 Tex. 392, 18 S.W. 707, 709 (1891) (urban).
149 See Buford v. Wasson, 49 Tex. Civ. App. 454, 109 S.W. 275, 278 (1908).

over for some purpose by permission of the landlord or with his tacit consent.[150]

A lease for an uncertain term is *prima facie* a tenancy at will.[151] Examples of such tenancies are leases which the parties agree are to last until the premises are sold,[152] as long as the tenant desires to use the premises,[153] as long as he pays the rent,[154] as long as the tenant is engaged in making and repairing harness,[155] or as long as the tenant wants the farm or the landlord owns it, or until the tenant is able to buy a farm for himself.[156] A mortgagor and mortgagee may stipulate that in the event of foreclosure of the security instrument the mortgagor-owner in possession shall thereafter hold as tenant at will of the purchaser at the foreclosure sale.[157] Further, when the agreement to lease for a term was not to become effective until a bond was executed, and that was never done, the tenant while in possession was held to be a tenant at will.[158]

A tenancy at will may be terminated at the will of either party upon notice to the other party.[159] When it is expressly possible of termination at the will of the tenant it is also by law terminable at the will of the landlord.[160] In a decision involving an urban tenancy the court held that a tenancy at will was terminable at any time by either party, upon "reasonable" notice to the other;[161] and in a decision involving a tenancy at will of a farm the lease was held terminable by the tenant at his own will or convenience (at the end of any crop year) and ". . . the lease was likewise terminable at the will of the landlord at the end of any crop year."[162] The death of either the landlord or the tenant puts an end to a tenancy at will.[163]

One in possession under a tenancy at will has all the rights in the premises that he would have under any other type of tenancy until his tenancy is terminated.[164]

150 Street-Whittington Co. v. Sayres, 172 S.W. 772, 776 (Tex. Civ. App. 1915) (Amarillo).
151 Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 310 (1935), superseding 76 S.W.2d 509 (Tex. Sup. Ct. 1934), which reversed 71 S.W.2d 402 (Tex. Civ. App. 1934) (Galveston, urban).
152 Lea v. Hernandez, 10 Tex. 137, 138 (1853) (urban); Willis v. Thomas, 9 S.W.2d 423, 424 (Tex. Civ. App. 1928) (San Antonio, urban).
153 Beauchamp v. Runnels, 35 Tex. Civ. App. 212, 79 S.W. 1105, 1106 (1904) (urban).
154 See Hill v. Hunter, 157 S.W. 247, 252 (Tex. Civ. App. 1913) (Austin).
155 Norman v. Morehouse, 243 S.W. 1104 (Tex. Civ. App. 1922) (Amarillo, urban).
156 Wildscheutz v. Lee, 281 S.W. 1105 (Tex. Civ. App. 1926) (San Antonio).
157 Scott v. Hewitt, 127 Tex. 31, 90 S.W.2d 816, 818 (1936) (urban).
158 Markowitz v. Davidson, 228 S.W. 968, 969 (Tex. Civ. App. 1921) (Fort Worth).
159 Buford v. Wasson, 49 Tex. Civ. App. 454, 109 S.W. 275, 278 (1908). See generally TEX. JUR. 53 (sec. 8).
160 Beauchamp v. Runnels, 35 Tex. Civ. App. 212, 79 S.W. 1105, 1106 (1904) (urban). See 14 TEX. L. REV. 109 (1935) for criticism of decision.
161 Willis v. Thomas, 9 S.W.2d 423, 424 (Tex. Civ. App. 1928) (San Antonio, urban).
162 See Wildscheutz v. Lee, 281 S.W. 1105 (Tex. Civ. App. 1926) (San Antonio).
163 Lea v. Hernandez, 10 Tex. 137, 138 (1853) (urban); First National Bank of Paris v. Wallace, 13 S.W.2d 176, 183 (Tex. Civ. App. 1928) (Texarkana), reversed on other grounds, 120 Tex. 92, 35 S.W.2d 1036 (1931).
164 Elliott v. State, 39 Tex. Crim. Rep. 242, 45 S.W. 711, 712 (1898).

Periodic Tenancies—Tenancies for Another Year

Periodic tenancies are tenancies from year to year, month to month, etc., reserving rent at stated periods, and subject to termination by the giving of notice of a certain duration. They may be created expressly, by a lease for an indefinite term of periods. Also they may be implied from an occupancy of premises under an unenforceable oral lease, or from a holding over after expiration of a definite term with consent of the lessor without a new agreement.[165]

Express periodic tenancies may be created by written or oral agreements but, if oral, to be enforceable the total lease term must be possible of being completed within a year.[166] An oral lease, with rent payable monthly, which was to last until the landlord needed the house,[167] and another, where the tenant at the end of a definite two-year term orally agreed to pay monthly rent in advance and to surrender the premises on demand, were held to be rental agreements from month to month, or periodic monthly tenancies.[168] So also was a written lease of indefinite duration reserving specified monthly rent.[169]

Periodic tenancies may exist where there is an occupancy of premises pursuant to oral leases voidable under the statute of frauds. For example, an oral lease on a farm for a term as long as the tenant paid the rent, by reason of a holding over under a former yearly tenancy and the fact that the property consisted of a farm rented by the year, was construed to be a tenancy from year to year, terminable at the pleasure of either the lessor or the lessee upon giving requisite notice.[170]

A "tenancy for another year" is created on the same terms if a tenant "holds over" or continues to occupy the leased premises after expiration of a definite term for a year, or for a term of years, without a new agreement but with the lessor's consent.[171] This is true whether the holding over follows a one-year oral lease[172] or a written lease.[173] Similarly, where the tenant holds over for a full year and continues in

165 See Note, Periodic Tenancies Created by Unenforceable Oral Leases, 19 TEX. L. REV. 339 (1941); 27 TEX. JUR. 53.
166 See TEX. ANN. REV. CIV. STAT. art. 3995 (Vernon, 1945).
167 Patterson v. Ellis, 149 S.W. 300, 301 (Tex. Civ. App. 1912) (Texarkana, urban).
168 McKibbin v. Pierce, 190 S.W. 1149, 1150 (Tex. Civ. App. 1917) (Amarillo, urban).
169 Sellers v. Spiller, 64 S.W.2d 1049, 1051 (Tex. Civ. App. 1933) (Austin).
170 Hill v. Hunter, 157 S.W. 247, 253 (Tex. Civ. App. 1913) (Austin).
171 See Shipman v. Mitchell, 64 Tex. 174, 176 (1885) (urban); Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban); BOBBITT, Tenancies from Year to Year and Related Estates, 8 TEX. L. REV. 331 (1930).
172 See Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban); Dallas Joint-Stock Land Bank v. Rutherford, 115 S.W.2d 1160, 1163 (Tex. Civ. App. 1938) (Waco).
173 See Shipman v. Mitchell, 64 Tex. 174, 176 (1885) (urban); Abeel v. McDonnell, 39 Tex. Civ. App. 453, 87 S.W. 1066, 1067 (1905) (urban).

possession, a tenancy for a second hold-over year is created.[174] The creation of a lease for a hold-over year does not depend upon the length of time a tenant holds over after the expiring term of one or more years, but will arise if the tenant holds over a few days or a single day, unless the circumstances are such as to excuse the holding over.[175]

The hold-over tenant is presumed to be in possession on the terms of his prior lease,[176] upon the presumption that the parties have tacitly renewed the former agreement;[177] and, therefore, where the term of the original lease was for eight months, the hold-over term is presumed of equal length;[178] but where the original term exceeded one year, the law will imply the making of a contract that would lawfully be made;[179] that is, it will imply a contract for the succeeding year.[180] Also, since the hold-over tenant is presumed in possession under the terms of his prior lease, the rate and manner of rental payment as originally agreed is implied for the hold-over year, whether it be cash rent[181] or "third and fourth" share rent,[182] and, in addition, it has been held that holding over meant "holding under the same kind of use."[183]

Although a tenant by the year, who remains in possession, is presumed to be holding under the same terms as those of the expired lease, such is only a presumption and may be rebutted upon proof of a new lease upon different terms.[184] It was held that a tenant who was granted temporary permission to remain on the property until assent to a renewal lease was obtained from an absent landlord,[185] and another who remained for some purpose of his own with tacit permission of the landlord, were not holding over under terms of the original leases.[186] However, it has been held that a tenant cannot rebut the presumption, arising from his holding over,

174 Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 54 (1894) (urban); Hunger v. Toubin Bros., 164 S.W.2d 765, 766 (Tex. Civ. App. 1942) (Austin, urban); Jones v. Winter, 215 S.W.2d 654, 656 (Tex. Civ. App. 1948) (Amarillo, urban).
175 Hunger v. Toubin Bros., 164 S.W.2d 765, 767 (Tex. Civ. App. 1942) (Austin, urban).
176 Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 53 (1894) (urban). See San Antonio v. French, 80 Tex. 575, 16 S.W. 440, 441 (1891) (urban); Drinkard v. Anderton, 280 S.W. 1076, 1077 (1926). Also see BOBBITT, Tenancies from Year to Year and Related Estates, 8 TEX. L. REV. 332 (1930).
177 See San Antonio v. French, 80 Tex. 575, 16 S.W. 440, 441 (1891) (urban); Rives v. Volk, 253 S.W. 831, 832 (Tex. Civ. App. 1923) (Galveston); 27 TEX. JUR. 321 (sec. 188).
178 Street-Whittington Co. v. Sayres, 172 S.W. 772, 777 (Tex. Civ. App. 1915) (Amarillo, urban).
179 See Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 54; TEX. ANN. REV. CIV. STAT. art. 3995 (Vernon, 1945).
180 Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 54.
181 Minor v. Kilgore, 38 S.W. 539 (Tex. Civ. App. 1896).
182 Drinkard v. Anderton, 280 S.W. 1076, 1077 (Tex. Civ. App. 1926) (Waco).
183 See Rives v. Volk, 253 S.W. 831, 833 (Tex. Civ. App. 1923) (Galveston).
184 Puckett v. Scott, 45 Tex. Civ. App. 392, 100 S.W. 969, 970 (1907) (urban); Furr v. Jones, 264 S.W. 164, 166 (Tex. Civ. App. 1924) (Fort Worth).
185 Hodge v. Hendrick, 97 S.W.2d 722, 726 (Tex. Civ. App. 1936) (Eastland, urban).
186 Street-Whittington Co. v. Sayres, 172 S.W. 772, 777 (Tex. Civ. App. 1915) (Amarillo, urban).

of an express or implied agreement to a renewal for another year on the terms of the expiring lease, by proof merely of his notifying the landlord that he intended to hold by the month.[187] Such a tenant would be released from the implied hold-over term only upon an agreement entered into which changed the terms under which he would hold, or an acquiescence on the part of the landlord to the proposed new terms submitted by the tenant.[188] But if, before expiration of the former lease, the landlord notified the tenant that after the expiring term he could occupy the premises only on a month-to-month basis, a tenant who holds over is presumed to have assented to the landlord's proposition.[189]

In a suit to recover possession the burden is on the landlord to show that a hold-over tenant's possession is wrongful.[190] "The right of a landlord to hold a hold-over tenant for another term includes the right to hold an assignee of the original lessee when he holds over the term."[191]

A tenancy at will or a periodical tenancy may arise out of the agreement between the parties when the tenant remains in possession after the end of the term with permission of the landlord.[192]

Common Law Tenancy from Year to Year

A tenant from year to year at common law has been defined as "one who holds lands . . . where no certain term has been mentioned, but an annual rent has been reserved," or "one who holds over, by consent given either expressly or constructively, after the determination of a lease for years."[193] A tenancy from year to year in many American jurisdictions also may be created ". . . by virtue of the tenant entering under a proposed lease for a period that contravenes the Statute of Frauds, thus creating a tenancy at will which is converted into a tenancy from year to year by the payment of periodic rent."[194]

Under the common law, a tenancy from year to year can be terminated by either the landlord or the tenant giving the other notice "at least a half year before the expiration of the

187 Hunger v. Toubin Bros., 164 S.W.2d 765, 766 (Tex. Civ. App. 1942) (Austin, urban).
188 Abeel v. McDonnell, 39 Tex. Civ. App. 453, 87 S.W. 1066, 1067 (1905) (urban). See Street-Whittington Co. v. Sayres, 172 S.W. 772, 777 (Tex. Civ. App. 1915) (Amarillo, urban).
189 Shipman v. Mitchell, 64 Tex. 174, 176 (1885) (urban).
190 Dallas Joint-Stock Land Bank v. Rutherford, 115 S.W. 2d 1160, 1163 (Tex. Civ. App. 1938) (Waco). See generally 27 TEX. JUR. 321 (sec. 188).
191 Hunger v. Toubin Bros., 164 S.W.2d 765, 767 (Tex. Civ. App. 1942) (Austin, urban).
192 Street-Whittington Co. v. Sayres, 172 S.W. 772, 776 (Tex. Civ. App. 1915) (Amarillo, urban). See generally 27 TEX. JUR. 322 (sec. 188).
193 BLACK, LAW DICTIONARY, 1712 (3rd. ed. 1933).
194 See discussion by BOBBITT, Tenancies from Year to Year and Related Estates, 8 TEX. L. REV. 330 (1930).

current year of the tenancy, so that the tenancy may expire at that period of the year at which it commenced."[195] The six-month period of notice has been changed by legislation in many American jurisidictions.[196]

Authorities are in conflict as to whether or not a common law tenancy from year to year, arising from a holding over, after a lease for years, without a new lease but with the landlord's consent, exists in Texas. In one article, appearing in 1930, it is said that: "Although Texas has no statute expressly regulating or changing the common law rules which are theoretically in force in such situations, there is no character of tenancy (unless created by express agreement) in this State which may properly be classified as a tenancy from year to year. . . Where there is a holding over by the tenants after a tenancy for a term of years it seems to be the unquestioned rule in Texas that a tenancy for another year is created.[197] "The essential difference between the general doctrine of a tenancy from year to year and the Texas doctrine of a tenancy for another year is that the former tenancy continues indefinitely unless the required notice before the end of the rent year is given, while in Texas each year constitutes a separate distinct tenancy and no notice is required to terminate the tenancy on the last day of any given rent year."[198] It is the opinion of a later writer that these conclusions by no means necessarily follow from the cases cited in the above article; that Texas courts have never definitely held whether or not a common law tenancy from year to year exists in this jurisidiction.[199]

Of course, tenancies from year to year can be created under Texas law by express written agreement between the landlord and tenant, and such agreements may provide for termination of the lease on six months' notice preceding the end of the annual term, as under the common law rule, or the contract might provide for a shorter or a longer period of notice.

195 ODGERS, K. C., W. BLAKE and ODGERS, WALTER BLAKE, The Common Law of England 877 (2d ed. vol. II, 1920).
196 BOBBITT, Tenancies from Year to Year and Related Estates, 8 TEX. L. REV. 329 (1930).
197 Id. at 331.
198 BOBBITT, Tenancies from Year to Year and Related Estates, 8 TEX. LAW R. 332 (1930).
199 See RICE, Note, Periodic Tenancy at Common Law—Development of Substitutes in the United States and Texas, 19 TEX. L. REV. 192 (1941). Also see 27 TEX. JUR. 54 (sec. 9).

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PART II. RIGHTS, DUTIES AND PERFORMANCE UNDER THE AGREEMENT

A valid lease or a sharecropping contract confers on the parties thereto certain rights and imposes on each party duties to carry out his part of the agreement.

Right to Possession of Leased Premises

Tenant's Right to Possession of Leased Premises

In the absence of agreement to the contrary, during the existence of a lease term, the tenant is as truly entitled to the exclusive use and possession of the leased premises as if he had purchased the fee simple.[1] A tenant in possession of leased premises within the meaning of a section of the penal code, in a decision involving an alleged offense under that section, was held the legal owner thereof until expiration of the lease;[2] and this applies, also, to a tenant at will who, until termination of the lease, has all the rights in the premises that he would have under any other character of tenancy.[3]

However, since one of the inherent rights incident to ownership of property is that of controlling its use, the landlord may restrict the extent of a tenant's rights by any lawful agreement;[4] and, further, a recurrent unauthorized use of the premises has been enjoined.[5] But where the lease contains no stipulation regarding use of the leased premises they may be used for any lawful purpose.[6]

In the absence of an agreement to the contrary, the tenant is entitled to possession, use, and enjoyment of the entire premises from the beginning of the lease term;[7] and, in a proper case, he may enjoin interference with his peaceable possession.[8] But where the lease gives the tenant the right to cut and use only timber necessary for the purposes of the lease,[9] or to cut and sell only the timber from new land put

1 See Wheatley v. Kollaer, 63 Tex. Civ. App. 459, 133 S.W. 903, 904 (1910) (urban); Galley v. Hedrick, 127 S.W.2d 978, 981 (Tex. Civ. App. 1939) (Amarillo). Also see 27 TEX. JUR. 226 (sec. 126).
2 Brumley v. State, 12 Tex. App. 609, 612 (1882).
3 Elliott v. State, 39 Tex. Crim. Rep. 242, 45 S.W. 711, 712 (1898).
4 Celli & Del Papa v. Galveston Brewing Co., 186 S.W. 278, 280 (Tex. Civ. App. 1916) (Galveston), affirmed, 227 S.W. 941 (Tex. Comm. App. 1921) (urban).
5 Sinclair Refining Co. v. McElree, 52 S.W.2d 679, 681 (Tex. Civ. App. 1932) (Dallas, urban); Davis v. Driver, 271 S.W. 435 (Tex. Civ. App. 1925) (Amarillo, urban).
6 Fred v. Moseley, 146 S.W. 343, 344 (Tex. Civ. App. 1912) (Dallas, urban).
7 Leo Sheep Co. v. Davenport, 234 S.W. 691, 692 (Tex. Civ. App. 1921) (Amarillo).
8 See Galley v. Hedrick, 127 S.W.2d 978, 980 (Tex. Civ. App. 1939) (Amarillo) (injunction denied).
9 See Johnson v. Gurley, 52 Tex. 222, 227 (1879).

into cultivation, the tenant's right to cut timber necessarily would be limited by the terms of the lease.[10]

Usage and custom, in reference to which the parties are presumed to have contracted, in many situations may in part determine the rights of the landlord and tenant under a lease. Custom cannot establish the terms of a lease, but, as with other contracts, "when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage and custom which prevails in the particular trade or business to which the contract relates . . ." and such custom may be shown, in event of disagreement or litigation, to more clearly define the intent of the parties.[11] In case of litigation, such custom should be both alleged and proved.[12]

In the absence of agreement between the landlord and tenant, usage or custom, if properly alleged, may be shown to determine the date of termination of an annual farm lease,[13] the length of time a farm lease is to run,[14] the kind of crops to be planted and the amount of rent to be paid,[15] the time for payment of rent,[16] whether share-rent was contemplated on the tenant's garden,[17] the right of the tenant to "Johnson grass" growing on stubble land,[18] the right of the tenant to harvest "Colorado grass" grown after the usual crop fails,[19] and to determine the right of a tenant to gather the remnant of the cotton crop remaining after the end of the lease term.[20]

Landlord's right to enter farm operated by the tenant. In the absence of stipulation in the lease so allowing, or permission granted by the tenant, the landlord, even in case of default in rent, has no right to re-enter the leased premises,[21] nor has he such right "even to make needed repairs."[22] Such re-entry by the landlord has been held to be unwarranted though the rent was unpaid and the tenancy was merely by sufferance.[23] The landlord's right of entry where a tenancy

10 See Beard v. Gooch & Son, 62 Tex. Civ. App. 69, 130 S.W. 1022, 1023 (1910); Booth v. Campbell, 240 S.W. 559, 560 (Tex. Civ. App. 1922) (Texarkana). Also see 27 TEX. JUR. 223 (sec. 125).
11 Bowles v. Driver, 113 S.W. 440 (Tex. Civ. App. 1908). See 27 TEX. JUR. 225 (sec. 125).
12 See Cooke v. Ellis, 196 S.W. 642, 644 (Tex. Civ. App. 1917) (Fort Worth).
13 Miller v. Lewis, 227 S.W. 796 (Tex. Civ. App. 1925) (San Antonio).
14 Brincefield v. Allen, 25 Tex. Civ. App. 258, 60 S.W. 1010, 1012 (1901).
15 Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 1919) (Fort Worth). See 42 TEX. JUR. 859 (sec. 24).
16 See Slay v. Milton, 64 Tex. 421, 425 (1885).
17 See Kimbrough v. Powell, 13 S.W.2d 467, 469 (Tex. Civ. App. 1929) (Waco).
18 See Cooke v. Ellis, 196 S.W. 642, 644 (Tex. Civ. App. 1917) (Fort Worth).
19 Jackson v. Taylor, 166 S.W. 413, 414 (Tex. Civ. App. 1914) (Fort Worth), second appeal, 180 S.W. 1142, 1144, 1145 (Tex. Civ. App. 1915) (Fort Worth).
20 Bowles v. Driver, 112 S.W. 440, 441 (Tex. Civ. App. 1908).
21 Jenner v. Carpenter, 48 S.W. 46 (Tex. Civ. App. 1898) (urban). See generally 27 TEX. JUR. 272 (sec. 155).
22 Higby v. Kirksey, 163 S.W. 315, 316 (Tex. Civ. App. 1914) (Fort Worth, urban).
23 Higby v. Kirksey, 163 S.W. 315, 316 (Tex. Civ. App. 1914) (Fort Worth, urban).

is at will is limited to the purpose of notifying the tenant that the tenancy is terminated.[24]

Where a landlord, who wanted to do some terracing, entered upon land prepared by the tenant for planting, without the tenant's permission, and began building the terraces, the tenant rightfully ordered him off the premises.[25]

"A tenant may maintain the ordinary actions for the wrongful disturbance of his possession by his landlord. Thus, where a landlord wrongfully intrudes upon the tenant's right to the exclusive possession of the premises, an action of trespass will lie against him as against any other wrongdoer."[26] In another decision it was said that the tenant may recover all damages proximately resulting from an unauthorized reentry by the landlord.[27]

It should be remembered that one of the inherent rights incident to ownership of property is that of controlling its use, and that the landlord may restrict the extent of a tenant's rights under a lease by any lawful agreement.[28] The landlord, therefore, may reserve the right to enter to make inspection, repairs or improvements, or for any other lawful purpose he wishes.

Possession When Farming on Shares

The person farming on shares may be (1) a tenant on shares, (2) a cropper on shares, or (3) an employee on shares, depending on the terms of the agreement with the landowner.[29]

Under the first type of agreement, which often provides that the landowner "leases"[30] or "rents"[31] the land to the cultivator, who is to "deliver" a share of the crop to the landowner,[32] and under which the parties intend that a tenancy and not a cropper relationship should exist,[33] with the occupant having exclusive possession of the farm during the term,

24 Elliott v. State, 39 Tex. Crim. Rep. 242, 45 S.W. 711, 712 (1898).
25 Lane v. State, 101 Tex. Crim. Rep. 593, 276 S.W. 712, 713 (1925).
26 Alford v. Thomas, 238 S.W. 270, 272 (Tex. Civ. App. 1922) (Fort Worth), quoting 16 R.C.L. 675.
27 See Higby v. Kirksey, 163 S.W. 315, 316 (Tex. Civ. App. 1914) (Fort Worth, urban).
28 Celli & Del Papa v. Galveston Brewing Co., 186 S.W. 278 (Tex. Civ. App. 1916) (Galveston), affirmed, 227 S.W. 941 (Tex. Comm. App. 1921) (urban).
29 See Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896). See generally 13 TEX. JUR. 14 (sec. 13).
30 See Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1925) (Amarillo).
31 See McCullough Hardware Co. v. Call, 155 S.W. 718, 720 (Tex. Civ. App. 1913) (Amarillo); Turner v. First Nat. Bank of Sulphur Springs, 234 S.W. 928 (Tex. Civ. App. 1921) (Texarkana).
32 See McCullough Hardware Co. v. Call, 155 S.W. 718, 720 (Tex. Civ. App. 1913) (Amarillo).
33 See Curlee v. Rogan, 136 S.W. 1126, 1127 (Tex. Civ. App. 1911).

a tenancy is created;[34] and such tenant on share-rent has all the rights to possession of the leased premises conferred on any other type of tenant.[35] Such tenant, whose rent is payable in kind by a share of the crop, retains the entire title in the unharvested crop subject to a lien for rent or supplies in favor of the landlord.[36]

The second type of agreement often provides for a division of the specific crop, with a reservation by the landowner of an undivided share, and, in the absence of stipulation providing otherwise, the parties here become tenants in common of the crops raised.[37] The court has at times referred to these parties as "joint owners" of the crop.[38] The share agreement between a landowner and a farmer, under which the landowner supplies the land, teams, implements, etc., and the cultivator supplies the labor, where the crops produced are to be divided equally, is usually held to create a tenancy in common of the crop;[39] and the cultivator who farms under this type of contract is a "cropper on the shares,"[40] since such share agreements ordinarily do not create the relation of landlord and tenant between the parties.[41] If the share agreement contains no language importing a present demise or conveyance of any interest in the land or right to its exclusive possession to the cultivator, whether or not he is an occupier, but, instead, the general possession is reserved by the owner, then the occupant is a mere cropper.[42]

Such mere cropper has no "estate" in the land[43]—no "possessory interest" in the premises,[44] but his contract is merely a personal engagement to furnish the labor for making the crop[45] with the right only of ingress and egress to the property.[46] Any right of possession of the premises which may be had by such a cropper, as where he is permitted to live on the farm, has been said to be "merely an incident to and dependent upon the performance of the services which the cropper

34 Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1925) (Amarillo); Cry v. Bass Hardware, 273 S.W. 347, 349 (Tex. Civ. App. 1925) (Texarkana). See 13 TEX. JUR. 35 (sec. 32).
35 See additional discussion under subtitle "Tenant's Right to Possession of Leased Premises," supra p. 29.
36 See Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
37 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896). See 27 TEX. JUR. 110 (sec. 44).
38 See Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin).
39 See Jaco v. Nash, 236 S.W. 235, 237 (Tex. Civ. App. 1921) (Dallas).
40 See Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin).
41 Jaco v. Nash, 236 S.W. 235, 237 (Tex. Civ. App. 1921) (Dallas).
42 See discussion in Cry v. Bass Hardware, 273 S.W. 350 (Tex. Civ. App. 1925) (Texarkana).
43 See Ellis v. Bingham, 150 S.W. 602, 603 (Tex. Civ. App. 1912) (Texarkana).
44 See Webb v. Garrett, 30 Tex. Civ. App. 240, 70 S.W. 992 (1902).
45 Ellis v. Bingham, 150 S.W. 602, 603 (Tex. Civ. App. 1912) (Texarkana).
46 See discussion in Cry v. Bass Hardware, 273 S.W. 347, 349, 350 (Tex. Civ. App. 1925) (Texarkana).

had contracted to render in making the crop upon the premises."[47]

Share-farming agreements, under the terms of which the parties are tenants in common in the crop, usually are held to be contracts of hiring, as distinguished from contracts of leasing. However, a landlord may be owner of a part of the crops by express agreement, even though the agreement in other respects is an ordinary lease and creates the usual relationship of landlord and tenant between the parties.[48] As was said in one decision: "The landlord and tenant act was not intended to take away the rights of the parties to make any contract they might deem proper in regard to the ownership of the respective parties in the crop raised, or any other matter concerning the same."[49] The question "as to whether the landlord has a mere lien upon the property raised upon shares, or whether he becomes the owner of a part so raised, is . . . to be determined from the rental contract."[50]

Growing crops on land that is sold, if they belong to the landowner, pass by the deed of conveyance to the purchaser of the land;[51] but title to a cropper's interest in the crop, being personalty, remains in the cropper.[52]

Under the third type of agreement, where the landowner "retains the property in the crop and the control thereof, and divides with the cropper his share, the cropper is the servant of the landowner and receives his share as the price of his labor." Such cropper "has no interest in the land or title to the crop except after division to such part as may be divided to him."[53]

"Cropper" contracts for a term longer than one year are unenforceable unless in writing.[54]

A share-cropping agreement generally does not constitute the parties partners: "they are not sharing in the profits but are interested jointly in the thing produced."[55] But if the

47 See Ellis v. Bingham, 150 S.W. 602, 603 (Tex. Civ. App. 1912) (Texarkana).
48 See Horsley v. Moss, 5 Tex. Civ. App. 341, 23 S.W. 1115, 1116 (1893); Miles v. Dorn, 40 Tex. Civ. App. 298, 90 S.W. 707, 709 (1905); Doke v. Trinity & B.V. Ry. Co., 60 Tex. Civ. App. 106, 126 S.W. 1195, 1197 (1910); Rentfrow v. Lancaster, 10 Tex. Civ. App. 325, 31 S.W. 229 (1895).
49 Horsley v. Moss, 5 Tex. Civ. App. 341, 23 S.W. 1115, 1116 (1893).
50 Miles v. Dorn, 40 Tex. Civ. App. 298, 90 S.W. 707, 709 (1905).
51 Ray v. Foutch, 50 S.W.2d 380, 381 (Tex. Civ. App. 1932) (Amarillo). See Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth); Jolley v. Brown, 191 S.W. 177, 180 (Tex. Civ. App. 1917) (Amarillo). Also see additional discussion under subtitle "Cropper's rights in crop on sale of farm," infra p. 109.
52 See Ray v. Foutch, 50 S.W.2d 380, 382 (Tex. Civ. App. 1932) (Amarillo); and 27 TEX. JUR. 393 (sec. 237).
53 See Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896); and 27 TEX. JUR. 391 (sec. 235).
54 TEX. ANN. REV. CIV. STAT. art. 3995 (5) (Vernon, 1945); see Cessac v. Leger, 214 S.W.2d 860, 864 (Tex. Civ. App. 1948) (Beaumont).
55 Texas Produce Exchange v. Sorrell, 168 S.W. 74, 76 (Tex. Civ. App. 1914) (San Antonio).

agreement provides for sharing in the net profits after all expenses are paid, a partnership may be created.[56]

Landlord's Duty to Put Tenant Into Possession

"He who lets agrees to give possession."[57] There is an implied covenant on the part of the landlord that when the time comes for the tenant to take possession under the terms of the lease the premises shall be open to his entry.[58] This implied agreement that there shall be no impediments to the tenant's taking possession does not extend beyond the beginning of the lease term, and if a stranger thereafter wrongfully prevents the taking of possession or dispossesses the tenant, the stranger, and not the landlord, is liable for the wrong done to the tenant.[59]

The lease contract, of course, may provide that it shall be the duty of the tenant to make arrangements with a former tenant for possession[60] or that the tenant, before obtaining possession, must purchase and retire an outstanding lease on the premises.[61] In the absence of agreement to the contrary, the tenant is entitled to possession of the entire premises leased from the beginning of the lease term;[62] and, if through mutual mistake there is great disparity in acreage, the tenant should be relieved of payment of part of the rent.[63] However, where a tenant took possession of only part of the farm and failed to notify the landlord, who was absent and ignorant of the fact that a trespasser had wrongfully taken possession of the remainder, the tenant was held liable for such proportionate part of the sum agreed upon as rent as the land cultivated by the tenant bore to the entire farm.[64]

A tenant claiming possession under a lease executed after the land had been mortgaged, if the tenant was a party to the foreclosure, is not entitled to possession of the premises under the terms of the lease after foreclosure of the mortgage except by agreement with the purchaser. The rights of the tenant, including his right in the crop remaining on the foreclosed premises, are discussed in subsequent chapters.[65]

56 See Willis v. Lewis Moore, 59 Tex. 628, 633 (1883).
57 Hertzberg v. Beisenbach, 64 Tex. 262, 265 (1885) (urban). See generally 27 TEX. JUR. 227 (sec. 126).
58 Hertzberg v. Beisenbach, 64 Tex. 262, 265 (1885) (urban).
59 Hertzberg v. Beisenbach, 64 Tex. 262, 265 (1885) (urban).
60 See Cummings v. Nix, 279 S.W. 484, 486 (Tex. Civ. App. 1926) (Amarillo).
61 See Estes v. Rutledge, 252 S.W. 224, 226 (Tex. Civ. App. 1923) (San Antonio, urban).
62 Leo Sheep Co. v. Davenport, 234 S.W. 691, 692 (Tex. Civ. App. 1921) (Amarillo).
63 Leo Sheep Co. v. Davenport, 234 S.W. 691, 693 (Tex. Civ. App. 1921) (Amarillo).
64 Northcutt v. Allen, 148 S.W. 607, 608 (Tex. Civ. App. 1912) (Dallas).
65 See discussion in Wootton v. Bishop, 257 S.W. 930 (Tex. Civ. App. 1924) (Amarillo). Also see additional discussion under subtitles "Interference by landlord or by others under paramount title," infra p. 37; "Sale, Foreclosure, or Devolution of Landlord's Reversion," infra p. 171; and "Right to crop after foreclosure or sale of leased premises," infra p. 101.

Damages recoverable for failure to put into possession. Recovery of damages has been allowed to prospective tenants from landlords who failed to deliver possession of the premises as agreed under a valid contract to lease a farm[66] or a ranch,[67] even though it was a contract to lease on shares,[68] and also where the landlord delivered possession of only a part of the agreed agricultural premises.[69] Ordinarily, the measure of damages recoverable for breach of a covenant to deliver possession of leased farm premises or any part of such property is the rental value of the property not delivered.[70] This measure of damages, where the rent remains unpaid, in practical effect means that the damage the tenant may recover is the difference between the rent which was to have been paid and the actual value of the lease term which was denied him, if the latter is greater than the agreed rent.[71] In addition, the tenant may be permitted to recover such special damages, if any, as under the circumstances must reasonably have been contemplated by the parties and would naturally and proximately have resulted from the breach.[72] Special damages, however, cannot be recovered without allegation and proof of knowledge by the landlord of the special circumstances producing such damages.[73]

In one decision involving a suit for the balance of rent alleged due and a counterclaim by the tenant for failure of the landlord to deliver 2 out of 13 sections of grazing land rented, the tenant, being unable to obtain other additional pasture, was, under the general rule, permitted a reduction in the contract rent in the amount of the rental value of the two sections of land withheld.[74] In another decision, the court approved as special damages the extra expense and loss of stock from straying incidental to tenant holding the cattle temporarily on the commons. In the latter case the lease provided that the landlord should pay all loss in event of sale (which sale occurred) of the land during the term.[75]

66 Cummings v. Nix, 279 S.W. 484 (Tex. Civ. App. 1926) (Amarillo).
67 Garner v. Crawford, 22 S.W.2d 975 (Tex. Civ. App. 1929) (El Paso).
68 McFarland v. Owens, 94 Tex. 650, 63 S.W. 530 (1901); 64 S.W. 229 (Tex. Civ. App. 1901) (petition held to state cause of action).
69 Cauble v. Hanson, 224 S.W. 922, 924 (Tex. Civ. App. 1920) (El Paso), affirmed, 249 S.W. 175 (Tex. Sup. Ct. 1923) (credit allowed on tenant's rent note for rental value of land landlord failed to deliver); Pressler v. Warren, 57 Tex. Civ. App. 635, 122 S.W. 909 (1909). See 27 TEX. JUR. 227 (sec. 127).
70 Cauble v. Hanson, 224 S.W. 922, 925 (Tex. Civ. App. 1920) (El Paso), affirmed, 249 S.W. 175 (Tex. Sup. Ct. 1923).
71 See Buck v. Morrow, 2 Tex. Civ. App. 361, 21 S.W. 398 (1893) (premises sold during lease term).
72 Cauble v. Hanson, 224 S.W. 922, 925 (Tex. Civ. App. 1920) (El Paso), affirmed, 249 S.W. 175 (Tex. Sup. Ct. 1923). See generally 27 TEX. JUR. 228 (sec. 128).
73 Garner v. Crawford, 22 S.W.2d 975, 977 (Tex. Civ. App. 1929) (El Paso). See Cummings v. Nix, 279 S.W. 484 (Tex. Civ. App. 1926) (Amarillo).
74 Cauble v. Hanson, 224 S.W. 922, 925 (Tex. Civ. App. 1920) (El Paso), affirmed, 249 S.W. 175 (Tex. Sup. Ct. 1923).
75 Buck v. Morrow, 2 Tex. Civ. App. 361, 21 S.W. 398, 399 (1893).

The tenant is entitled to possession of the particular farm leased, and he cannot be required to take another farm tendered by the landlord to reduce damages suffered from the landlord's breach of contract.[76] However, in one case where the landlord failed to furnish only a small part of the agreed acreage, some rent-free newly-cleared ground, and tendered other such land less convenient, and which the tenant refused, the damages allowed the tenant for breach of the contract were reduced by the net value of the cotton crop which probably could have been raised on the land tendered.[77]

Generally, in decisions that involve withholding possession of crop land from a share tenant the measure of damages claimable by such tenant is the reasonable value of the tenant's share of the crop he could and would reasonably have raised on the premises, minus the expense he would have incurred in making and gathering the crop, and minus such sums as the tenant earned or might by reasonable diligence have earned at other labor or by leasing other land.[78] In addition, the tenant may be permitted to recover such special damages, if any, as under the circumstances naturally and proximately resulted from the breach and were within the contemplation of the parties, which, in one case, it was contended, included damages for loss of use of the dwelling house, loss of feed stacked and of pasture on adjoining land available to the tenant, damage from embarrassment and depreciation of machinery.[79]

In a decision involving a "third and fourth" share rental, however, where the landlord furnished only one-half of the agreed acreage, the tenant, who, with family labor, could have farmed the withheld land without extra expense, was upheld in his claim for damages of the full value of his share of the crop,[80] on the theory that in rentals of farms on shares, employment of the tenant or cropper and his family often is the major benefit contemplated and is valuable whether a profit over and above such labor and expense is realized or not, and to deprive them of the right to labor is to take away the very benefit both parties agreed they should receive.[81]

A landlord who wrongfully withheld a barn on the leased premises was held liable in damages for the value of its use.[82]

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76 Hulshizer v. Nelson, 229 S.W. 658, 661 (Tex. Civ. App. 1921) (San Antonio).
77 Brannen v. McCarley, 146 S.W. 299, 300 (Tex. Civ. App. 1910) (El Paso).
78 Butler v. Perdue, 199 S.W. 1176 (Tex. Civ. App. 1918) (Texarkana). See court's instructions in Cummings v. Nix, 279 S.W. 484, 486 (Tex. Civ. App. 1926) (Amarillo).
79 Cummings v. Nix, 279 S.W. 484, 485 (Tex. Civ. App. 1926) (Amarillo).
80 Pressler v. Warren, 57 Tex. Civ. App. 635, 122 S.W. 909, 910 (1909).
81 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 525 (1908). See additional discussion under subtitle "Interference with Occupancy of a Farmer on Shares," infra p. 41.
82 Goodhue v. Hawkins, 133 S.W. 286, 291 (Tex. Civ. App. 1910) (urban).

The tenant has a lien on the unexempt property of the landlord in the tenant's possession and upon all rents under the lease for damages sustained from any breach by the landlord of the lease contract.[83]

Interference with Tenant's Possession

Covenant for quiet enjoyment of premises. When a person leases realty, in the absence of an express warranty and unless inconsistent with the lease terms, there is an implied covenant that the tenant shall have the quiet enjoyment and possession of the land during the continuance of the lease, and this covenant means that the tenant shall not be evicted or disturbed by the landlord or by persons deriving title from him or by virtue of a title paramount to his, but implies no warranty against the acts of strangers.[84] Though a lease may not contain an express covenant for quiet possession and enjoyment, the use of the words "lease," or "demise," or "agrees to let," or the words "grant and demise" imports such a covenant.[85]

Interference by landlord or by others under paramount title. The landlord has been held to be liable in damages for such breaches of the covenant of quiet enjoyment as, for example, leasing the same ranch for the same lease term to another who disturbed the tenant's possession;[86] re-entry by the landlord on the leased premises without right or consent, even for the purpose of making needed repairs;[87] wrongful and malicious locking of a door by the landlord, thereby denying the tenant use of the premises; [88] and unjust accusations of theft made against the tenant by the landlord's agent, coupled with threats of personal violence, which alarmed the tenant as to his safety and caused him to abandon the premises, plus refusal to permit harvesting of crops.[89] Where the landlord re-let the leased ranch to subsequent tenants who wrongfully evicted the rightful tenant or wrongfully moved stock on to the ranch pasture, it was held that the first tenant might bring his action for damages against the landlord[90] or against the trespassing tenant who had actual notice of the first

83 TEX. ANN. REV. CIV. STAT. art. 5236 (Vernon, 1947). See additional discussion under subtitle "Breach of Contract by Landlord," infra p. 180.
84 Thomas v. Brin, 38 Tex. Civ. App. 180, 85 S.W. 842, 845 (1905). See generally 27 TEX. JUR. 269 (sec. 152).
85 Alford v. Thomas, 238 S.W. 270, 272 (Tex. Civ. App. 1922) (Fort Worth).
86 Fort Terrett Ranch Co. v. Bell, 275 S.W. 81, 82 (Tex. Civ. App. 1925) (Austin). See generally 27 TEX. JUR. 273 (sec. 155).
87 Higby v. Kirksey, 163 S.W. 315, 316 (Tex. Civ. App. 1914) (Fort Worth, urban).
88 Williams v. Yoe, 22 Tex. Civ. App. 446, 54 S.W. 614 (1900) (urban).
89 Alford v. Thomas, 238 S.W. 270, 272 (Tex. Civ. App. 1922) (Fort Worth).
90 Fort Terrett Ranch Co. v. Bell, 275 S.W. 81, 82 (Tex. Civ. App. 1925) (tenant allowed to hold either agent or his undisclosed principal).

lease.[91] But the tenant cannot recover from the landlord for wrongful eviction by a stranger to the landlord's title.[92]

A tenant claiming possession under an expired lease who rented land to a subtenant was held liable to the subtenant for the value of the lease when the premises were repossessed by the true owner.[93]

A buyer of a farm with notice of an existing tenancy who wrongfully evicts the tenant in possession under a valid lease from the former owner is liable in damages for the wrongful ouster;[94] and the measure of damages recoverable by such wrongfully ousted share-tenant was said in one case to be ". . . the reasonable market value of his part of the crops which is was reasonably probable he would have raised on the farm during the year, less the expense of raising and harvesting them, and less such sums as the lessee and the dependent members of his family could have earned during the same year . . ." in other employment.[95]

If a trespassing landlord wrongfully destroys the tenant's growing crops, the cause of action is in tort, and in one decision the measure of the damage done was held to be the value of the crop just as it stood upon the ground at the time and place of its destruction, which could be arrived at by estimating the market value of the probable yield under proper cultivation, and subtracting therefrom the expense of maturing, harvesting and marketing.[96] A landowner who sold to a farmer the privilege of cutting hay from certain land, and later, before harvest, excluded him from the premises was held liable in damages for the market value of the hay, minus the expense of harvesting and marketing; and in this situation there was said to be no obligation to mitigate losses by leasing other available hay land, since the broken agreement was a contract of sale under which the purchaser would do a specific thing or work for a contemplated profit and was not a contract for hire or for employment.[97]

A purchaser under foreclosure decree of a mortgaged farm is entitled to immediate possession from a tenant who holds under a lease created after the property was mortgaged,

91 Harrington & Overton v. Chambers, 143 S.W. 662 (Tex. Civ. App. 1912) (Amarillo).
92 Thomas v. Brin, 38 Tex. Civ. App. 180, 85 S.W. 842, 845 (1905).
93 Kolp v. Prewitt, 9 S.W.2d 490, 494 (Tex. Civ. App. 1928) (Fort Worth, urban).
94 Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 1919) (Fort Worth); Robinson v. Street, 220 S.W. 648, 651 (Tex. Civ. App. 1920) (Beaumont); Willson v. Riley, 240 S.W. 626 (Tex. Civ. App. 1922) (Beaumont). See 27 TEX. JUR. 290 (sec. 166).
95 Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 1919) (Fort Worth).
96 See Smith v. Roberts, 218 S.W. 27, 30 (Tex. Civ. App. 1920) (Amarillo). Also see 27 TEX. JUR. 276 (sec. 157).
97 Bankers' Trust Co. v. Schulze, 220 S.W. 570, 571 (Tex. Civ. App. 1920) (Galveston), affirmed, 236 S.W. 703, 704 (Tex. Comm. App. 1922).

when the landlord and tenant are made parties, since such foreclosure decree terminates the lease.[98] Such tenant cannot thereafter proceed to plant further crops and to occupy the land under the terms of the lease; but, under the doctrine of emblements, he may thereafter enter upon the premises for the purpose of harvesting and removing the crop already growing upon the land.[99] Moreover, the tenant, though not a party to the foreclosure suit, after yielding possession in good faith on demand of the purchaser under the foreclosure decree of a mortgage given before the lease, may sue his landlord for the damage he suffered through the wrongful eviction.[100]

Generally, the courts will not enjoin breach of terms of a lease where there is an adequate remedy at law in an action for damages, but an injunction will be granted to restrain an insolvent landlord who cannot respond in damages from withholding possession of leased crop land.[101] Similarly, in one case where a suit for damages would have been useless against insolvent persons claiming the same land under a subsequent rental contract from the landlord's vendee, such insolvent persons were enjoined from obstructing the tenant's farming operations.[102]

An injunction was also issued in another case restoring possession of an irrigated farm to a tenant wrongfully evicted by the landlord who attempted an unwarranted forfeiture of the leasehold.[103] Further, an injunction ordering restoration of withheld personal property was declared, on a different occasion, the only immediate and effective remedy that could adequately protect the tenant against the wrongful acts of a landlord who forcibly ousted the tenant from the land at the beginning of the term and took possession of his farming tools, implements, feed and stock at the opening of the farming season, particularly since a determination of the extent of the injury and thus the amount of money damages would have been extremely difficult if not impossible.[104]

98 See Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo). See generally 6 TEX. L. REV. 392 (1928). Also see additional discussion under subtitles "Parties Entitled to Rental Payment when Leased Premises are Sold or Foreclosed," infra p. 66; and "Sale, Foreclosure, or Devolution of Landlord's Reversion," infra p. 171.

99 See Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo). Also see additional discussion under subtitle "Harvesting crops after termination of lease or after end of rental period—'Emblements'," infra p. 100.

100 Avery & Sons' Plow Co. v. Kennerly, 12 S.W.2d 140, 141 (Tex. Comm. App. 1929), reversing 300 S.W. 159 (Tex. Civ. App. 1927) (Amarillo, urban). See 27 TEX. JUR. 293 (sec. 167).

101 Foster v. Roseberry, 78 S.W. 701 (Tex. Civ. App. 1904), certified question answered, 98 Tex. 138, 81 S.W. 521 (1904).

102 See discussion in Henderson v. Parish, 265 S.W. 226 (Tex. Civ. App. 1924) (Texarkana). See generally 27 TEX. JUR. 270 (sec. 153).

103 Obets & Harris v. Speed, 211 S.W. 316, 318 (Tex. Civ. App. 1919) (El Paso).

104 Wicker v. Thomson, 242 S.W. 1106, 1108 (Tex. Civ. App. 1922) (Amarillo).

Interference with tenant's possession by third persons. A tenant cannot recover damages from the landlord for a disturbance of his possession of leased premises by a third person who is a stranger to the lease agreement, since the landlord's covenant of quiet enjoyment and peaceful possession only warrants that the tenant shall not be evicted or disturbed by the landlord or by persons deriving title from him or by virtue of a title paramount to his, but expresses or implies no warranty against the acts of strangers.[105] However, a tenant can recover his actual damages from such trespassing third person for any injury done to his leasehold interests,[106] including injury, if any, to pasture for grazing purposes[107] and to the tenant's crops.[108] Only the landowner can recover for injury solely to the land itself.[109] He can also recover for fire damage to fences,[110] or for permanent destruction of the grass.[111] The tenant of a leased farm, and not the landlord, may claim compensation for loss of annual growing grass in the pasture following a grass fire, carelessly set.[112] In one case the landlord had assigned his claim for damages to the tenant for injury to the grass, which occurred after the expiration of one lease and before negotiation of another.[113] A tenant at sufferance may recover for his loss of pasture for grazing purposes, but only for the elapsed time between the burning of the grass and the termination of his occupancy.[114]

Damages were recovered from one who, with notice of a tenant's lease, wrongfully drove and kept the tenant's cattle out of a leased pasture;[115] and where a trespasser wrongfully turned his own grade cattle into a pasture stocked with the tenant's purbreds, and as a result the tenant's purbred cows were bred by the trespasser's scrub bulls, the tenant recovered, in addition to the value of the grass in the pasture wrongfully used, the depreciation in market value of his purebred cows.[116] Where, because of a railroad's negligence in failing

105 Thomas v. Brin, 38 Tex. Civ. App. 180, 85 S.W. 842, 845 (1905). See 27 TEX. JUR. 292 (sec. 166).
106 Holland v. City of San Antonio, 23 S.W. 756 (Tex. Civ. App. 1893) (urban).
107 Shell Petroleum Corporation v. Parker, 37 S.W.2d 1064, 1066 (Tex. Civ. App. 1931) (El Paso); Harrington & Overton v. Chambers, 143 S.W. 662, 663 (Tex. Civ. App. 1912) (Amarillo); Baldwin v. Richardson, 87 S.W. 746, 747 (Tex. Civ. App. 1905); Texas & Pac. Ry. Co. v. Torrey, 4 Willson Civ. Cas. Ct. App. sec. 256, 16 S.W. 547 (1891). See generally 27 TEX. JUR. 341 (sec. 202).
108 The Texas & Pacific Ry. Co. v. Lige Bayliss, 62 Tex. 570, 575 (1884).
109 See Holland v. City of San Antonio, 23 S.W. 756, 757 (Tex. Civ. App. 1893) (urban); Shell Petroleum Corporation v. Parker, 37 S.W. 2d 1064, 1066 (Tex. Civ. App. 1931) (El Paso).
110 Gulf, C. & S.F. Ry. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S.W. 89, 90 (1893).
111 Shell Petroleum Corporation v. Parker, 37 S.W.2d 1064, 1066 (Tex. Civ. App. 1931) (El Paso).
112 Gulf, C. & S.F. Ry. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S.W. 89, 90 (1893).
113 See Gulf, C. & S.F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S.W. 43, 45 (1894); 23 S.W. 851 (1893).
114 Texas & Pac. Ry. Co. v. Torrey, 4 Willson Civ. Cas. Ct. App. sec. 256, 16 S.W. 547 (1891).
115 McAllister v. Sanders, 41 S.W. 388, 389 (Tex. Civ. App. 1897).
116 See Baldwin v. Richardson, 39 Tex. Civ. App. 406, 87 S.W. 746, 747 (1905).

to maintain cattle guards properly, the tenant's growing crop was totally destroyed by wandering cattle and hogs, the tenant recovered in damages from the railroad company the value of the crop at the time of its destruction.[117]

Interference with Occupancy of a Farmer on Shares

A landowner who wrongfully interferes with the occupancy of his premises occupied under agreement by a farmer on shares, by breach of his contract with such farmer is liable for the natural and probable consequences of his wrongful act.[118] Landowners have been held liable for such proximately resulting injuries where the harmed farmer was a tenant on shares,[119] a cropper on shares[120] or an employee on shares;[121] and where the interference took the form of a refusal to put the sharefarmer in possession as agreed, or through renting to another and putting the latter in possession,[122] and in instances of wrongful ouster before the end of the term of "third and fourth" share-tenant[123] and of "half and half" share-tenants.[124]

The ousted farmer, in a proper case, may obtain an injunction in effect restoring him to possession of the farm from which he has been evicted.[125] In some situations the farmer may be merely permitted ingress and egress to harvest crops which failed to mature before the end of the term.[126] Where the crop is available, he may sue to recover his share of the crop;[127] but, generally, the sharefarmer's remedy when wrong-

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117 The Texas & Pacific Railway Co. v. Lige Bayliss, 62 Tex. 570, 572 (1884).

118 See Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).

119 Springer v. Riley, 136 S.W. 577 (Tex. Civ. App. 1911); Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).

120 Tignor v. Toney, 13 Tex. Civ. App 518, 35 S.W. 881 (1896). See Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903) (where it is not clear whether the "half and half" contract is a share tenancy or a sharecropper agreement).

121 Hall v. White, 208 S.W. 669, 670 (Tex. Civ. App. 1918). (Employee on shares wrongfully discharged).

122 King v. Griffin,, 39 Tex. Civ. App. 497, 87 S.W. 844 (1905); Butler v. Perdue, 199 S.W. 1176 (Tex. Civ. App. 1918) (Texarkana).

123 Lamar v. Hildreth, 209 S.W. 167 (Tex. Civ. App. 1919) (Amarillo); Springer v. Riley, 136 S.W. 577 (Tex. Civ. App. 1911); Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).

124 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1908); Smith v. Milam, 143 S.W. 293 (Tex. Civ. App. 1912) (Fort Worth); Bost v. McCrea, 172 S.W. 561 (Tex. Civ. App. 1915) (Amarillo).

125 See discussion in Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S.W. 664, 665 (1904). See generally 27 TEX. JUR. 397 (sec. 240).

126 See statement in Crow v. Ball, 99 S.W. 583, 584 (Tex. Civ. App. 1907).

127 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).

fully refused possession or ousted from the farm by the landowner is to bring an action for damages.[128]

"Just what the exact measure of damages is in a suit by a tenant or sharecropper against his landlord for a breach of a rental contract has been the subject of much discussion . . . a bewildering number of decisions many of which only add confusion to an already uncertain subject are found."[129]

Generally, a farmer on shares wrongfully ousted from the premises by the landowner may recover in an action for damages the reasonable market value of the farmer's share of the crop he reasonably expected to raise, minus expenses he reasonably would have incurred in performing his contract, and minus such amounts as those thrown out of employment earned or by reasonable diligence might have earned in other employment after breach of the contract;[130] and this same general measure of damages appears to apply whether the ousted sharefarmer was a "third and fourth" share-tenant[131] or a "half and half" sharefarmer.[132] The same measure of damages has been applied where the landowner wrongfully refused the sharefarmer possession of the leased premises,[133] and also where other violations of the lease terms by the landowner prevented the sharefarmer's performance of his part of the agreement.[134]

One must always bear in mind, however, that under the above general measure of damages for interference by the landowner with the possession of a sharefarmer, the deductions that may be made from the market value of the injured farmer's share of the crop will depend on the facts of the par-

128 See Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882; Crews v. Cortez, 102 Tex. 111, 113 S.W. 523 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1908); Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903); Barnett v. Govan, 241 S.W. 276 (Tex. Civ. App. 1922) (Texarkana); Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas); Butler v. Perdue, 199 S.W. 1176 (Tex. Civ. App. 1918) (Texarkana); Bost v. McCrea, 172 S.W. 561 (Tex. Civ. App. 1915) (Amarillo); Smith v. Milam, 143 S.W. 293 (Tex. Civ. App. 1911) (Fort Worth); Springer v. Riley, 136 S.W. 577 (Tex. Civ. App. 1911); King v. Griffin, 39 Tex. Civ. App. 497, 87 S.W. 844 (1905); Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S.W. 664, 665 (1904).

129 Ray v. Foutch, 50 S.W.2d 380, 382 (Tex. Civ. App. 1932) (Amarillo).

130 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 525 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1908). See Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903). See generally 27 TEX. JUR. 398 (sec. 241).

131 Springer v. Riley, 136 S.W. 577, 579 (Tex. Civ. App. 1911); Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).

132 Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903); Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 526 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1908); Bost v. McCrea, 172 S.W. 561, 564 (Tex. Civ. App. 1915) (Amarillo); Brooks v. Davis, 148 S.W. 1107, 1108 (Tex. Civ. App. 1912) (Dallas); Smith v. Milam, 143 S.W. 293 (Tex. Civ. App. 1911) (Fort Worth).

133 King v. Griffin, 39 Tex. Civ. App. 497, 87 S.W. 844 (1905); Butler v. Perdue, 199 S.W. 1176 (Tex. Civ. App. 1917) (Texarkana).

134 Mathews v. Foster, 238 S.W. 317, 318 (Tex. Civ. App. 1922) (San Antonio); Waggoner v. Moore, 45 Tex. Civ. App. 308, 101 S.W. 1058, 1059 (1907). See Tull v. Turley, 36 S.W.2d 1101, 1104 (Tex. Civ. App. 1931) (Amarillo).

ticular case,[135] as will also the injured farmer's right to claim additional special damages.[136]

Agreements to operate a farm on shares have been said sometimes to be like contracts of employment "intended to furnish employment for the labor of the tenant or cropper. The profit to be realized out of the crops over and above the value of the labor and other outlays expended in making them is therefore not all that is contemplated in such contracts. Employment for the tenant or cropper when so secured is valuable, whether a profit over and above such labor and other expenses is realized or not, and this may be true as to the labor of members of his family which he can control and utilize without extra expense."[137] On breach of the contract, the tenant or cropper "may be thrown into enforced idleness, and thus he may be denied one of the benefits contemplated in the making of the contract;" and in such cases one should not deduct the entire value of the labor that was necessary for the making of the crop, because the tenant or cropper and his family would have performed much of that labor, but only such sums as those thrown out of employment could by reasonable diligence have earned thereafter elsewhere, plus all other expenses, including those for necessary outside hired labor, which the tenant or cropper himself would have incurred in performing his part of the contract if he had been allowed to stay.[138]

A sharetenant or sharefarmer who is wrongfully deprived of possession of a farm may recover damages though the breach of contract occurred before a crop existed,[139] since the estimate of the damages can be based on the crop he reasonably would have expected to raise on the land during the term,[140] which was held to be estimated with sufficient cer-

135 Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753, 754 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903); Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 526 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1908); Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas). See 27 TEX. JUR. 401 (sec. 242).

136 See Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903); Jackson v. Taylor, 166 S.W. 413, 414 (Tex. Civ. App. 1914) (Fort Worth); and Brincefield v. Allen, 25 Tex. Civ. App. 258, 60 S.W. 1010, 1012 (1901) (where the court inferred that in certain factual situations special damages would be allowed.)

137 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 525 (1908). See Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753, 754 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903).

138 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 525 (1908); Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753, 754 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903).

139 Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903), answering certified question, 75 S.W. 817 (Tex. Civ. App. 1903), (contract breached January 1, before planting); Waggoner v. Moore, 45 Tex. Civ. App. 308, 101 S.W. 1058, 1059 (1907).

140 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo); Springer v. Riley, 136 S.W. 577, 579 (Tex. Civ. App. 1911); King v. Griffin, 39 Tex. Civ. App. 497, 87 S.W. 844 (1905).

tainty in one case from production per acre on the farm during previous years when cultivated by the ousted farmer.[141]

A sharefarmer (sharetenant or sharecropper) may recover in damages the value of his share of the crop without deducting the cost incurred by the landowner in completing, harvesting and marketing the crop, where such sharefarmer who is a tenant in common of the crop is deprived of the crop by its being tortiously taken and converted as a result of a willful trespass without *bona fide* claim of right,[142] or where the landowner by threats of personal violence wrongfully runs him off the place and converts the crop,[143] or he leaves the premises and the crop as a result of abusive language and intimidation by the landowner or his agent sufficient to cause fear of bodily harm and terror.[144] In decisions involving conversion by the landowner of the sharefarmer's share of the crop, where they owned the crop as tenants in common, nondeductible expenses have been held to include the cost to the landowner of baling grass hay[145] and of threshing oats.[146] However, where a breach of an executory contract for the raising of crops on shares occurs before they are sown or while still immature, in determining the net damages due the sharefarmer, the expenses which he would have incurred, plus such sums as those to whose services he was entitled, wrongfully thrown out of employment earned, or by reasonable diligence could have earned in other employment, are deducted from the full value of the sharefarmer's share of the crop.[147]

On abandonment of the crops by the renter on shares, the landlord may enter to save them, even though the tenant has not abandoned the premises, and it is not necessary that the tenant give verbal notice to the landlord of intention to abandon if such intention is manifest from acts and declarations of the tenant.[148]

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141 Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).
142 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896); Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S.W. 664, 665 (1904).
143 Barnett v. Govan, 241 S.W. 276, 277 (Tex. Civ. App. 1922) (Texarkana).
144 See Yarbrough v. Brookins, 294 S.W. 900, 904 (Tex. Civ. App. 1927) (Amarillo) (where the court held the cropper might recover exemplary damages from the landlord's agent who committed the tortious acts, but not from the principal unless he authorized, participated in, or ratified such tortious acts). Also see 27 TEX. JUR. 402 (sec. 242).
145 Jackson v. Taylor, 166 S.W. 413, 414 (Tex. Civ. App. 1914) (Fort Worth).
146 Stewart v. Patterson, 204 S.W. 768, 771 (Tex. Civ. App. 1918) (Fort Worth).
147 Crews v. Cortez, 102 Tex. 111, 113 S.W. 523, 526 (1908), answering certified question, 52 Tex. Civ. App. 644, 115 S.W. 609 (1903). See Ray v. Foutch, 50 S.W.2d 380, 382 (Tex. Civ. App. 1932) (Amarillo); Waggoner v. Moore, 45 Tex. Civ. App. 308, 101 S.W. 1058, 1059 (1907); Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
148 Bettis v. Key, 60 Tex. Civ. App. 529, 128 S.W. 1160, 1161 (1910). See additional discussion under subtitle "Abandonment of crop by tenant," infra p. 104; and "Improper cultivation—abandonment of crop by cropper," infra p. 109.

A purchaser of a farm operated on the shares gets title to the landowner's share interest in the growing crop but not to the interest of the sharefarmer.[149] If the sharefarming agreement reserved to the landlord as rent a proportion of the *proceeds* of the crops raised, the purchaser of the farm has no title in any share of the growing crop, since a tenancy was created with title to the entire crop vesting in the tenant.[150] But if the landowner reserved as rent a proportion of the *specific crops* raised, the agreement was for raising the crop on the shares, creating a tenancy in common in the crops raised, with title to a part of the growing crop reserved in the landowner, and on sale of the farm, the purchaser obtains whatever interest the landowner had in the crop.[151]

Sharecroppers who farm under an agreement giving each a separate tract of land to work, with no responsibility for the acts of the other croppers on other tracts, may sue individually on breach by the landowner of the agreement;[152] but where land is to be worked by two or more croppers jointly, one cropper, suing the landowner for breach of the contract, should join the other or all other croppers as parties plaintiff, and, if they refuse, then as parties defendant.[153]

Homestead Rights in Leased Premises

General Provisions of Homestead Law

A Texas rural homestead may consist of not more than 200 acres of land with the improvements thereon, and may be in one or more parcels.[154] The same shall be used for the purposes of a home.[155] When the farm or ranch comprises a tract or tracts of land exceeding 200 acres, the head of the family may designate and set apart, in the manner provided by law, the particular 200 acres desired for the homestead.[156] How-

149 Jolley v. Brown, 191 S.W. 177, 180 (Tex. Civ. App. 1917) (Amarillo); Ray v. Foutch, 50 S.W.2d 380, 381 (Tex. Civ. App 1932) (Amarillo).
150 Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth).
151 Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth). See additional discussion under subtitles "Right to crop after foreclosure or sale of leased premises," infra p. 101; and "Cropper's rights in crop on sale of farm," infra p. 109.
152 Gazley v. Wayne, 36 Tex. 689, 690 (1871).
153 Dawson v. George, 193 S.W. 495, 496 (Tex. Civ. App. 1917) (El Paso).
154 TEX. CONST. Art. XVI, sec. 51. (Repeated in slightly different language in TEX. ANN. REV. CIV. STAT. as art. 3833 (Vernon, 1945) "The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon;—provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired." See COLE, The Homestead Provisions of the Texas Constitution, 3 TEX. L. REV. 221 (1925) for general discussion of Texas homestead law.
155 TEX. ANN. REV. CIV. STAT. art. 3833 (Vernon, 1945).
156 Id. at 3841-3858.

ever, actual possession, occupation and use of a smaller tract as the home of the family has been held to make the property a homestead in fact and in law;[157] also, where no homestead has been dedicated by actual occupancy, effect may be given to ownership, intention and preparation to use property for a home, in determining whether that property is the homestead,[158] though it has been determined that intention alone, without overt acts of homestead occupancy, cannot give a homestead right in property.[159]

Use of land "for some one purpose of a home, either by cultivating it, using it directly for the purpose of raising family supplies, or for cutting firewood and such like, is a use on which to base a claim of homestead."[160] A residence upon the land is not necessarily required.[161]

The homestead is protected from forced sale for the payment of all debts except for purchase money thereof, for taxes due on it or for work and material used in constructing improvements thereon,[162] when contracted for in writing, with consent of the wife, as prescribed by law.[163] Further, crops grown upon a homestead are not subject to levy and sale for debt until severed from the land by gathering,[164] because to complete effectively an execution sale even of a matured crop then ungathered, the purchaser, in harvesting, must take possession of the land upon which the crop is found, and such an invasion of the homestead right cannot be permitted.[165] The purpose of exempting a rural homestead from sale is to enable the owner to support himself and family, and this purpose would be defeated if creditors were allowed to invade it and seize and sell his growing crops.[166]

157 Texas Land and Loan Co. v. Blalock, 76 Tex. 85, 13 S.W. 12, 13 (1890); Coates v. Caldwell, 71 Tex. 19, 8 S.W. 922, 923 (1888).

158 Towery v. Plainview Building & Loan Ass'n, 99 S.W.2d 1039, 1041 (Tex. Civ. App. 1936) (Amarillo, urban).

159 Robertson v. Home Owners Loan Corporation, 147 S.W.2d 949, 953 (Tex. Civ. App. 1941) (Dallas, urban).

160 Autry v. Reasor, 102 Tex. 123, 113 S.W. 748 (1908), reversing on rehearing, 102 Tex. 123, 108 S.W. 1162 (1908).

161 See Hall v. Fields, 81 Tex. 553, 17 S.W. 82, 84 (1891).

162 For a discussion of liens for improvements on homesteads, see Note, Homestead Liens for Improvements, 17 TEX. L. REV. 469 (1939).

163 TEX. ANN. REV. CIV. STAT. art. 3839 (Vernon, 1945). "Exemption does not apply. The exemption of the homestead provided for in this title shall not apply where the debt is due:
1. For the purchase money of such homestead or a part of such purchase money.
2. For taxes due thereon.
3. For work and material used in constructing improvements thereon; but in this last case such work and material must have been contracted for in writing, and the consent of the wife, if there be one, must have been given in the same manner as is by law required in making a sale and conveyance of the homestead."
See TEX. CONST. Art. XVI, sec. 50.

164 Bailey v. Oliver, 9 S.W. 606 (Tex. Sup. Ct. 1888).

165 Coates, v. Caldwell, 71 Tex. 19, 8 S.W. 922, 923 (1888).

166 Alexander v. Holt, 59 Tex. 205, 206 (1883); Moore v. Graham, 29 Tex. Civ. App. 235, 69 S.W. 200, 202 (1902).

Landlord's Homestead Rights in Leased Premises

Temporary renting of the homestead will not change its character when no other homestead has been acquired.[167] However, "the homestead character must have been first impressed upon the property before the above proviso can become pertinent."[168]

When property once has been impressed with the homestead character it will be presumed to so continue until its use as such has been abandoned with the intention not to use it again as a home; and the evidence of intention not to return and claim the exemption must be certain and conclusive.[169]

A lease for five years of a farm homestead on account of ill health, but accompanied with the intention of returning at a later date, was held a temporary renting which did not destroy the homestead character of the property.[170] However, renting of a farm and moving away with the intention of abandoning the present homestead followed by establishment of a new one will deprive the owner of his homestead rights in the former.[171] It is well established that abandonment of a homestead is largely a question of intention, and the mere fact of acquiring and moving upon another farm does not conclude the question of abandonment of the homestead on the former.[172]

A renting of a farm homestead for six years and moving to another state, with intention of returning and living upon the homestead, was held not an abandonment of the homestead rights in that farm;[173] nor was a periodic leasing over a period of 13 years, part of which time the owner cultivated the farm with hired labor, held an abandonment of the homestead.[174] The renting from time to time, by a widow, of part of a rural homestead, without any intention of abandonment, while she occupied and used the remainder herself, it was held did not terminate its homestead character.[175]

Tenant's Homestead Rights in Leased Premises

A tenant may claim as exempt from forced sale, under the homestead act, premises occupied or used as a homestead,

167 TEX. CONST. Art. XVI, sec. 51.
168 Blackwell v. Lasseter, 203 S.W. 619, 622 (Tex. Civ. App. 1918) (El Paso), affirmed, 227 S.W. 944 (Tex. Comm. App. 1921); Autry v. Reasor, 102 Tex. 123, 113 S.W. 748 (1908), reversing on rehearing, 102 Tex. 123, 108 S.W. 1162 (1908). See generally 22 TEX. JUR. 103 (sec. 70).
169 Bogart v. Cowboy State Bank & Trust Co., 182 S.W. 678, 681 (Tex. Civ. App. 1915) (Amarillo).
170 Bogart v. Cowboy State Bank & Trust Co., 182 S.W. 678, 681 (Tex. Civ. App. 1915) (Amarillo).
171 Calvin v. Neel, 191 S.W. 791, 795 (Tex. Civ. App. 1917) (Fort Worth).
172 See Silvers v. Welch, 127 Tex. 58, 91 S.W.2d 686, 688 (Tex. Comm. App. 1936).
173 Spikes-Nash Co. v. Manning, 204 S.W. 374, 375 (Tex. Civ. App. 1918) (Texarkana).
174 Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S.W. 164 (1896).
175 Schultz v. Schultz, 45 S.W.2d 312, 313 (Tex. Civ. App. 1931) (Austin).

whether the lease is for a fixed term, or at the will of the owners.[176] A tenant's homestead right in the premises, however, is not as broad as the homestead right of an owner in fee, and is, necessarily, limited by his lease contract and expires when his term expires, or when he breaches his contract.[177] A tenant is not entitled to claim a homestead exemption in the leased premises so as to prevent the collection of rents by the landlord, since the promise to pay rent is the purchase price by which the tenant acquires homestead rights in the leasehold.[178] Nor will the tenant's homestead exemption defeat the landlord's claim for supplies furnished him.[179]

"A homestead may consist of several parcels of land, which need not be adjoining or contiguous to the one upon which are situated the dwelling house and home of the family, but may be entirely disconnected therewith, or each remotely situated therefrom . . . Nor is it necessary that the several parcels should be acquired at the same time, nor, when it consists of leased premises, that the several parcels should be leased from and held under the same landlord . . ." if the aggregate quantity of the parcels does not exceed 200 acres.[180]

Unharvested crops on a rural tenant's homestead are also exempt from forced sale by creditors;[181] and since such crops are exempt from execution, a *bona fide* sale of the crops to others by the debtor passes a good title and is not a fraud on creditors.[182] The owner of crops grown upon a homestead may execute a valid chattel mortgage thereon.[183] Crops grown upon a homestead upon being severed from the land by gathering become subject to levy and sale under execution, but until gathered they are exempt.[184]

A tenant on shares may assert homestead rights in the leased premises;[185] and where exclusive possession of the

176 Young v. Hollingsworth, 16 S.W.2d 844, 846 (Tex. Civ. App. 1929) (Waco); Phillips v. Warner, 4 Willson Civ. Cas. Ct. App. sec. 147, 16 S.W. 423 (1890); Grimes v. Cline, 300 S.W. 235, 236 (Tex. Civ. App. 1927) (Texarkana); Allen v. Ashburn, 27 Tex. Civ. App. 239, 65 S.W. 45, 47 (1907). See 22 TEX. JUR. 243 (sec. 169).

177 Stephens v. Cox, 255 S.W. 241, rehearing denied, 256 S.W. 643 (Tex. Civ. App. 1923) (Austin).

178 Stephens v. Cox, 255 S.W. 241, rehearing denied, 256 S.W. 643 (Tex. Civ. App. 1923) (Austin).

179 Stephens v. Cox, 255 S.W. 241, rehearing denied, 256 S.W. 643 (Tex. Civ. App. 1923) (Austin).

180 Moore v. Graham, 29 Tex. Civ. App. 235, 69 S.W. 200, 202 (1902).

181 Phillips v. Warner, 4 Willson Civ. Cas. Ct. App. sec. 147, 16 S.W. 423, 424 (1890); McCullough Hardware Co. v. Call, 155 S.W. 718, 720 (Tex. Civ. App. 1913) (Amarillo).

182 Eaves v. Williams, 10 Tex. Civ. App. 423, 31 S.W. 86, 87 (1895); Nunn-Weldon Dry Goods Co. v. Haden, 95 S.W. 73 (Tex. Civ. App. 1906).

183 Silberberg v. Trilling, 82 Tex. 523, 18 S.W. 591, 592 (1891).

184 Bailey v. Oliver, 9 S.W. 606 (Tex. Sup. Ct. 1888); Coates v. Caldwell, 8 S.W. 922 (Tex. Sup. Ct. 1888); Cry v. Bass Hardware, 273 S.W. 347, 349 (Tex. Civ. App. 1925) (Texarkana). See generally 13 TEX. JUR. 7 (sec. 6).

185 See Parker v. Hale, 78 S.W. 555, 556 (Tex. Civ. App. 1903).

premises is in the tenant, it is immaterial whether the landlord was to receive one-half or a "third and fourth" of the crops raised,[186] or was to receive a portion thereof or their proceeds as rent.[187]

Cropper Cannot Assert Homestead Rights

One occupying premises as a sharecropper has no possessory interest upon which to base a homestead right,[188] since a cropper has no estate in the land but has merely a right to possession incident to and dependent upon the performance of a personal engagement to furnish the labor of himself and family in making the crop upon the premises.[189] In contrast to a tenant, who has the right to exclusive possession of the premises for a fixed time, a cropper is an employee, one hired to work the land and to be compensated by a share of the crop raised, with the right only of ingress and egress on the property.[190] Hence, a cropper cannot assert a homestead exemption to prevent a creditor levying on a crop growing upon the premises.[191]

Use of the Leased Farm

Mandatory and Permissive Uses

In the absence of restriction in the lease to the contrary, a tenant may use leased premises for any purpose not prohibited by law for which the property is adapted.[192] The landlord, however, may restrict the uses to which leased premises may be put, since the right to control its use is one of the inherent rights incident to ownership of property.[193]

The landlord may include in the lease a proviso regarding the character of crops to be planted;[194] or, in the absence of specific agreement, the usual custom of the community may determine the kind of crop to be planted.[195] Similarly, the landlord may include in the lease agreement a provision that the tenant shall cultivate and farm the land in a good and workmanlike manner,[196] and on failure of a tenant to properly

186 See Cry v. Bass Hardware, 273 S.W. 347, 350 (Tex. Civ. App. 1925) (Texarkana).
187 See McCullough Hardware Co. v. Call, 155 S.W. 718 (Tex. Civ. App. 1913) (Amarillo).
188 Webb v. Garrett, 30 Tex. Civ. App. 240, 70 S.W. 992 (1902). See generally 22 TEX. JUR. 245 (sec. 171).
189 See Ellis v. Bingham, 150 S.W. 602, 603 (Tex. Civ. App. 1912) (Texarkana).
190 Cry v. Bass Hardware, 273 S.W. 347, 350 (Tex. Civ. App. 1925) (Texarkana).
191 Watson v. Schultz, 208 S.W. 958, 960 (Tex. Civ. App. 1919) (Austin).
192 Fred v. Moseley, 146 S.W. 343, 344 (Tex. Civ. App. 1912) (Dallas, urban).
193 Celli & Del Papa v. Galveston Brewing Co., 186 S.W. 278, 280 (Tex. Civ. App. 1916) (Galveston), affirmed, 227 S.W. 941 (Tex. Comm. App. 1921) (urban).
194 See Seaton v. White, 50 S.W.2d 874 (Tex. Civ. App. 1932) (Amarillo).
195 Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 1919) (Fort Worth).
196 Henson v. Baxter, 166 S.W. 460, 461 (Tex. Civ. App. 1914) (Fort Worth); Shotwell v. Crier, 216 S.W. 262 (Tex. Civ. App. 1919) (Fort Worth).

cultivate, a claim for damages has been held not too remote, speculative and uncertain,[197] and, where a tenant permitted weeds to grow between the rows of cotton almost as high as the cotton, damages were recovered.[198] Also, it has been indicated that damages, if their assertion had been timely, might have been recoverable from a tenant who failed to plow, cultivate and kill out certain patches of Johnson grass, as agreed.[199]

In a rental ". . . contract where the landlord is to receive a part of the crop there is an implied covenant that ordinary care should be exercised by the tenant to cultivate the premises in a farmerlike manner."[200] Also ". . . in all lease contracts, in the absence of any express agreement as to the use of the leased premises, there is an implied agreement on the part of the tenant to use the premises in a tenantlike manner and without permitting or committing injury to the property."[201]

In the absence of any restriction against the same in a share-lease, a tenant was held to have the right of pasturing all his work stock used for cultivating the land, though the lease entitled the landlord to one-half of the money received from pasturing cattle;[202] and another court stated that he had, perhaps, in general a right of pasturage thereon, provided he exercised that right in a manner consistent with good husbandry.[203] It has been held a question of fact whether pasturage of land when wet would be in accordance with good husbandry.[204] Where pasturing lands results in injury to the land, the landlord may bring an action against the tenant and, in a proper case, secure money damages,[205] or, if pasturing land when wet is not in accordance with good husbandry, he may ask the court to enjoin the tenant from pasturing at such times and secure the injunction.[206]

Where the landlord agrees to give the tenant the right to use such timber on the premises as is necessary for the purposes of the lease, and the tenant agrees not to cut and sell growing timber, a tenant who cuts cordwood and rails for sale is liable in an action for damages.[207] Similarly, where the

197 Shotwell v. Crier, 216 S.W. 263 (Tex. Civ. App. 1919) (Fort Worth).
198 Henson v. Baxter, 166 S.W. 461 (Tex. Civ. App. 1914) (Fort Worth).
199 Dixon v. Watson, 52 Tex. Civ. App. 412, 115 S.W. 100, 102 (1909).
200 Cammack v. Rogers, 32 Tex. Civ. App. 125, 74 S.W. 924, 948 (1903), on certified question. Error refused, 96 Tex. 457, 73 S.W. 795 (1903).
201 Friemel v. Coker, 218 S.W. 1105, 1107 (Tex. Civ. App. 1920) (Amarillo).
202 Roden v. Farmer's Nat. Bank of Arlington, 19 S.W.2d 331, 333 (Tex. Civ. App. 1929) (Fort Worth).
203 See Friemel v. Coker, 218 S.W. 1105, 1107 (Tex. Civ. App. 1920) (Amarillo).
204 See Friemel v. Coker, 218 S.W. 1105, 1107 (Tex. Civ. App. 1920) (Amarillo).
205 See Gorman v. Brazelton, 168 S.W. 434, 435 (Tex. Civ. App. 1914) (Fort Worth).
206 Friemel v. Coker, 218 S.W. 1105, 1107 (Tex. Civ. App. 1920) (Amarillo).
207 Johnson v. Gurley, 52 Tex. 222, 227 (1879).

lease terms limit the right of the tenant to cut and own timber to that on new land cleared and put into cultivation, the tenant is not authorized to cut and sell timber from other land,[208] unless in a case where, in good faith, he intended to clear and cultivate it all.[209]

Prohibited Uses—Waste, Nuisances and Unlawful Uses

Waste. "Waste" as used in reference to real estate is ". . . an unlawful act or omission of duty on the part of a tenant which results in permanent injury to the inheritance";[210] as, for example, ". . . the destruction of houses, trees, or other corporeal hereditaments on the premises by a tenant who is rightfully in possession . . ."[211]

"The law imposes upon a tenant . . . the duty to take good care of the premises, wear and tear excepted, and this obligation is implied where not expressly waived whether written into the lease contract or not."[212] Further, since the landlord has a right to a continuance of the state of things as they were and to exercise his own judgment and caprice about any change, the fact that the property in the future will be restored, or that an alteration does not diminish the value of the property and may in fact enhance it, does not affect its character as waste.[213] An unauthorized cutting of a hole in a building wall constitutes waste and may be enjoined.[214]

Wrongfully cutting trees on an easement is waste.[215] In a decision involving a life tenancy the court ruled that cutting trees on a leasehold without specific leave, if such act ". . . is contrary to good husbandry and will work a permanent injury to the freehold . . ." amounts to waste.[216] Ordinarily, in a life tenancy of a farm it is not considered waste to cut down wood or timber for the purpose of fitting the land for cultivation or for use as pasture, the answer depending on what a prudent farmer would do, having regard to the value of the inheritance, the proportion of timber land to the whole tract,

208 Beard v. Gooch & Son, 62 Tex. Civ. App. 69, 130 S.W. 1022, 1023 (1910).
209 Booth v. Campbell, 240 S.W. 559, 561 (Tex. Civ. App. 1922) (Texarkana).
210 Brader v. Ellinghausen, 154 S.W.2d 662, 665 (Tex. Civ. App. 1941) (Fort Worth, oil). See generally 43 TEX. JUR. 977 (sec. 1).
211 Gulf Oil Corporation v. Horton, 143 S.W.2d 132, 134 (Tex. Civ. App. 1940) (Amarillo, oil).
212 Gulf Oil Corporation v. Horton, 143 S.W.2d 132, 134 (Tex. Civ. App. 1940) (Amarillo, oil).
213 Hamburger & Dreyling v. Settegast, 62 Tex. Civ. App. 446, 131 S.W. 639, 641 (1910) (urban).
214 Hamburger & Dreyling v. Settegast, 62 Tex. Civ. App. 446, 131 S.W. 639, 641 (1910) (urban).
215 See Southwestern Bell Telephone Co. v. Burris, 68 S.W.2d 542 (Tex. Civ. App. 1934) (Beaumont) (reversed and remanded in absence of proof of plaintiff's interest in land).
216 Anderson v. Anderson, 97 S.W.2d 513, 515 (Tex. Civ. App. 1936) (Fort Worth, life tenancy).

and sometimes to the custom of the district.[217] If the tenancy is for a period less than life, the tenant needs the express consent of the landowner to cut timber.

Proceedings to evict a tenant will not bar an action for waste.[218]

Nuisances and unlawful uses. "A nuisance, broadly stated, is anything that works an injury, harm, or prejudice to an individual or the public," and ". . . will embrace everything that endangers life or health, offends the human senses, transgresses laws of decency, or obstructs, impairs, or destroys, the reasonable, peaceful, and comfortable use of property."[219] "A public nuisance is an interference with the rights of the community at large," while "a private nuisance is an interference with the use and enjoyment of land."[220] As distinguished from a public nuisance, a private nuisance includes any wrongful act which deteriorates or destroys the property of some individual.

A lawful use of property or lawful conduct of business is never a public nuisance *per se*. It is a place of business only where a public statute is violated that is a public nuisance *per se*.[221]

Fruit trees, shrubs and plants infected with certain diseases and pests may be abated as public nuisances.[222]

"The owner of premises is under a primary obligation to keep his premises from becoming a public nuisance," and although it was the tenant who was maintaining a disorderly house on the premises of which the landlord had no knowledge, the Texas Supreme Court held in 1915 that both might be enjoined from continuing it, under a statute authorizing an injunction to prevent such use of premises.[223] The rule is frequently announced that an owner is not liable for a private nuisance created by his tenant and of which he has no knowledge, but that court in the same case expressed doubt as to whether that doctrine can be accepted without qualifications.[224]

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217 Anderson v. Anderson, 97 S.W.2d 513, 515 (Tex. Civ. App. 1936) (Fort Worth, life tenancy).
218 TEX. ANN. REV. CIV. STAT. art. 3994 (Vernon, 1945). "The proceedings under a forcible entry, or forcible detainer, shall not bar an action for trespass, damages, waste, rent or mesne profits."
219 Truehart v. Parker, 257 S.W. 640 (Tex. Civ. App. 1923) (San Antonio, urban).
220 PROSSER, Nuisances Without Fault, 20 TEX. L. REV. 411 (1942).
221 Waits v. State, 76 S.W.2d 545, 546 (Tex. Civ. App. 1934) (Texarkana, urban). (Action to enjoin and abate a public nuisance where intoxicating liquor was kept and sold.)
222 TEX. ANN. REV. CIV. STAT. arts. 119-135, 135a-1 (Vernon, 1947).
223 Moore v. State, 107 Tex. 490, 181 S.W. 438, 440 (1915) (urban). See generally 31 TEX. JUR. 425 (sec. 14).
224 Moore v. State, 107 Tex. 490, 181 S.W. 438, 440 (1915) (urban).

"An owner of land is not ordinarily liable for damages caused by a nuisance thereon unless he created the nuisance or knowingly permitted another to create or maintain it. Liability is predicated on the wrongful act of creating or continuing the nuisance rather than on the ownership or occupancy of the premises."[225] But the creator of a nuisance cannot by conveying the property to a third person escape liability for the damages caused by the continuance of that nuisance.[226] Nor is the purchaser of land on which a nuisance exists liable for merely permitting it to remain, in the absence of a request to abate it; but, if the purchaser by affirmative acts continues the nuisance, he is liable for damages caused thereby.[227] In fact, all persons who aid or assist in creating and maintaining a nuisance are liable for the damages caused.[228]

A slaughterhouse, although not located in a city or town, was held to be *prima facie* a nuisance, and its construction may be enjoined where it is shown that it will not or cannot be so conducted that it will prove not to be a nuisance.[229]

A hog ranch, as such, located seven miles from town, is not within itself a nuisance, but it may become such due to the method and manner of its use.[230]. "It is incumbent upon the owners of such ranch to conduct the same in such manner as not to become a nuisance and an annoyance to those living near it . . ." and if such numbers of hogs are confined in pens to small for their care in a sanitary manner, or if garbage is thrown and permitted to remain upon the ground, causing unusual and excessive disagreeable and noxious odors near another's residence, such nuisance may be enjoined.[231]

A barn, as such, is not a nuisance,[232] but when erected in a town and it is to be used in a manner creating vapors, noxious gases, odors and flies, so as to endanger health, it is a nuisance and construction may be enjoined.[233] Similarly, a dairy barn and barnyard in a small town, when kept as such places usually are kept for family use and convenience of the home, may not constitute a nuisance, but when used as a breeding ground for livestock or even as a place to carry on a dairy business in such manner as to interfere materially

225 See 31 TEX. JUR. 425 (sec. 14), citing 20 R.C.L. 391.
226 Wilkerson v. Garrett, 229 S.W. 666, 668 (Tex. Civ. App. 1921) (San Antonio).
227 Wilkerson v. Garrett, 229 S.W. 666, 668 (Tex. Civ. App. 1921) (San Antonio).
228 Comminge v. Stevenson, 76 Tex. 642, 13 S.W. 556, 558 (1899).
229 Huff v. Letsinger, 7 S.W.2d 181, 183 (Tex. Civ. App. 1928) (Amarillo).
230 Royalty v. Strange, 204 S.W. 870 (Tex. Civ. App. 1918) (Galveston), error refused, 220 S.W. 421, 423 (Tex. Civ. App. 1920).
231 Royalty v. Strange, 204 S.W. 870, 871 (Tex. Civ. App. 1918) (Galveston), error refused, 220 S.W. 421, 423 (Tex. Civ. App. 1920).
232 Davis v. Joiner, 140 S.W. 252, 253 (Tex. Civ. App. 1911) (Dallas, urban).
233 Jacobs & Wright v. Brigham, 227 S.W. 249, 250 (Tex. Civ. App. 1921) (Dallas, urban).

with the enjoyment of adjacent homes, constitutes a nuisance, and the owner thereof, besides being liable in damages, may be restrained from such future use of the barn and barnyard.[234]

Dams, particlarly earthen dams, often create an ever-impending danger to life and property of those living downstream, and may constitute a nuisance.[235]

A lease for an illegal purpose knowingly executed by both parties is not enforceable by either the landlord or tenant;[236] but, if illegal only in part and the legal part in no way depends or rests upon the illegal part, the contract is severable, and the legal portion will be enforced.[237]

Engaging in any trade, business or occupation injurious to the health of those who reside in the vicinity,[238] leaving a carcass within 500 yards of a residence or 50 yards from a public road,[239] or polluting any public body of surface water are unlawful acts in Texas, punishable on conviction by fines.[240]

It is unlawful for an owner or tenant holding separate grazing or pasture lands within one fence or common enclosure to keep within the general enclosure more livestock than his tract or tracts will reasonably pasture, and a person thus grazing excessively will be liable in both a criminal and civil action.[241]

Any farmer who willfully permits the excessive or wasteful use of water from an irrigation system,[242] or who willfully causes or knowingly permits waste of artesian water, on conviction may be fined or imprisoned, or both.[243]

Every person or corporation who willfully or negligently sets or communicates fire to timber lands, woods, brush, grass or stubble on lands not their own, shall upon conviction be fined or imprisoned, or both.[244]

Any person who shall break, pull down, or injure the fence of another without his consent or shall leave open any

234 Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S.W. 1094, 1096 (1900) (urban).
235 McMahan v. City of Abilene, 261 S.W. 455, 456 (Tex. Civ. App. 1924) (El Paso), error dismissed, 292 S.W. 525 (Tex. Comm. App. 1927).
236 Eckles v. Nowlin, 158 S.W. 794, 795 (Tex. Civ. App. 1913) (Dallas, urban). See 27 TEX. JUR. 58 (sec. 11).
237 Wicks v. Conves, 171 S.W. 774 (Tex. Civ. App. 1914) (El Paso), certified question answered, 110 Tex. 539, 221 S.W. 938, 939 (1920) (urban).
238 TEX. ANN. PEN. CODE art. 695 (Vernon, 1936).
239 Id., art. 696.
240 TEX. ANN. PEN. CODE art. 698b (Vernon, 1936, Supp. 1947).
241 TEX. ANN. PEN. CODE art. 1351a (Vernon, 1925, Supp. 1949).
242 TEX. ANN. PEN. CODE art. 844 (Vernon, 1936); TEX. ANN. REV. CIV. STAT. art. 7606 (Vernon, 1937).
243 TEX. ANN. PEN. CODE arts. 845-847 (Vernon, 1936).
244 TEX. ANN. PEN. CODE art. 1388b-1 (Vernon, 1925, Supp. 1949).

gate leading into the enclosure of another,[245] or shall remove a dividing fence, except by the mutual consent of the joint owners, may be fined or imprisoned.[246]

Payment of Rent

Tenants Pay Rent—Croppers Receive Wages

Rent is the ". . . compensation which the owner of land receives for its use by another."[247] "It is a yearly profit in money, etc., issuing out of, and for the use of, lands . . ." owing to the landlord.[248] Rent may be payable in money,[249] in a portion of specific crops or their proceeds,[250] or in other goods or services.[251]

Tenants pay rent to the landlord for the use of leased premises. As was stated above, the payment may consist of a portion of the crop raised.[252] A cropper receives from the farmer-employer a share of the crop grown as compensation for his work[253]—"as the price of his labor."[254] Where the intent of the parties as expressed in the language they have used, interpreted in the light of surrounding circumstances, is to create a tenancy, a farmer on shares may be a tenant whether the agreement is a "third and fourth,"[255] or a "half and half" contract.[256] Ordinarily, however, where there is no specific understanding to the contrary, a "half and half" agreement, by the terms of which one party supplies the land, teams, implements, etc., and the other supplies the labor, does not create a tenancy but instead creates a landowner-cropper relationship rendering the parties tenants in common as to the crops.[257]

Liabiliy for Rent Arises from Express or Implied Covenant

Liability for rent ". . . must arise from contract, express or implied, and presupposes the relation of landlord and ten-

245 TEX. ANN. PEN. CODE arts. 1352, 1353 (Vernon, 1925).
246 Id., art. 1354.
247 Turner v. First National Bank of Sulphur Springs, 234 S.W. 928 (Tex. Civ. App. 1921) (Texarkana). See 27 TEX. JUR. 81 (sec. 26).
248 Shultz v. Spreain, 1 White & W. Civ. Cas. Ct. App. sec. 917 (1880).
249 See Felker v. Hyman, 135 S.W. 1128, 1129 (Tex. Civ. App. 1911).
250 McCullough Hardware Co. v. Call, 155 S.W. 718, 720 (Tex. Civ. App. 1913) (Amarillo).
251 See Lipscomb v. Butler, 35 S.W.2d 742, 743 (Tex. Civ. App. 1931) (San Antonio, urban) (where offer to receive workshop as rent was not unconditionally accepted).
252 Curlee v. Rogan, 136 S.W. 1126, 1128 (Tex. Civ. App. 1911); Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo).
253 See Cry v. Bass Hardware, 273 S.W. 347, 350 (Tex. Civ. App. 1925) (Texarkana). Also see 27 TEX. JUR. 390 (sec. 234).
254 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
255 See McCullough Hardware Co. v. Call, 155 S.W. 718, 720 (Tex. Civ. App. 1913) (Amarillo).
256 See Turner v. First National Bank of Sulphur Springs, 234 S.W. 928 (Tex. Civ. App. 1921) (Texarkana).
257 Jaco v. Nash & Co., 236 S.W. 235, 237 (Tex. Civ. App. 1921) (Dallas).

ant."[258] Such liability is based either upon privity of contract, where there is an express covenant to pay rent, or, in the absence of an express covenant to pay, the liability arises upon an implied obligation, where there is a privity of estate arising from occupancy of premises.[259] Similarly, an obligation to pay rent is implied where one remains in possession after default and repudiation of a contract to purchase land, provided the vendor also disaffirms the contract and does not seek its performance.[260]

Whether liability for rent exists under an express contract, and the character of such liability, will depend upon the terms of the particular agreement.[261] "The validity of a rental contract must be tested by the law and conditions at the time the contract was made."[262] When a tenant in possession under an express lease holds over without a new agreement, he will be deemed to hold on the terms of the expiring lease and an implied contract would arise to pay rent in the sums named in the prior agreement.[263]

Time of Rental Payment and Parties Entitled Thereto

"The time of payment of rental is ordinarily a matter of agreement between landlord and tenant."[264] Rent payable in kind, necessarily cannot be paid until the crop is gathered.[265] The same applies to advances that must be repaid out of the crop, since the tenant, generally, has no other means of payment.[266]

Where a certain cash rental is to be paid for a fixed period, and the time of payment is not stated in the lease, it is not due until the last day of the period for which the rent is to be paid.[267] It was held in a case involving a ranch lease, reserving annual cash rent in advance due on a fixed date and payable at any time within 30 days thereafter, that it might be legally cancelled on failure of the tenant to remit before the end of the 30-day period of grace.[268]

"Rent payable in advance is considered due only when it becomes payable . . ."[269] It is the general rule that "the owner

258 See Brown v. Randolph, 26 Tex. Civ. App. 66, 62 S.W. 981, 982 (1901).
259 Cauble v. Hanson, 224 S.W. 922, 923 (Tex. Civ. App. 1920) (El Paso), affirmed, 249 S.W. 175 (Tex. Comm. App. 1923).
260 Jones v. Hutchinson, 21 Tex. 370 (1856); see Brown v. Randolph, 26 Tex. Civ. App. 66, 62 S.W. 981, 982 (1901). Also see 27 TEX. JUR. 82 (sec. 26).
261 Cross v. Freeman, 19 Tex. Civ. App. 428, 47 S.W. 473, 474 (1898). See Odom v. Perry, 36 S.W.2d 612, 615 (Tex. Civ. App. 1931) (El Paso).
262 Lancaster v. Wheeler, 266 S.W. 795, 796 (Tex. Civ. App. 1924) (Texarkana).
263 Minor v. Kilgore, 38 S.W. 539 (Tex. Civ. App. 1896). See additional discussion under subtitle "Periodic Tenancies—Tenancies for Another Year," supra p. 24.
264 See 27 TEX. JUR. 86 (sec. 29).
265 See Slay v. Milton, 64 Tex. 421, 425 (1885).
266 See Slay v. Milton, 64 Tex. 421, 425 (1885).
267 Bailey v. Williams, 223 S.W. 311, 313 (Tex. Civ. App. 1920) (Austin).
268 Felker v. Hyman, 135 S.W. 1128, 1129 (Tex. Civ. App. 1911).
269 Rives v. James, 3 S.W.2d 932, 934 (Tex. Civ. App. 1928) (San Antonio).

of the fee at the time advance rent becomes due is entitled thereto . . ."[270] Upon a conveyance of real estate, the purchaser is entitled to the subsequently accruing rentals unless the seller expressly reserves the same.[271] Under this rule, the purchaser of the fee would be entitled to crop share rent becoming payable thereafter, unless reserved by the vendor. On sale of a part of leased premises, rentals not due are apportioned between the original landlord and the purchaser; and, thereafter, the tenant owes rent to the new landlord on that part owned by him.[272] However, where the purchaser of land defaults and the contract is rescinded by the seller, and notice of this is given to the lessor, the tenant's rent obligation is again to the original owner; but it has been held in one case that a tenant who, without notice of the intention of the vendor to renounce the contract of sale, had given the purchaser a promissory note for the rent which had been so transferred that he was liable in law to pay it to the holder at maturity, was not responsible to the original owner for the rent, since there would be no equity in subjecting the tenant to a double rent burden.[273]

The tenant's obligation to pay rent may be assigned by the landlord without carrying with it any interest in the realty itself.[274] After notice to the tenant of such assignment, he can do no act which will adversely affect the assignee's rights.[275]

"Where a sale (of land) is made under foreclosure of a lien created subsequent to the lease, the purchaser, unless there has been a severance of the rents from the reversion, is entitled to . . . rent accruing after his purchase."[276] But foreclosure of a lien created prior to the lease puts an end to the lease itself if the tenant is a party to the foreclosure, and the purchaser has the right in such case to immediate possession of the property.[277]

Unless provided for in the lease contract, a tenant, on destruction of the premises, cannot recover advance rents paid by him.[278]

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270 Rives v. James, 3 S.W.2d 932, 934 (Tex. Civ. App. 1928) (San Antonio).
271 Walker v. Ames, 229 S.W. 365, 367 (Tex. Civ. App. 1921) (El Paso); Rives v. James, 3 S.W.2d 932, 933 (Tex. Civ. App. 1928) (San Antonio).
272 Shultz v. Sprein, 1 White & W. Civ. Cas. Ct. App. sec. 917 (1883).
273 Jones v. Hutchinson, 21 Tex. 370, 377 (1858).
274 Davis v. Aydelott, 238 S.W. 1011, 1012 (Tex. Civ. App. 1922) (Texarkana).
275 See Maxwell v. Urban, 22 Tex. Civ. App. 565, 55 S.W. 1124, 1125 (1900) (Judgment for assignee reversed on other grounds).
276 Wootton v. Bishop, 257 S.W. 930, 931 (Tex. Civ. App. 1924) (Amarillo).
277 Wootton v. Bishop, 257 S.W. 930, 931 (Tex. Civ. App. 1924) (Amarillo). In regard to tenant's right to emblements, see discussion under subtitle "Right to crops after foreclosure or sale of leased premises," infra p. 101.
278 Smith v. Weingarten, 120 S.W.2d 878, 879 (Tex. Civ. App. 1938) (Beaumont, urban).

Amount of Rent

Statutory regulation of rent. The landlord has a preference lien on the current crop raised upon the premises and on those animals, tools and other property provided for the tenant by the landlord, for rent and for necessary supplies, etc., furnished by the landlord to enable the tenant to make, harvest and prepare such crop for market. This preference lien does not apply where a tenant who furnishes everything except the land is charged a rental of more than one-third of the value of the grain and more than one-fourth of the value of the cotton raised, nor does it apply where a tenant who furnishes only the labor is directly or indirectly charged a rental of more than one-half the value of the grain and of the cotton raised.[279]

A previous 1915 amendment to the Landlord's Lien Article of the Landlord-Tenant Act, which permitted a tenant, from whom a rental was collected in excess of the maximums then stipulated, to recover "double the full amount of such rent or money so received or collected,"[280] was held violative of the State and Federal Constitutions. The court in holding the 1915 Amendment unconstitutional said the amendment did ". . . not provide for fair or reasonable returns or take into account the value of a piece of property, the improve-

279 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947) "Landlord's lien. All persons leasing or renting lands or tenements at will or for a term of years shall have a preference lien upon the property of the tenant, as hereinafter indicated, upon such premises, for any rent that may become due and for all money and the value of all animals, tools, provisions and supplies furnished or caused to be furnished by the landlord to the tenant to make a crop on such premises; and to gather, secure, house and put the same in condition for marketing, the money, animals and tools and provisions and supplies so furnished or caused to be furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products or other property; and this lien shall apply only to animals, tools and other property furnished or caused to be furnished by the landlord to the tenant and to the crop raised on such premises. Provided, further, that all persons leasing or renting lands or tenements at will or for a term of years where the landlord furnishes everything except the labor and the tenant furnishes the labor shall have a preference lien upon the crop or crops grown on such premises for any rent that may become due and for all money, provisions and supplies furnished or caused to be furnished by the landlord to the tenant, to make a crop on such premises; and to gather, secure, house, and put the same in condition for marketing, the money, provisions and supplies so furnished or caused to be furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products or other property, and this lien shall apply only to the crop or crops grown on the premises for the year in which the same is furnished or caused to be furnished.

"This article shall not apply in any way or in any case where any person leases or rents lands or tenements at will or for a term of years for agricultural purposes where the same is cultivated by the tenant who furnishes everything except the land, and where the landlord charges a rental of more than one-third of the value of the grain and more than one-fourth of the value of the cotton raised on said land; nor where the landlord furnishes everything except the labor and the tenant furnishes the labor and the landlord directly or indirectly charges a rental of more than one-half the value of the grain and more than one-half of the value of the cotton raised on said land, and any contract for the leasing or renting of land or tenements at will or for a term of years for agricultural purposes stipulating or fixing a higher or greater rental than that herein provided for shall not carry any statutory lien nor shall such lien attach in favor of the landlord, his estate or assigns, upon any of the property named, nor for the purpose mentioned in this article." (As amended Acts 1931, 42 Leg., p. 171, c. 100, sec. 1.) See, generally, 27 TEX. JUR. 114 et seq. (secs. 48-58).

280 Tex. Laws, 34th Leg. Reg. Sess. 1915, c. 38, sec. 1.

ments upon it, or its location," but instead fixed an arbitrary standard.[281] Another provision of the amendment, declaring lease contracts stipulating a higher rental than provided for in the act null and void and unenforceable in any court of the State, likewise became ineffective, as the court held this 1915 amendment to be an entirety, and in its entirety void and of no legal effect.[282] This amendment previously had been held unconstitutional by the Court of Civil Appeals in two decisions, one involving a charge of excess cash rent,[283] and the other of excess "bonus rent" in addition to permissible "third and fourth" crop rent.[284]

The Supreme Court voided the 1915 amendment in its entirety but left the original article unimpaired and in full force and effect as it had stood on the statute books since 1874. The original act conferred a landlord's lien for rent and for advances by the landlord upon the crop raised on the rented premises that year and upon those animals, tools and other property furnished by the landlord to the tenant.[285] Thereafter, in 1931, the Legislature amended this original landlord's lien article by denying the landlord's lien under certain classes of lease contracts, that is, where the rental payment stipulated for exceeded a certain percentage of the crop.[286] The act, as amended in 1931, is similar to the act as amended in 1915, in that it denies a landlord a lien under certain classes of leases, but differs in that it does not, as did the 1915 act, declare such lease contracts void, nor does it allow recovery of double any rental payments.

The provisions of the Landlord-Tenant Act apply only where a tenancy exists and rent is payable, and, therefore, do not apply where the landlord and tenant by express agreement are tenants in common of the crop (or joint owners).[287] Also, they do not apply under a sharecropper relation, since here there is no tenancy in the land, although the parties are tenants in common in the crop.[288] Under the latter relation the landowner necessarily cannot have a lien for rent, since there is no rent in a landowner-sharecropper relation. The parties are tenants in common of the crops grown, which

281 Culberson v. Ashford, 118 Tex. 491, 18 S.W.2d 585, 587 (1929). See generally 27 TEX. JUR. 87 (sec. 30).
282 Culberson v. Ashford, 118 Tex. 491, 18 S.W.2d 585, 587 (1929).
283 Miller v. Branch, 233 S.W. 1032 (Tex. Civ. App. 1921) (Dallas).
284 Rumbo v. Winterrowd, 228 S.W. 258 (Tex. Civ. App. 1921) (Dallas).
285 Culberson v. Ashford, 118 Tex. 491, 18 S.W.2d 585, 587 (1929).
286 See TEX. ANN. REV. CIV. STAT. art 5222 (Vernon, 1947).
287 Rosser v. Cole, 226 S.W. 510, 511 (Tex. Civ. App. 1921) (Amarillo).
288 Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543, 545 (Tex. Comm. App. 1929). (The landlord-employer here attempted to enforce a landlord's lien on the crops against his cropper-employee.) See 27 TEX. JUR. 389 (sec. 234). Regarding statutory liens for advances, see discussion under subtitle "Landowner's statutory lien for advances or furnish," infra p. 117 et seq.

amounts to a specific interest of each in the crops themselves.[289] In a case where the landlord-tenant relationship existed, the court stated "Ownership and lien are inconsistent interests, and cannot exist together in the same person as to the same subject matter,"[290] and, necessarily, a lien to secure rent is inconsistent with the relationship of tenancy in common in the crop wherever that is the relationship between landlord and tenant by their agreement.[291]

Under the provisions of the landlord's lien statute, as amended in 1915,[292] a landlord, who furnished everything but the labor to make and harvest the crop and who charged as yearly rental one-half of all the crops plus the cottonseed, was held to have lost his preferential lien.[293] Another such case stated: "The plain letter of the law is violated when the contract in terms stipulates for the payment of rent in a percentage of the crops which exceeds the limits fixed by the statute. The spirit of the law may be violated when the contract calls for the payment of what is commonly called 'standing rent,' either in money, or in a fixed amount of a commodity, which exceeds in value the legal percentage of what the rented premises would, by proper cultivation, yield under ordinary conditions."[294] However, that case held that one who asserted that a certain "standing rent" was illegal under the 1915 amendment, would have to show that such amount exceeded the legal percentage of what the premises would by proper cultivation yield under ordinary conditions.[295]

Another 1915 amendment case stated: "Where additional facilities (besides the land) . . . are furnished by the landlord, the contract is taken out from under the operation of the statute, and a greater share of the crop than that fixed in the statute may be contracted for."[296] Under that Landlord's Lien Act, the prohibition against a rental charge greater than one-fourth of the cotton applied only in cases where the ten-

289 See Horseley v. Moss, 5 Tex. Civ. App. 341, 23 S.W. 1115, 1116 (1893).
290 Antone v. Miles, 47 Tex. Civ. App. 289, 105 S.W. 39, 41; see 27 TEX. JUR. 116 (sec. 50).
291 Texas & Pac. Ry. Co. v. Bayliss, 62 Tex. 570, 575 (1884).
292 Tex. Laws, 34th Reg. Sess. 1915, c. 38, sec. 1. The landlord's lien act as amended in 1931 contained in essence a reenactment of those provisions of the 1915 amendment, denying a landlord a lien where the lease contract stipulated for a named excessive rental payment. These excess rental payment clauses of the 1915 amendment, although not held constitutionally objectionable, fell with void parts of the amendment when the entire amendment was voided by the Supreme Court. As these excess-rental-payment-clauses have been reenacted in the 1931 amendment, the following decisions construing them under the 1915 amendment are still persuasive rulings of the courts.
293 Hawthorn v. Coates Bros., 202 S.W. 804 (Tex. Civ. App. 1918) (Texarkana). (Statutory landlord's lien on cotton denied but judgment against tenant affirmed.)
294 See Lancaster v. Wheeler, 266 S.W. 795, 796 (Tex. Civ. App. 1924) (Texarkana).
295 Lancaster v. Wheeler, 266 S.W. 795, 796 (Tex. Civ. App. 1924) (Texarkana).
296 Rutledge v. Murphy, 230 S.W. 1034 (Tex. Civ. App. 1921) (San Antonio). (The landlord here sued for the difference between the value of one-fourth and one-third of the cotton crop, and the constitutionality of the act was not an issue.)

ant "furnishes everything except the land." A landlord who furnished the tenant, in addition to the land, a fine Bermuda grass pasture, a cane patch, a melon patch, a garden and a comfortable and attractive dwelling in close proximity to an excellent school, was held entitled to charge as rental one-third of the cotton without affecting the validity and enforceability of the contract under the statute.[297] Similarly, a rental contract under which the landlord furnished the land and tools, pasturage for the work stock and a milk cow for the tenant, in return for a rental payment of one-third of the feed, one-fourth of the cotton, and the maize stalks after heading of feed, was held not illegal or in violation of that statute.[298]

Nor was the statute as amended in 1915 held to affect the validity of a lease providing for a rental payment of one-half of the cotton and all the cottonseed, where the landlord was to furnish everything necessary to produce a cotton crop and, in addition, agreed to and did furnish the tenant a house on another tract of land, a one-half acre garden plot, pasturage for a horse, a wagon and team to haul firewood, pay all expenses of ginning and guaranteed the tenant's furnish account.[299] The same conclusion was reached regarding a lease at $20 per acre of irrigated cotton land, where the landlord furnished the land and also kept the irrigation engine and machinery in repair, which appeared not to be a trivial undertaking but might require the outlay of considerable expense.[300]

Similarly, a greater rental charge than one-half of all the crop, permitted under the act, was held not to have been charged under a lease where the landlord furnished everything except the labor, but the tenant, by a separate special arrangement, which was not a part of the rental contract, agreed to feed one of the landlord's teams during the year for its use.[301]

Also, a lease wherein the landlord was to furnish everything except the labor, which was to be supplied by the tenant, and the crop was to be divided equally, was held not to be made objectionable under the act by a clause in the lease giving the landlord a lien on the tenant's interest in the crop for sums of money and provisions advanced to the tenant.[302]

297 Rutledge v. Murphy, 230 S.W. 1034 (Tex. Civ. App. 1921) (San Antonio).
298 James v. Blake, 206 S.W. 546, 549 (Tex. Civ. App. 1918) (Amarillo).
299 Green v. Prince, 201 S.W. 200, 203 (Tex. Civ. App. 1918) (Austin). (Suit by tenant to recover penalty under the 1915 act. Decision might be persuasive for a holding that a landlord might obligate himself to furnish more than described under the present 1931 act, and still have a right to contract for compensation therefor without losing his landlord's lien.)
300 Doby v. Sanders, 198 S.W. 806, 807 (Tex. Civ. App. 1917) (Amarillo). (Suit to recover rent and advances and to foreclose the landlord's lien.)
301 Raymond v. Ashley, 222 S.W. 992 (Tex. Civ. App. 1920) (Texarkana).
302 Penn v. Hare, 223 S.W. 527, 529 (Tex. Civ. App. 1920) (Texarkana).

Rental rates fixed by express or implied agreement. Aside from the influence on rental rates of the Landlord's Lien Statute,[303] the amount of rent the tenant is required to pay generally is the result of agreement between the landlord and tenant.[304]

"A tenant holding over with consent of the landlord is deemed to be in possession of the premises upon the terms of his prior lease under the presumption that the parties have renewed their former agreement."[305] Therefore, unless the tenant on holding over by consent gives notice of a repudiation of the terms of the prior agreement, an implied contract will arise from the holding over that the tenant will pay rent in the amount originally agreed.[306]

Where one rents premises without a stipulated rental sum being agreed on, or holds over, repudiating the rental rate of the previous contract without agreement as to the new rate, it is implied that the tenant will pay the landlord the reasonable rental value for the use of the premises[307] or farm rented.[308] Testimony of the landlord has been held admissible to show the reasonable rental value of his farm;[309] and to show the reasonable rental value of a ranch the landlord, in another case, was permitted to introduce evidence by comparison, by showing the rental value of other ranches, the land in controversy not having an established rental value upon the market.[310]

In the absence of a specific agreement between the landlord and tenant with respect to the amount of rental to be paid, and where the tenant is not one holding over with consent of the landlord, the usual custom in that neighborhood would determine such question.[311]

A party to avail himself of a custom in a legal proceeding one court held, must both plead and prove facts constituting the custom. A tenant who had failed to plead such custom was refused permission to testify that it was "the cus-

303 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
304 See 27 TEX. JUR. 87 (sec. 30).
305 See Rives v. Volk, 253 S.W. 831, 832 (Tex. Civ. App. 1923) (Galveston). See also City of San Antonio v. French, 80 Tex. 575, 16 S.W. 440, 441 (1891) (urban).
306 Minor v. Kilgore, 38 S.W. 539 (Tex. Civ. App. 1896). See additional discussion under subtitle "Periodic Tenancies—Tenancies for Another Year," supra p. 24.
307 Lovelady v. Harding, 207 S.W. 933, 935 (Tex. Civ. App. 1918) (Fort Worth, urban).
308 Kubena v. Mikulascik, 228 S.W. 1105, 1107 (Tex. Civ. App. 1921) (Galveston). See Majors v. Goodrich, 54 S.W. 919, 920 (Tex. Civ. App. 1900).
309 Kubena v. Mikulascik, 228 S.W. 1105, 1106 (Tex. Civ. App. 1921). See Houston Land & Irrigation Co. v. Bradford, 118 S.W. 158 (Tex. Civ. App. 1909). See generally 27 TEX. JUR. 88 (sec. 30).
310 See Felker v. Hyman, 135 S.W. 1128, 1130 (Tex. Civ. App. 1911).
311 See Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 919) (Fort Worth); Drinkard v. Anderton, 280 S.W. 1076, 1077 (Tex. Civ. App. 1926) (Waco). Amend v. Sealy & Smith Foundation for John Sealy Hosp., 219 S.W.2d 549, 553 (Tex. Civ. App. 1949) (Amarillo).

tom with the renters and owners of land for the tenant to have all garden truck which he raised for his home consumption," and not give the landowner any part as rent, and that the landlord knew of the custom at the time he rented the premises.[312]

A tenant paying an annual cash rent for the whole farm under the provisions of a lease for a term of years and which gave him the right to clear uncultivated land, was not required to pay additional rent for land on that farm which he had cleared during the lease term and made suitable for cultivation.[313] However, after expiration of the original lease term, a landlord has been held entitled to rent from the same tenant for a new term on the entire premises, including rent on the improvement made by the tenant, which, by agreement, were to become the property of the landlord.[314]

Rent Liability When Tenant Assigns or Sublets Premises

Under Texas statute a tenant is not permitted to assign a lease or sublet the premises without first obtaining the consent of the landlord.[315] This statute, however, apparently does not prohibit a tenant from obtaining, without the landlord's consent, a cropper to cultivate his lands, provided the cropping agreement does not give the cropper the right to the exclusive possession of the premises, thereby, in fact, creating a tenancy.[316]

"The tenant who parts with the entire term embraced in his lease becomes an assignor of the lease, and the instrument is an assignment; but where the tenant by terms, conditions, or limitations in the instrument does not part with the entire term granted him by the landlord, so that there remains in him a reversionary interest, the transaction is a subletting and not an assignment."[317] One Texas court defined a "subtenant" as "one who leases all or a part of rented premises from an original lessee for a term less than that held by the latter . . ."[318] Another court stated that an asignment of a

312 Kimbrough v. Powell, 13 S.W.2d 467, 469 (Tex. Civ. App. 1929) (Waco).

313 See Hazlewood v. Pennybacker, 50 S.W. 199 (Tex. Civ. App. 1899); second appeal, 26 Tex. Civ. App. 183, 61 S.W. 153 (1901).

314 Mentz v. Haight, 97 S.W. 1076 (Tex. Civ. App. 1906).

315 TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1947). "A person renting said lands or tenements shall not rent or lease the same during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney." See additional discussion under subtitle "Assignment or subletting of leasehold", infra p. 173.

316 See Shoemake v. Gillespie, 28 S.W.2d 1114, 1115 (Tex. Civ. App. 1930) (Austin). (The court found the relationship here to be a tenancy.) See generally 27 TEX. JUR. 366 (sec. 217).

317 Davis v. Vidal, 105 Tex. 444, 151 S.W. 290, 292 (1912), affirming 133 S.W. 1074 (Tex. Civ. App. 1911) (urban). See generally 27 TEX. JUR. 359 (sec. 214), 381 (sec. 228), 382 (sec. 229).

318 Elliott v. Dodson, 297 S.W. 520, 522 (Tex. Civ. App. 1927) (Fort Worth).

lease was "nothing but a subletting for the whole term,"[319] and a later court defined it as a "transfer of the premises in toto for the whole term of the lease."[320]

The distinction between an assignment and a subletting, as is indicated below, is important at times in resolving the rights of the landowner to maintain an action for rent against the tenant in possession.

In the absence of an express release, a tenant is not released from his express covenant to pay rent by a subletting, though he had express permission to sublet.[321] Also, in the absence of such release, the tenant is not released from such express rent covenant by an assignment of the leased premises, though the assignment was agreed to by the landlord.[322] The original tenant is not released from his express obligation to pay rent by the landlord's asquiescence in the assignment;[323] nor is he released from it by the mere granting of written permission from the landlord to assign;[324] nor by an acceptance by the landlord of rent from an assignee,[325] since such release must be express and cannot arise by implication.[326] Both the original tenant who has expressly covenanted to pay rent and the assignee are liable to the landlord for payment of the rent, though the landlord can have but one satisfaction.[327] The assignee is liable primarily to the landlord for the rent, and the original tenant secondarily, in the nature of a surety.[328]

Although a tenant obligated to pay rent under express covenant continues liable for rent after subletting or assigning, unless expressly released by the landlord, a distinction is said to exist where the obligation to pay rent arose by implication of law.[329] This distinction is worth noting, since the obligation to pay rent under agricultural leases is often implied in law. In one Texas decision it was said that "in the absence of an express covenant to pay rent, if the lessee parts

319 See Russell v. Old River Co., 210 S.W. 705, 709 (Tex. Civ. App. 1919) (Beaumont), quoting Menger v. Ward, 28 S.W. 821, 824 (Tex. Civ. App. 1894).

320 Dodson v. Moore, 272 S.W. 263, 265 (Tex. Civ. App. 1925) (Amarillo).

321 Pressler v. Barreda, 157 S.W. 435, 436 (Tex. Civ. App. 1913) (San Antonio, urban). See generally 27 TEX. JUR. 385 (sec. 231).

322 Cauble v. Hanson, 249 S.W. 175, 179 (Tex. Comm. App. 1923), affirming 224 S.W. 922, 923 (Tex. Civ. App. 1920); Goffinet v. Broome & Baldwin, 208 S.W. 567, 571 (Tex. Civ. App. 1919) (Amarillo). See generally 27 TEX. JUR. 384 (sec. 230); 14 TEX. L. REV. 108 (1935) and 2 TEX. L. REV. 127 (1923).

323 Gray v. Tate, 251 S.W. 820, 822 (Tex. Civ. App. 1923) (El Paso, urban).

324 Kirby v. Tips, 67 S.W.2d 661, 668 (Tex. Civ. App. 1934) (Galveston, urban).

325 King v. Grubbs, 275 S.W. 855, 857 (Tex. Civ. App. 1925) (El Paso, urban).

326 Gaddy v. Rich, 59 S.W.2d 921, 923 (Tex. Civ. App. 1933) (San Antonio, urban). (Judgment reversed and case remanded on other grounds.)

327 King v. Grubbs, 275 S.W. 855, 857 (Tex. Civ. App. 1925) (El Paso, urban).

328 Gaddy v. Rich, 59 S.W.2d 921, 923 (Tex. Civ. App. 1933) (San Antonio, urban).

329 See 27 TEX. JUR. 395 (sec. 230).

with his estate, with the consent of the lessor . . . the lessee is not further obligated to pay rent . . ."[330]

In legal force and effect the assignee, by the assignment, takes the lease with all its rights and subject to its liabilities; the original landlord, therefore, may recover the rent due from the date of the assignment from the assignee.[331] Regardless of an express assumption or agreement to pay, the assignees are liable to the original landlord for the stipulated rent,[332] since "the law fixes the liability."[333] When the lease of premises has been assigned to two assignees, they both become liable for the rent.[334] The assignee of a lease contract is liable for the rent for the whole lease term from the date of assignment,[335] and unless released by the landlord cannot avoid liability by reassigning the premises to a third party,[336] or by an agreement with the tenant to cancel the assignment.[337]

Since upon assignment of the lease the tenant and assignee both become liable to the original landlord for the rent which accrues after the assignment,[338] the fact that the landlord has prosecuted a suit against the original tenant for such rent, under which nothing has been collected, does not release the assignee;[339] but the original tenant, or assignor, is entitled to recover from the assignee any such rental which he may be required to pay by reason of the assignee's default.[340]

Where the assignment of the lease is merely a mortgage, the mortgagee is not responsible for payment of rent accruing thereafter, unless the mortgagee takes possession and occupies the premises.[341]

Unlike an assignee of the lease, who is liable directly to the original landlord for the rent due thereafter, a subtenant is not so liable. The original landlord cannot recover rent of such subtenant, since there is privity neither of estate nor of

330 Cauble v. Hanson, 224 S.W. 922, 923 (Tex. Civ. App. 1920) (El Paso) affirmed, 249 S.W. 175 (Tex. Comm. App. 1923).
331 Martin v. Stires, 171 S.W. 836, 838 (Tex. Civ. App. 1914) (San Antonio, urban).
332 Leonard v. Burton, 11 S.W.2d 668, 670 (Tex. Civ. App. 1928) (El Paso, urban); Waggoner v. Edwards, 83 S.W.2d 386, 388 (Tex. Civ. App. 1935) (Amarillo); 68 S.W.2d 655 (Tex. Civ. App. 1933) (urban).
333 Jackson v. Knight, 194 S.W. 844 (Tex. Civ. App. 1917) (Amarillo).
334 Central Nat. Bank v. Dallas Bank & Trust Co., 66 S.W.2d 474, 478 (Tex. Civ. App. 1933) (Dallas, urban).
335 Marathon Oil Co. v. Rone, 83 S.W.2d 1028, 1030 (Tex. Civ. App. 1935) (Fort Worth, urban).
336 Waggoner v. Edwards, 68 S.W.2d 655, 663; 83 S.W.2d 386 (Tex. Civ. App. 1934) (Amarillo, urban); Speed v. Jay, 267 S.W. 1033, 1035 (Tex. Civ. App. 1925) (Amarillo, urban).
337 Marathon Oil Co. v. Lambert, 103 S.W.2d 176, 181 (Tex. Civ. App. 1937) (Dallas, urban).
338 Gray v. Tate, 251 S.W. 820, 822 (Tex. Civ. App. 1923) (El Paso, urban).
339 LeGierse & Co. v. Jacob R. Green, 61 Tex. 128, 133 (1884) (urban).
340 Gray v. Tate, 251 S.W. 820, 822 (Tex. Civ. App. 1923) (El Paso, urban).
341 Minney v. Scharbauer, 286 S.W. 552, 557 (Tex. Civ. App. 1926) (Fort Worth, urban).

contract between the original landlord and the undertenant.[342] Inasmuch as subtenant, generally, is not personally liable to the original landlord for rent,[343] the original landlord cannot hold a subtenant upon the headtenant's covenant to pay rent[344] unless the subtenant has assumed the same,[345] thereby agreeing to pay rent to the original landlord.[346]

An acceptance by the landlord of rent from a subtenant in full settlement for rent was held a satisfaction of rent claims against him, whether or not there was a lease agreement between the landlord and subtenant over the premises cultivated.[347] But if the subtenant converts and removes from the premises the crop he raised, upon which the original landlord has a rent lien, the subtenant has been held liable to the original landlord to the extent of the value of the crop converted for rent due the original lessor, even though he has paid his own rent to the tenant, his immediate landlord, by giving him negotiable notes which have been transferred by the tenant to innocent holders.[348]

Where the tenant under the lease terms had the right to sublease, but the landlord refused to permit a subtenant to go into possession of the premises, the tenant has been held relieved of his obligation to pay rent.[349]

Parties Entitled to Rental Payment when Leased Premises are Sold or Foreclosed

Generally, when property is sold during the lease term the right to rent follows the title. However, the grantor may expressly reserve the rent.[350] Under this rule, on sale of leased premises, all the grantor's interests therein, including the right to rents subsequently accruing, pass to the purchaser,[351] unless there is a contrary agreement, [352] as where future rents have been reserved[353] or assigned by the grantor.[354] The sale

342 Davis v. Vidal, 105 Tex. 444, 151 S.W. 290, 291 (1912), affirming 133 S.W. 1074, 1075 (Tex. Civ. App. 1911) (urban). See generally 27 TEX. JUR. 380 (sec. 227).
343 Logan v. Green, 53 S.W.2d 119, 122 (Tex. Civ. App. 1932) (Amarillo, urban).
344 Knight v. Old & Ragland, 2 Willson Civ. Cas. Ct. App. sec. 79 (1883).
345 Tinsley v. Metzler, 44 S.W.2d 820, 821 (Tex. Civ. App. 1931) (El Paso).
346 Giddings v. Felker, 70 Tex. 176, 7 S.W. 694 (1888).
347 Smith v. Price, 22 Tex. Civ. App. 296, 54 S.W. 254, 255 (1899).
348 Horton v. Lee, 180 S.W. 1169, 1170 (Tex. Civ. App. 1915) (Dallas).
349 Penick v. Eddleman, 291 S.W. 194, 195 (Tex. Comm. App. 1927), affirming 283 S.W. 300 (Tex. Civ. App. 1926) (El Paso, urban). See generally 27 TEX. JUR. 387 (sec. 232).
350 Faulkner v. Warren, 1 White & W. Civ. Cas. Ct. App. sec. 658 (1878). See generally, 27 TEX. JUR. 97 (sec. 35).
351 Shultz v. Spreain, 1 White & W. Civ. Cas. Ct. App. sec. 917 (1880); Vogel v. Zuercher, 135 S.W. 737, 738 (Tex. Civ. App. 1911). See generally, 43 TEX. JUR. 271 (sec. 163).
352 Hereford Cattle Co. v. Powell, 13 Tex. Civ. App. 496, 36 S.W. 1033, 1036 (1896); Armstrong v. Gifford, 196 S.W. 723, 724 (Tex. Civ. App. 1917) (San Antonio); Davis v. Aydelott, 238 S.W. 1011, 1012 (Tex. Civ. App. 1922) (Texarkana).
353 Applegate v. Kilgore, 91 S.W. 238, 239 (Tex. Civ. App. 1906).
354 Bowyer v. Beardon, 116 Tex. 337, 291 S.W. 219, 223 (Tex. Comm. App. 1927); Davis v. Aydelott, 238 S.W. 1011, 1012 (Tex. Civ. App. 1922) (Texarkana).

of the leased premises, however, does not carry with it the right to rents already accrued. In other words, the transfer of leased premises does not carry with it any rights to the accrued rents, but the purchaser is entitled to subsequently accruing rentals, unless reserved.[355] The same rules apply when part of leased premises are sold, in that, if no reservation, as to that sold, the tenant owes rent to the new landlord.[356]

The general rule, that where a sale has occurred the owner of leased premises at the time the rents fall due is entitled to the entire amount then due unless reserved,[357] and that subsequently accruing rentals pass to the purchaser of the land, applies whether rents are payable in money or in a portion of the crop raised on the land.[358] Further, in the absence of evidence of agreement by the parties to the contrary, "when lands are rented by the year for farming purposes the rent is not due until the crops are made and a reasonable time allowed for their harvesting."[359]

The right of the purchaser of the land, however, to the subsequently accruing rent "is subject to all the equities or just demands of the tenant or other encumbrances of which the grantee (purchaser) had notice affecting and controlling the payment of rent."[360]

Inasmuch as the right to unaccrued rents passes to the purchaser on sale of leased premises, unless reserved, the grantor-landlord cannot retain the right to such rent, or any interest in it, by merely keeping in his possession a rent note, in the customary form, executed by his tenant, since in his hands it is simply evidence of a lease contract, and it does not have the effect of severing the rents from the realty until it passes out of his hands.[361] But such unaccrued rents may be severed from the realty and, therefore, not pass to the purchaser by the seller's prior assignment of his rental notes to a third person, or by his giving a mortgage on the unaccrued rent of which the purchaser of the land had notice.[362]

The holder of a simple option to purchase land, when the option contract does not purport to deal with crops and rents,

355 Rives v. James, 3 S.W.2d 932, 934 (Tex. Civ. App. 1928) (San Antonio).
356 Shultz v. Spreain, 1 White & W. Civ. Cas. Ct. App. sec. 917 (1880).
357 Hearne v. Lewis, 78 Tex. 276, 14 S.W. 572 (1890).
358 Farthing Lumber Co. v. Williams, 194 S.W. 453, 456 (Tex. Civ. App. 1917) (Galveston).
359 Farthing Lumber Co. v. Williams, 194 S.W. 453, 456 (Tex. Civ. App. 1917) (Galveston). See Schultz v. Spreain, 2 Posey Unrep. Cas. pp. 206, 208, 211 (1880).
360 Lester v. Zink, 154 S.W. 1161, 1164 (Tex. Civ. App. 1913) (Dallas).
361 Evans v. First Guaranty State Bank of Southmayd, 195 S.W. 1171, 1172 (Tex. Civ. App. 1917) (Amarillo).
362 Faircloth v. Flewellen, 130 S.W.2d 1098, 1100 (Tex. Civ. App. 1939) (Eastland, urban).

is not entitled thereunder to any crops and rents until after he "tenders full compliance with its terms and becomes entitled to receive a conveyance in accordance therewith." Thereafter the general rule applies.[363] Where the seller of the premises wrongfully retains possession after receiving payment of the purchase price, he will become responsible to the purchaser for the rental value of the premises during the wrongful withholding.[364]

Under Texas law, the mortgagee of land is but a lienholder, "the legal title yet remaining in the owner of mortgaged premises, with an unimpaired right to lease and obtain the emblements in the way of growing crops."[365] Further, the owner of mortgaged premises may assign his interest in the rent crop,[366] or he may mortgage his rent cotton,[367] and thereby sever either constructively or actually the rents from the land, before his title to the rent crops is divested by foreclosure of the land.[368]

As between the mortgagor and mortgagee, generally, the right of possession of mortgaged premises is the criterion of the right to take the rents and profits. The one, therefore, whether mortgagor or mortgagee, who has the right of possession of the premises at the time the rents fall due, unless the rents have been severed, has the right to receive them. Since in Texas the mortgagor is entitled to possession of the premises, he has the right, as against the mortgagee, to the rents and profits until by forclosure the latter has obtained the right to their possession. And, generally, an apportionment of rent is not ever made in reference to the length of time of the occupation; but whoever owns the premises at the time the rent falls due is entitled to the entire sum due at that time.[369]

"A lease existing at the date of the mortgage is in no way invalidated by giving the mortgage. It is then a paramount interest, and the mortgage is subject to it. . . . The mortgagee has only the rights of the mortgagor as against the lessee."[370] Where a sale is made under foreclosure of a

363 Roberts v. Armstrong, 231 S.W. 371, 374 (Tex. Comm. App. 1921), reversing 212 S.W. 227 (Tex. Civ. App. 1919).
364 Siemers v. Hunt, 28 Tex. Civ. App. 44, 65 S.W. 62 (1901).
365 Sanger Bros. v. Hunsucker, 212 S.W. 514, 516 (Tex. Civ. App. 1919) (Fort Worth).
366 Roth v. Connor, 25 S.W.2d 246, 247 (Tex. Civ. App. 1930) (Dallas); Foster v. Millingar, 293 S.W. 249 (Tex. Civ. App. 1927) first appeal, 8 S.W.2d 514, 515, second appeal, affirmed 17 S.W.2d 768, 769 (Tex. Comm. App. 1929).
367 Red River Nat. Bank v. Summers, 30 S.W.2d 726, 728 (Tex. Civ. App. 1930) (Texarkana).
368 Roth v. Connor, 25 S.W.2d 246, 247 (Tex. Civ. App. 1930); Red River Nat. Bank v. Summers, 30 S.W.2d 726, 728 (Tex. Civ. App. 1930) (Texarkana).
369 Groos & Co. v. Chittim, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907). See generally, 27 TEX. JUR. 99 (sec. 36) and 29 TEX. JUR. 884 (sec. 73).
370 Groos & Co. v. Chittim, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907).

lien on the land created subsequent to the lease (or, stated differently, the lease is made before the mortgage) the purchaser, unless there has been a severance of the rents from the reversion, is entitled to sue the tenant on the lease contract for rent accruing after his purchase.[371] A change of landlords is effected. "Instead of being the tenant of the mortgagor, he becomes the tenant of the mortgagee, or of him who by the foreclosure has acquired the reversion."[372]

However, where the lease is made subsequent to the mortgage, the tenant, if he has notice of it, holds subject to the right of the mortgagee to terminate it;[373] and a foreclosure of such a mortgage lien, if the tenant is a party to the foreclosure, puts an end to the lease itself, and the purchaser has the right to immediate possession of the property.[374]

Rent Liability on Abandonment of Premises or Crops—Harvesting[375]

Abandonment without cause by the tenant of leased premises before expiration of the lease term will not relieve him of his obligation to pay rent as agreed under the terms of his contract.[376] Nor will he be relieved by failure to take possession of the leased premises[377] or to remain in possession for the full term.[378]

The landlord is entitled to retake possession of farm premises abandoned by the tenant.[379] However, leaving rented premises in possession of a suitable hired man who is to harvest the crops is not an abandonment, and the landlord has no right to interfere.[380] Nor does it constitute an abandonment for a tenant who is not in default for his rent to leave the leased farm for a period of two months, since there is "no rule of law which requires a tenant to remain at all times in physical possession of the leased premises."[381] But the tenant's acts of assigning the farm lease to another without the

371 Wootton v. Bishop, 257 S.W. 930, 931 (Tex. Civ. App. 1924) (Amarillo).
372 Groos & Co. v. Chittim, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907).
373 Groos & Co. v. Chittim, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907).
374 Wootton v. Bishop, 257 S.W. 930, 931 (Tex. Civ. App. 1924) (Amarillo).
375 Also see discussion under subtitles "Abandonment of crop by tenant," infra p. 104; "Improper cultivation—abandonment of crop by cropper," infra p. 109; and "Termination by surrender, by abandonment and acceptance, and on assignment or subletting," infra p. 198.
376 Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban); Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 54 (1894) (urban); Faseler v. Kothman, 70 S.W. 321, 322 (Tex. Civ. App. 1902); Newark Shoe Stores v. Loeb, 47 S.W.2d 366 (Tex. Civ. App. 1931) (Beaumont, urban). See generally, 27 TEX. JUR. 86 (sec. 28); 312 (sec. 182).
377 King v. Grubbs, 275 S.W. 855, 857 (Tex. Civ. App. 1925) (El Paso, urban).
378 Pressler v. Barreda, 157 S.W. 435, 436 (Tex. Civ. App. 1913) (San Antonio, urban).
379 Dodson v. Moore, 272 S.W. 263, 265 (Tex. Civ. App. 1925) (Amarillo). See generally, 27 TEX. JUR. 310 (sec. 181).
380 See Rainey v. Old, 180 S.W. 923, 925 (Tex. Civ. App. 1915) (Texarkana).
381 Obets & Harris v. Speed, 211 S.W. 316, 318 (Tex. Civ. App. 1919) (El Paso).

landlord's consent and of moving his household goods off the leased premises have been held such an abandonment as entitled the landlord to take possession.[382]

Although merely moving off of leased grazing lands will not relieve the tenant of liability for rent under the lease terms,[383] a tenant who abandoned the lease contract following and in accordance with the landlord's agreement to release the tenant from payment of rent and cancel all rent notes, was properly relieved from payment of that rent.[384] And where the landlord fraudulently represented that a farm contained at least 140 acres in good condition for cultivation when there were less than 50 acres in that condition, the tenant had his election either to abandon the leased premises entirely or to remain and cultivate the land and have an abatement of the rental to the extent of the deficiency.[385]

On the tenant's abandonment of the premises before expiration of the lease, the landlord is not required to relet the premises for the protection of the tenant, but, at his option, may permit the premises to remain idle and recover from the tenant the full rent agreed to be paid.[386] Although the landlord is under no obligation to attempt to relet abandoned premises,[387] he may do so and, thereafter, recover from the tenant the difference between the rent he was to receive from the original tenant and the rent he did receive on reletting.[388]

"Mere renting of premises to another upon the tenant's vacating in violation of his contract is not a release of the tenant from his contract;"[389] nor would acceptance of rent from another release the original tenant,[390] since "to constitute a surrender of a lease there must be a mutual agreement" between the landlord and tenant.[391]

"Where the tenant has abandoned the farm premises and the crop, the landlord has the right to enter and care for the crop as if the lease had never been made . . ." since to rule

382 Dodson v. Moore, 272 S.W. 263, 265 (Tex. Civ. App. 1925) first appeal, reformed and affirmed, 297 S.W. 520 (Tex. Civ. App. 1927) second appeal.
383 Goffinet v. Broome & Baldwin, 208 S.W. 567, 571 (Tex. Civ. App. 1919) (Amarillo).
384 Savage v. Mowery, 166 S.W. 905, 907 (Tex. Civ. App. 1914) (San Antonio).
385 Mitchell v. Zimmerman, 4 Tex. 75, 82 (1849).
386 Early v. Isaacson, 31 S.W.2d 515, 517 (Tex. Civ. App. 1930) (Amarillo, urban). See generally, 27 TEX. JUR. 314 (sec. 184); 316 (sec. 185).
387 Racke v. Anheuser-Busch Brewing Assn., 17 Tex. Civ. App. 177, 42 S.W. 774, 775 (1897) (urban).
388 Randall v. Thompson Bros., 1 White & W. Civ. Cas. Ct. App. sec. 1102 (1881) (urban).
389 Marathon Oil Co. v. Rone, 83 S.W.2d 1028, 1029, 1031 (Tex. Civ. App. 1935) (Fort Worth, urban).
390 Johnson v. Neeley, 36 S.W.2d 799, 802 (Tex. Civ. App. 1931) (Waco, urban).
391 Early v. Isaacson, 31 S.W.2d 515, 517 (Tex. Civ. App. 1930) (Amarillo). See generally 27 TEX. JUR. 312 (sec. 183); see Note, 9 TEX. L. REV. 578 (1931) for a criticism of the decision.

otherwise "an owner of valuable property might be compelled to stand by and see his property go to ruin for want of someone to occupy and care for it.[392] Under this rule the courts have upheld the landlord's right to gather and market crops abandoned by either sharetenants[393] or sharecroppers;[394] and the landlord may apply the proceeds of the sale of the crop to the indebtedness due him.[395] Further, where a sharetenant has abandoned only the crops and remains in possession of the premises, the landlord has a right to enter to save them; and it is not necessary that the tenant give notice of intention to abandon the crop, if that intention is manifest from his acts and declarations.[396]

The landlord may apply the proceeds from sale of the abandoned crop to the tenant's debts due him,[397] and, where the parties are tenants in common of the crop, the maturing, harvesting and marketing costs are all properly deducted from the cropper's share.[398] Of course, the landlord is required to use "ordinary care and diligence and to exercise good faith" in the disposition made by him of the abandoned crop.[399] The landlord in retaking possession of abandoned premises is required to "safely care" for property left there by the tenant.[400]

Abandonment of premises and crops through fear of violence on the part of the landlord is not a voluntary abandonment, and the landlord under such circumstances cannot complain because the cost of gathering and marketing is charged against him.[401]

Although a tenant under certain circumstances has a right to harvest the remnant of a crop after the expiration of the lease term, he must act promptly, and when he abandons the crop remnant and the landlord hires it picked, the tenant cannot, thereafter, claim a proportionate share.[402]

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392 Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo). See generally 27 TEX. JUR. 396 (sec. 239); 13 TEX. JUR. 18 (sec. 16).

393 Taack v. Underwood, 226 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo); Bettis v. Key, 60 Tex. Civ. App. 529, 128 S.W. 1160, 1161 (1910); Cunningham v. Skinner, 97 S.W. 509, 510 (Tex. Civ. App. 1906).

394 Rogers v. Frazier Bros. & Co., 108 S.W. 727, 729 (Tex. Civ. App. 1908); Jaco v. Nash & Co., 236 S.W. 235, 238 (Tex. Civ. App. 1921) (Dallas).

395 Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo).

396 Bettis v. Key, 60 Tex. Civ. App. 529, 128 S.W. 1160, 1161 (1910).

397 Cunningham v. Skinner, 97 S.W. 509, 510 (Tex. Civ. App. 1906).

398 Jaco v. Nash & Co., 236 S.W. 235, 238 (Tex. Civ. App. 1921) (Dallas); Rogers v. Frazier Bros. & Co., 108 S.W. 727, 729 (Tex. Civ. App. 1908).

399 Taack v. Underwood, 266 S.W. 620 (Tex. Civ. App. 1924) (Amarillo).

400 Alsbury v. Linville, 214 S.W. 492, 495 (Tex. Civ. App. 1919) (San Antonio, urban). See generally 27 TEX. JUR. 69 (sec. 19).

401 Barnett v. Govan, 241 S.W. 276, 277 (Tex. Civ. App. 1922) (Texarkana). (The landlord in this case was required to bear only one-half the cost of harvesting and marketing.)

402 Huggins v. Reynolds, 51 Tex. Civ. App. 504, 112 S.W. 116, 117 (1908). See additional discussion under subtitle "Harvesting crops after termination of lease or after end of rental period—'Emblements'," infra p. 100 et seq.

Either the landlord or the crop mortgagee may harvest an abandoned crop, but neither is under obligation to do so.[403] Where the crop mortgagee gathers the crop he must turn over to the landlord his share rent, but he is not liable to the landlord for failure to gather all the crop.[404] Should the landlord decide to harvest and market the abandoned crop, his lien for the cost thereof is superior to a mortgage or a storage lien.[405]

Reduction or Release from Rent Liability

In an early case, unprofitable operation of a leased farm because of intervention of war was held no defense to an action on bearer rent notes given for rent and for hire of slaves, where the notes had been sold.[406] Similarly, an untenantable condition of premises does not release the tenant from a duty to pay rent, where the landlord had not agreed in the lease to repair,[407] but in an action for rent where the landlord had totally failed to construct wells and windmills on a leased ranch, as agreed, the tenant was held entitled to offsetting damages.[408]

"The covenant of the landlord to repair and the tenant's covenant to pay rent are regarded as independent covenants unless the contract between the parties evidences the contrary. Accordingly, the breach by the landlord of his covenant does not justify the refusal of the tenant to perform his covenant to pay rent."[409] The tenant, however, may recover for the landlord's breach in an action for damages.[410]

Where under the terms of the lease from month to month the covenant to repair is in the nature of a condition (the tenant rents upon the condition that certain repairs are made), the tenant, in case the landlord fails to repair, would be authorized to annul the agreement and to vacate the premises at any time and thereby escape further liability for rent from time of vacation.[411] Similarly, a landlord's failure to make certain repairs necessary to fit the premises to the tenant's use, as agreed, it was held, justified the tenant's abandonment and provided the tenant a valid defense to an action for rent accruing after abandonment.[412]

403 McNeill v. Vickery, 26 S.W.2d 741, 742 (Tex. Civ. App. 1930) (Waco).
404 McNeill v. Vickery, 26 S.W.2d 741, 742 (Tex. Civ. App. 1930) (Waco).
405 Holmes v. Klein, 59 S.W.2d 171, 173 (Tex. Civ. App. 1933) (Amarillo). See additional discussion under subtitle "Other Liens on Crops—Priorities," infra p. 149.
406 Loggins v. Buck's Administrators, 33 Tex. 113, 119 (1870).
407 Tays v. Ecker, 6 Tex. Civ. App. 188, 24 S.W. 954, 955 (1894) (urban).
408 New York & T. Land Co. v. Cruger, 27 S.W. 212, 213 (Tex. Civ. App. 1894).
409 Mitchell v. Weiss, 26 S.W.2d 699, 700 (Tex. Civ. App. 1930) (El Paso, urban).
410 Mitchell v. Weiss, 26 S.W.2d 699, 701 (Tex. Civ. App. 1930) (El Paso, urban).
411 Mazzie v. Woolly, 273 S.W. 642, 643 (Tex. Civ. App. 1925) (Texarkana, urban).
412 Vincent v. Central City Loan & Investment Co., 45 Tex. Civ. App. 36, 99 S.W. 428, 429 (Tex. Civ. App. 1907) (urban).

A landlord's entry on leased land to make preservative repairs, provided such entry was in subserviency to the estate of the tenant and without any intent of resuming possession, would not constitute resumption of possession and control to relieve the tenant of liability for rent.[413]

The tenant of lands upon which the improvements are destroyed by fire subsequent to the execution of the lease contract cannot be relieved from an express covenant to pay rent, unless it is so stipulated in the contract, or the landlord has covenanted to rebuild.[414] It follows, therefore, that the burning of a leased "house during the tenant's term, in the absence of any covenant against loss by fire, was no defense against the payment of the rent for the whole term."[415]

Where a lease contract does not require the landlord either to repair or to release the tenant from paying rent on account of damage by fire, but the landlord voluntarily agrees to repair and the tenant moves out for such purpose, the repair work must be made within a reasonable time, for if the landlord withholds possession and delays for an unreasonable time the tenant's resuming possession, he thereby breaches the agreement under which he went into possession to repair, and should not be permitted to recover rent for that unreasonable period of time.[416] Similarly, where the lease contract permits the landlord to elect whether he will repair following a fire, or allow the lessee to repair, he must make the election within a reasonable time.[417] The tenant, of course, is liable for the rent accruing prior to the fire.[418]

"In a leasing of rooms and apartments in buildings, a destruction of the building terminates the lease and with it the liability of the tenant for rents thereafter accruing."[419] The same ruling appears to apply "where the lease is of the improvements only and does not include the freehold."[420] So, a lease prohibiting use of a building for purposes other than a grain warehouse was held a lease of improvements and was terminated on destruction of the warehouse.[421]

"When a landlord evicts his tenant, whether rightfully or not, and resumes possession of the premises, the rental con-

413 Goodman v. Republic Inv. Co., 215 S.W. 466, 469 (Tex. Civ. App. 1919) (El Paso, urban).
414 Japhet v. Polemanakos, 160 S.W. 416, 417 (Tex. Civ. App. 1913) (El Paso, urban).
415 Diamond v. Harris, 33 Tex. 634, 636 (1870) (urban).
416 Chambers v. Mattingly, 47 Tex. Civ. App. 129, 103 S.W. 663 (1907) (urban).
417 Dallas Opera House Ass'n v. Dallas Enterprises, Inc., 298 S.W. 397, 398 (Tex. Comm. App. 1927), affirming 288 S.W. 656 (Tex. Civ. App. 1926).
418 Minney v. Scharbauer, 286 S.W. 552, 556 (Tex. Civ. App. 1926) (Fort Worth, urban).
419 White v. Steele, 33 S.W.2d 224, 226 (Tex. Civ. App. 1930) (El Paso, urban).
420 White v. Steele, 33 S.W.2d 224, 226 (Tex. Civ. App. 1930); Japhet v. Polemanakos, 160 S.W. 416, 417 (Tex. Civ. App. 1913) (El Paso, urban).
421 Norman v. Stark Grain & Elevator Co., 237 S.W. 963, 966 (Tex. Civ. App. 1922) (Dallas, urban).

tract is at an end, and the landlord cannot then claim rents for any length of time beyond the date of the eviction, though the rent is made payable in advance."[422] Nor may the landlord, after his wrongful breach of the rental contract has forced the tenant to move, apply rents already paid against repairs for which the tenant had agreed to pay and which were made by the landlord.[423] However, a tenant renting land, the title to which he knew then to be in litigation, cannot, after eviction by the rightful owners, recover any advance rents paid.[424]

Partial eviction from the leased premises by act of the lessor will relieve the tenant from liability to pay rent upon any portion of the premises during the continuance of the eviction, since the landlord cannot so apportion his wrong as to force the tenant to pay anything for the residue.[425] Further, the landlord's seizing equipment and machinery leased with the premises "constitutes an eviction of the tenant terminating the lease" and precludes recovery of rent.[426]

An exception to the rule against apportionment of a contract results on sale of part of leased premises, for as to the portion sold, the tenant owes rent to the new landlord-purchaser.[427] An apportionment of rent is never made as to length of time of occupation, but when the rent falls due, the owner of the reversion at that time is entitled to the entire sum.[428]

Where there is a mutual abandonment of a lease, the lease terms control only to the time of the mutual abandonment.[429] A tenant to be relieved from rent liability must indicate his acceptance at once of the landlord's offer to immediately cancel or end the contract; merely moving off the premises without conveying to the landlord his acceptance of the proposition is not sufficient.[430] However, when a tenant accepts the landlord's offer to terminate the lease if salt appears in the irrigation water in a quantity sufficient to injure the rice crop, the tenant's election releases him from payment of unaccrued rent, if salt appears in such an amount.[431]

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422 Nolan v. Stauffacher, 3 Willson Civ. Cas. Ct. App. sec. 372 (1888). See additional discussion under subtitle "Termination on forfeiture of lease and on eviction," infra p. 201.
423 Holtzclaw v. Moore, 192 S.W. 582, 583 (Tex. Civ. App. 1917) (Austin, urban).
424 McKie v. Echols, 1 White & W. Civ. Cas. Ct. App. sec. 1283 (1882).
425 Ellison v. Charbonneau, 101 S.W.2d 310, 316 (Tex. Civ. App. 1937) (Fort Worth, urban).
426 Barret v. Heartfield, 140 S.W.2d 942, 945 (Tex. Civ. App. 1940) (Beaumont, urban).
427 Shultz v. Spreain, 1 White & W. Civ. Cas. Ct. App. sec. 917 (1880).
428 Lester v. Zink, 154 S.W. 1161, 1164 (Tex. Civ. App. 1913) (Dallas).
429 Lam v. Lockhart, 151 S.W.2d 620 (Tex. Civ. App. 1941) (El Paso, urban).
430 Goffinet v. Broome & Baldwin, 208 S.W. 567, 571 (Tex. Civ. App. 1919) (Amarillo). See additional discussion under subtitle "Termination by surrender, by abandonment and acceptance, and on assignment or subletting," infra p. 198.
431 Savage v. Mowery, 166 S.W. 905, 907 (Tex. Civ. App. 1914) (San Antonio).

Fraud perpetrated by the landlord in procuring a lease enables the lessee to repudiate it; and upon abrogation of the lease by agreement by the parties, the tenant's possession of the premises thereafter does not render him liable under the original contract.[432]

To constitute a surrender of a lease there must be a mutual agreement between the landlord and tenant. Each must agree to surrender his rights under the lease to terminate it.[433] Where a tenant for years is ordered to vacate by the landlord and chooses to do so, this amounts to a termination of the lease,[434] and no rent for the remainder of the term can be collected.[435]

"Ordinarily, in the absence of physical or actual possession taken by the landlord, possession of the premises is evidenced by a surrender to him of the keys by the tenant."[436]

A contract between the tenant and a third party to take over the premises and perform the tenant's obligations creates a principal and surety between the tenant and such third party as to liability for rent. A landlord may release such a surety without releasing the principal from his obligation to pay rent.[437]

It is the general rule that subsequent impossibility of performance of a contract, or the fact that fulfillment of a contract turns out to be difficult, unreasonable, dangerous or burdensome, does not discharge a party from his obligation.[438] Under an exception to this general rule, however, a person may be released from his contract (or lease) where performance is later rendered impossible by reason of change of law or of action taken by or under the authority of the government, but the exception does not apply where the impossibility created by law is only a temporary one or where the change merely makes performance more burdensome.[439]

A tenant who leased "about 14,700 acres" of pasture land was held entitled to be relieved of payment of part of the rental if through mutual mistake there was a great disparity as to the acreage.[440] Similarly, if a ranch is leased at a certain price per acre and a deficiency in acreage occurs as a result of mutual mistake, the tenant could recover the excess

432 Flores v. Schwartz, 259 S.W. 266, 267 (Tex. Civ. App. 1924) (San Antonio, urban).
433 Early v. Isaacson, 31 S.W.2d 515, 517 (Tex. Civ. App. 1930) (Amarillo, urban).
434 Davidson v. Harris, 154 S.W. 689, 690 (Tex. Civ. App. 1913) (Galveston, urban).
435 Garcia v. Olivares, 74 S.W.2d 1064 (Tex. Civ. App. 1934) (Beaumont, urban).
436 Sellers v. Spiller, 64 S.W.2d 1049 (Tex. Civ. App. 1933) (Austin, urban).
437 Logan v. Green, 53 S.W.2d 119, 123 (Tex. Civ. App. 1932) (Amarillo, urban).
438 Keton v. Patton, 233 S.W. 128, 129 (Tex. Civ. App. 1921) (Austin, urban).
439 Keton v. Patton, 233 S.W. 128, 129 (Tex. Civ. App. 1921) (Austin, urban).
440 Leo Sheep Co. v. Davenport, 234 S.W. 691, 693 (Tex. Civ. App. 1921) (Amarillo).

rental paid (he had already filed suit), or the difference in rental, at the agreed price per acre, between the acreage leased and the actual acreage obtained.[441] An abatement of rent also should be permitted at the per-acre rental rate where the landlord, although innocently, represented the tillable land as 30 acres when there were but 21 acres.[442]

Nonpayment of Rent

A breach of the covenant to pay rent will not work a forfeiture of the lease or give the landlord the right of reentry, unless the lease contract provides for a forfeiture in the event of such failure.[443] Although, in a proper case, the courts will enforce a forfeiture for default in payment of rent,[444] forfeitures are not favored and equity will relieve the tenant against the consequences thereof, if "through accident or mistake or the misleading conduct of the lessor, the lessee has failed to comply with the covenants of the lease, and adequate compensation can be made for the breach, . . . there being no willful and culpable neglect on the part of the tenant."[445] However, forfeitures will be enforced though the default is not willful,[446] and, further, a court of equity has refused to intercede in favor of a tenant who wilfully and persistently defaulted in the payment of his rents.[447]

Exercise under the lease terms of the right of forfeiture of the main lease also terminates the subtenant's rights to possession.[448]

Unless the lease contains an express waiver of demand, the landlord cannot enforce a forfeiture without first making a formal demand upon the tenant for the overdue rent.[449] Ordinarily, tender by the tenant, immediately after filing of the suit, of all past-due rents with interest and costs is sufficient to obtain from the court relief against the forfeiture.[450] Tender of only a part of the overdue rent is not enough.[451] Further, the right of such relief after tender is not an absolute

441 Evans v. Renfroe, 170 S.W.2d 636, 643 (Tex. Civ. App. 1943) (Austin).
442 Jones v. Jones, 2 Willson Civ. Cas. Ct. App. sec. 1 (1883).
443 Ewing v. Miles, 12 Tex. Civ. App. 19, 33 S.W. 235, 238 (1895) (urban); Bagby v. Hodge, 297 S.W. 882, 883 (Tex. Civ. App. 1927) (Austin, urban); see generally 27 TEX. JUR. 89 (sec. 31).
444 Minney v. Scharbauer, 286 S.W. 552, 556 (Tex. Civ. App. 1926) (Fort Worth, urban).
445 Randolph v. Mitchell, 51 S.W. 297, 298 (Tex. Civ. App. 1899).
446 Randolph v. Mitchell, 51 S.W. 297, 298 (Tex. Civ. App. 1899).
447 Crawford v. Texas Improvement Co., 196 S.W. 195, 200 (Tex. Civ. App. 1917) (El Paso, urban).
448 Emerson Shoe Co. v. Zesmer, 286 F. 490 (C.C.A. 5th 1923) (urban).
449 Gray v. Vogelsang, 236 S.W. 122, 126 (Tex. Civ. App. 1921) (Galveston, urban); Conn v. Southern Pine Lumber Co., 11 S.W.2d 199, 202 (Tex. Civ. App. 1928) (Beaumont).
450 Crawford v. Texas Improvement Co., 196 S.W. 195, 201 (Tex. Civ. App. 1917) (El Paso, urban).
451 McCray v. Kelly, 130 S.W.2d 458, 462 (Tex. Civ. App. 1939) (Galveston).

right, and the court may properly deny its grace to a willful and persistent defaulter.[452]

Where the lease contained no provision for repossession for nonpayment of rent, a landlord, repossessing and renting to another for less, was not permitted to recover from the tenant the difference between the rent due under the lease and the rent received from the other tenant.[453] Nor was a landlord having a right of reentry for nonpayment of rent allowed to recover rents accruing after date of repossession when he took possession without notice or demand as required at common law.[454] Generally, upon the landlord's forfeiting the tenant's lease by entry and repossession of leased premises for nonpayment of rent, unless the lease provides otherwise, the tenant remains liable only for rent theretofore accrued[455] or "in arrears at that time."[456]

In order, however, that an entry by the landlord will constitute a resumption of possession and control, it must be inconsistent with and hostile to the right of possession of the tenant. An entry made in subserviency to the estate of the tenant, and without intention to resume possession of the premises, would not amount to a resumption of possession and control.[457]

Suit to Recover Rent

"Suits for the recovery of rents may be brought in the county and precinct in which the rented premises, or a part thereof are situated."[458] Original jurisdiction in such actions is in the justice courts when the amount in controversy is $200 or less;[459] exclusive original jurisdiction is in the county court when the matter in controvery exceeds in value $200 but does not exceed $500;[460] concurrently, original jurisdiction is in either the county or district court when the matter in controversy exceeds $500 but is not over $1,000;[461] and original jurisdiction is in the district court when the suit involves $500 or more.[462]

452 Crawford v. Texas Improvement Co., 196 S.W. 195, 201 (Tex. Civ. App. 1917) (El Paso).
453 Waggoner v. Edwards, 83 S.W.2d 386, 388 (Tex. Civ. App. 1935) (Amarillo), second appeal, 68 S.W.2d 655 (Tex. Civ. App. 1933) first appeal (urban).
454 Wutke v. Yolton, 71 S.W.2d 549, 551 (Tex. Civ. App. 1934) (Beaumont, urban).
455 See Bohning v. Caldwell, 36 F.2d 222, 223 (C.C.A. 5th 1929) (urban).
456 See Silbert v. Keton, 29 S.W.2d 824, 826 (Tex. Civ. App. 1930) (Waco, urban), and 27 TEX. JUR. 90.
457 Goodman v. Republic Inv. Co., 215 S.W. 466, 469 (Tex. Civ. App. 1919) (El Paso, urban).
458 TEX. ANN. REV. CIV. STAT. art. 2390, subd. 5 (Vernon, 1938). See generally 27 TEX. JUR. 92 (sec. 32).
459 TEX. ANN. REV. CIV. STAT. art. 2385 (Vernon, 1938).
460 TEX. ANN. REV. CIV. STAT. art. 1949 (Vernon, 1949).
461 Id., art. 1950.
462 Id., art. 1906.

Suit for rent, however, may be brought in a county other than the situs of the tenant's residence and that of the leased premises when the tenant has contracted to that effect in writing, by agreeing to pay the rent in that other county, but, where the lease terms are raised by implication from "holding over" after such a rent contract, that contract does not come within the exceptions to the statute.[463] All persons necessary in the recovery of the rent should be parties in the action and, under proper circumstances, joint landlords may sue;[464] also, a husband and wife may be joined.[465]

The landlord, when there exists the right to rescind on the tenant's default in the payment of rent, may "either rescind and cancel the lease contract and sue for recovery of the amounts due him at the time of the cancellation," or he may "treat the lease as a continuing obligation and sue for rents due and for such future amounts as might accrue thereunder . . .; but, in the absence of a clearly expressed agreement to that effect, he cannot take from the appellee (tenant) all the possible benefits of a continuing lease and demand of him a fulfillment of all its future obligations."[466] On the tenant's default in payment of rent, the landlord has a right to sue for each period's rent as it falls due.[467] One case stated, upon the tenant's abandonment of the premises, the landlord "might have taken possession and sued for damages for the breach."[468]

Tenants have been permitted to assert various types of counterclaims against the landlord's claim for rent, including payment on rent already made;[469] damage from frostbite to potatoes wrongfully, maliciously and carelessly levied upon, and compensation as agreed for clearing the leased land;[470] unliquidated damage to tenant's crops caused by landlord's cattle;[471] damage for breach of warranty of horses sold tenant in part consideration for the lease;[472] decrease in value of pasture due to lessor's permitting a wrongful diminution of water supply;[473] damage from failure of landlord to construct

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463 Mahon v. Cotton, 13 Tex. Civ. App. 239, 35 S.W. 869 (1896) (urban).

464 Marshall v. Magness, 211 S.W. 541, 542 (Tex. Civ. App. 1919) (Amarillo).

465 Lovelady v. Harding, 207 S.W. 933, 935 (Tex. Civ. App. 1918) (Fort Worth, urban).

466 Walling v. Christie & Hobby, 54 S.W.2d 186, 188 (Tex. Civ. App. 1932) (Galveston, urban).

467 Lyles v. Murphy, 38 Tex. 75, 80 (1873); Racke v. Anheuser-Busch Brewing Ass'n, 17 Tex. Civ. App. 167, 42 S.W. 774 (1897) (urban).

468 Davidson v. Hirsh, 45 Tex. Civ. App. 631, 101 S.W. 269 (1907) (urban).

469 Harris v. McGuffey, 185 S.W. 1024 (Tex. Civ. App. 1916) (Texarkana).

470 Hurst v. Benson, 27 Tex. Civ. App. 227, 65 S.W. 76, 77 (1901).

471 Duran v. Lucas, 144 S.W. 695, 697 (Tex. Civ. App. 1912) (San Antonio).

472 Gillespie v. Ambrose, 161 S.W. 937, 938 (Tex. Civ. App. 1913) (Fort Worth).

473 White v. Hilderbrand, 293 S.W. 221, 222 (Tex. Civ. App. 1927) (Amarillo).

wells and windmill as agreed;[474] amount landlord agreed to pay tenant for baling hay;[475] and damages resulting from landlord's failure to repair as agreed.[476]

Repairs, Alterations and Improvement

Condition of Premises at Time of Tenant's Entry

In the absence of a covenant on the part of the landlord to repair, there is no implied warranty on the part of the landlord that the leased premises are in a tenantable condition or, as one case held, that the leased structure is fit for occupancy.[477] "The tenant, in the absence of an agreement to the contrary, takes the rented premises as he finds them, under the doctrine of caveat emptor,"[478] unless, of course, there is fraud or concealment by the landlord as to their condition.[479] There is no implied covenant that the premises are tenantable, or reasonably suitable for occupation,[480] nor that the leased buildings will be kept in a tenantable condition.[481]

Further, "there is no implied warranty upon the part of the landlord that the premises are fit for the purposes for which they are leased,"[482] or for the particular use for which they are intended by the tenant.[483] In one decision, where the tenant insisted on the existence of an implied covenant that the landlord would deliver the premises in substantially the condition needed for the conduct of the tenant's business, the court found covenants only to deliver the premises in the condition the tenant found them when the lease was made.[484] The rule of *caveat emptor* also applies where a building leased during construction ". . . is sufficiently near completion to permit the tenant to ascertain its suitableness for the intended use . . . but a different rule prevails where the construction has not commenced or where it has not progressed sufficiently to afford the tenant an opportunity to judge its suitability."[485]

Where a lease contract had been reduced to writing but

474 New York & T. Land Co. v. Cruger, 27 S.W. 212, 213 (Tex. Civ. App. 1894).
475 Kimbrough v. Powell, 13 S.W.2d 467, 468 (Tex. Civ. App. 1929) (Waco).
476 Oscar v. Sackville, 253 S.W. 651, 652 (Tex. Civ. App. 1923) (Austin, urban); Coleman v. Bunce, 37 Tex. 171, 173 (1872).
477 American Exchange Nat. Bank of Dallas v. Swope & Mangold, 46 Tex. Civ. App. 64, 101 S.W. 872, 873 (1907) (urban).
478 Walling v. Houston & T.C.R. Co., 195 S.W. 232, 237 (Tex. Civ. App. 1917) (Dallas, urban).
479 Archibald v. Fidelity Title and Trust Co., 296 S.W. 680, 682 (Tex. Civ. App. 1927) (Eastland, urban).
480 Jackson v. Amador, 75 S.W.2d 892, 893 (Tex. Civ. App. 1934) (Eastland, urban).
481 Weiss v. Mitchell, 58 S.W.2d 165, 166 (Tex. Civ. App. 1933) (Dallas, urban).
482 Lynch v. Ortlieb, 70 Tex. 727, 8 S.W. 515, 516 (1888) (urban). See generally 27 TEX. JUR. 238 (sec. 134).
483 Young Corporation v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930) (El Paso), first appeal; 41 S.W.2d 686 (Tex. Civ. App. 1931) second appeal; reversed on other grounds, 66 S.W.2d 676 (Tex. Comm. App. 1933) (urban).
484 Angelo v. Deutser, 30 S.W.2d 707, 710 (Tex. Civ. App. 1930) (Beaumont, urban).
485 Young Corporation v. McClintic, 26 S.W.2d 460, 462 (Tex. Civ. App. 1930) (El Paso).

contained no representations as to the character of the land leased, as to the water upon it, or its suitableness for pasturing cattle, the landlord was not held liable in damages when the supply of water proved insufficient for the purposes intended by the tenant.[486] However, where a landlord represented leased land to be adaptable for the growing of rice, and free from obnoxious weeds and grasses, upon which representations the tenant relied, but the land, in fact, was filled with the seed of a grass commonly known to rice farmers as "hoorah grass," which would take possession of the land, retard the growth of the rice and cause much of it to die out, the landlord was held liable to the tenant in damages for the misrepresentation. The measure of damages was held to be the difference between the value of the rice crop the tenant would have raised had the land been as represented, minus the necessary additional expense which would have been incurred, and the value of the crop actually raised.[487] Similarly, another case held that where a landlord fraudulently represented the character of the leased land as all tillable and in cultivation, whereas, in fact, 30 of the 158 acres were rocky sod land which had never been cultivated, the tenant before taking possession might have rescinded the lease; and that it was not necessary that the tenant should have relied exclusively upon the landlord's false statements if they exerted a material influence.[488] However, according to another decision, if the tenant knew while the lease was still executory that the land was sodded with Johnson grass and, therefore, that the landlord's statements to the contrary were false, he waived any right of action to recover damages occasioned by the falsity, since "misrepresentation to a party having knowledge of the facts, or means of ascertaining them, can form no basis for an action of fraud and deceit."[489]

In one decision, a tenant who was induced to lease by the landlord's fraudulent misrepresentations as to the character of the land was upheld where he seasonably rescinded the contract before entering into possession;[490] but in another case where the tenant already occupied the premises, cancellation of the lease was denied and the injury remedied by allowing the tenant damages.[491]

Rights and Duties in Respect to Repair of Leased Premises

Obligation to repair in absence of agreement. "A land-

486 Bowen v. Hatch, 34 S.W. 330, 333 (Tex. Civ. App. 1896).
487 Poutra v. Sapp, 181 S.W. 792 (Tex. Civ. App. 1916) (Galveston).
488 Robey v. Craig, 172 S.W. 203, 204 (Tex. Civ. App. 1914) (Austin).
489 Klyce v. Gundlach, 193 S.W. 1092, 1093 (Tex. Civ. App. 1917) (Austin).
490 Robey v. Craig, 172 S.W. 203 (Tex. Civ. App. 1914) (Austin).
491 Siegel v. Huehner, 16 S.W.2d 919 (Tex. Civ. App. 1929) (El Paso, urban). See generally 27 TEX. JUR. 245 (sec. 138).

lord is not bound to repair leased premises unless there is a covenent or agreement on his part to do so;"[492] and generally "the mere relation of landlord and tenant creates no obligation on the landlord's part to repair or keep in repairs the leased premises;"[493] nor will the prevalence of a general custom among landlords in the community to repair impose such liability.[494] The landlord, however, must repair that part of premises reserved for the common use[495] of two or more tenants (common hallways, stairs, roofs, etc.,) but he is under no obligation to repair the portion of the premises leased to each tenant.[496]

Except where the landlord agrees to repair, or premises are let with a nuisance upon them, the tenant, and not the landlord, is obligated to repair the premises leased to him, and is responsible for damages resulting from want of repairs.[497] Each of several tenants in one building is responsible only for so much of the premises as his lease includes, leaving the landlord liable for every part not included in the actual holding of any one tenant.[498] Where the owner leases the entire premises, or one entire apartment, to a main-tenant who sublets part of the building or part of his apartment, such owner, in the absence of agreement to repair, or of fraud or concealment of hidden defects of which he had knowledge, is not responsible to the tenant or to the subtenant for injuries resulting from the unsafe condition of those premises rented to the tenant, unless the injury occurred on some part of the building the control of which was reserved to the owner.[499]

In the absence of covenant to that effect, the landlord is under no obligation to repair the leased premises even when they become defective from decay or deterioration.[500] Nor need the landlord divulge defects in the premises open to observation, but the tenant must discover them at his peril. "The only duty resting upon the landlord is to disclose latent defects actually known to him."[501] However, a landlord in control of a party wall between two buildings rented by him is

492 Weinstein v. Harrison, 66 Tex. 546, 1 S.W. 626, 627 (1886) (urban). See also 27 TEX. JUR. 250 (sec. 141).
493 Ross v. Haner, 258 S.W. 1036, 1037 (Tex. Comm. App. 1924), affirming 244 S.W. 231 (Tex. Civ. App. 1922) (urban).
494 Weinstein v. Harrison, 66 Tex. 546, 1 S.W. 626, 627 (1886) (urban).
495 Lang v. Henderson, 215 S.W.2d 585, 588 (Tex. Sup. Ct. 1948), reversing 211 S.W.2d 972 (Tex. Civ. App. 1948) (Dallas, urban).
496 Meeker v. Phillips Petroleum Co., 94 S.W.2d 186, 188 (Tex. Civ. App. 1936) (El Paso, urban).
497 O'Connor v. Andrews, 81 Tex. 28, 16 S.W. 628, 629 (1891) (urban).
498 O'Connor v. Andrews, 81 Tex. 28, 16 S.W. 628, 629 (1891) (urban). See generally 6 TEX. L. REV. 390 (1928).
499 Morton v. Burton-Lingo Co., 136 Tex. 263, 150 S.W.2d 239, 240 (Tex. Comm. App. 1941), affirming 126 S.W.2d 727 (Tex. Civ. App. 1939) (urban).
500 Pollack v. Perry, 217 S.W. 967, 971, reversed on other grounds, 235 S.W. 541 (Tex. Comm. App. 1921) (urban).
501 Willcox v. Denson, 292 S.W. 621, 623 (Tex. Civ. App. 1927) (Austin), reversed on other grounds, 298 S.W. 534 (Tex. Comm. App. 1927) (urban).

liable to either tenant for his failure to properly maintain it in a reasonably safe condition.[502]

Unless the landlord agrees to make repairs or improvements upon rented premises at the time of making the lease, he is not bound to do so;[503] and, ordinarily, there would be no consideration for a later oral promise to repair.[504] Yet, where the landlord induces the lease by misrepresentation, a later promise to remedy the wrong by making such repairs as will put the premises in the condition represented will be enforceable.[505] However, repairs gratuitously made by the landlord do not constitute an admission of liability to make repairs generally or to keep the premises in repair.[506]

Although a tenant is bound to exercise reasonable care to protect leased property from damage, such a duty will not require him to undertake any extraordinary and costly construction.[507] The law, in the absence of an express agreement, imposes on every tenant the duty only to make such repairs as are necessary to preserve the property in the same condition it was when he rented it, less such deterioration as time and ordinary use of it would work, or to bear the expenses of such repairs.[508]

In the absence of an agreement, express or implied, with the landlord to reimburse a tenant for sums expended in repairing leased premises, such sums cannot be recovered;[509] also, generally, the repairs are made by the tenant for his own convenience and are not intended as an addition to the premises for the benefit of the landlord.[510] Although a tenant ordinarily is not entitled to reimbursement from the landlord for expenses of repairing leased premises,[511] one tenant, induced to rent by the owner's misrepresentation in regard to the condition of the property, was held to have the right, upon discovering the misrepresentations made in inducing the trade, either to abandon the contract or to affirm it and sue for damages for the amount spent in putting the premises in the condition represented.[512]

"In the absence of a provision so allowing in the con-

502 Willcox v. Denson, 298 S.W. 534 (Tex. Comm. App. 1927), reversing 292 S.W. 621 (Tex. Civ. App. 1927).
503 Blackwell v. Speer, 98 S.W. 903, 904 (Tex. Civ. App. 1906) (urban).
504 Miller & Bro. v. Nigro, 230 S.W. 511, 513 (Tex. Civ. App. 1921) (Amarillo, urban).
505 Miller & Bro. v. Nigro, 230 S.W. 511, 514 (Tex. Civ. App. 1921) (Amarillo, urban).
506 Vahlsing v. Hartford Fire Ins. Co., 108 S.W.2d 947, 952 (Tex. Civ. App. 1937) (San Antonio, urban).
507 Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth, urban).
508 Martinez v. Thompson, 80 Tex. 568, 16 S.W. 334, 335 (1891) (urban). See generally 27 TEX. JUR. 259 (sec. 146).
509 Riggs v. Gray, 31 Tex. Civ. App. 268, 72 S.W. 101, 103 (1903).
510 Goedeke v. Baker, 28 S.W. 1039 (Tex. Civ. App. 1894).
511 Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth, urban).
512 Miller & Bro. v. Nigro, 230 S.W. 511, 514 (Tex. Civ. App. 1921) (Amarillo, urban).

tract of lease and of a consent by the tenant, the landlord has no right of entry upon the leased premises even to make needed repairs."[513]

Repair of fences. "In the absence of any special agreement to the contrary, the law fixes upon the lessee of rented premises the obligation to keep the fences around the same in repair during the term of the lease."[514] If the fences around the rented premises are good when the tenant takes possession, and the tenant fails to keep them in repair during his term, he is responsible to the landlord for whatever damage might be sustained by him by the neglect,[515] including damage to the landlord's share of a feed crop stacked on the premises and eaten by the tenant's cattle.[516] Although a tenant is required by the lease to keep existing fences in good repair, he is under no obligation to build new ones, unless so agreed; and such a lease contract entitling the tenant to payment for improvements was held to embrace the right to payment for new fences built around land not enclosed when the lease was executed.[517] A tenant is not obligated to repair fences destroyed by a stranger without fault of the tenant.[518]

Texas statutes provide that every gardener or farmer shall have a fence around his cultivated land at least five feet high and sufficiently close to turn hogs.[519] If the fence is insufficient, owners of trespassing stock are not liable for the resulting damage.[520] However, the freeholders of any county or subdivision thereof may petition for and get an election to determine whether in such county or subdivision hogs, sheep or goats,[521] and in certain enumerated counties whether horses, mules, jacks, jennets or cattle,[522] or domestic turkeys shall be permitted to run at large.[523] Where a stock law has

513 Higby v. Kirksey, 163 S.W. 315, 316 (Tex. Civ. App. 1914) (Fort Worth, urban).
514 Taul v. Shanklin, 1 White & W. Civ. Cas. Ct. App. sec. 1138 (1881); Morgan v. Tims, 44 Tex. Civ. App. 308, 97 S.W. 832, 833 (1906). See 27 TEX. JUR. 260 (sec. 146); also see 19 TEX. JUR. 601 (sec. 5), and 27 TEX. JUR. 359 (sec. 213).
515 Andrews v. Jones, 36 Tex. 149, 150 (1871).
516 Friemel v. Coker, 218 S.W. 1105, 1107 (Tex. Civ. App. 1920) (Amarillo).
517 Hazlewood v. Pennybacker, 50 S.W. 199, 202 (Tex. Civ. App. 1899), first appeal; 26 Tex. Civ. App. 183, 61 S.W. 153 (1901), second appeal. Reversed on other grounds.
518 West Central Drilling Co. v. Malone, 219 S.W.2d 601, 602 (Tex. Civ. App. 1949) (Eastland).
519 TEX. ANN. REV. CIV. STAT. art. 3947 (Vernon, 1945). "Sufficient fence. Every gardener or farmer, except as otherwise provided by law, shall make a sufficient fence about his cleared land in cultivation, at least five feet high, and make such fence sufficiently close to prevent hogs passing through the same; but it shall be unlawful for any person whomsoever, by joining fences or otherwise, to build or maintain more than three miles lineal measure of fence running in the same general direction without a gateway in the same, which gateway must be at least ten feet wide, and shall not be locked."
620 TEX. ANN. REV. CIV. STAT. art. 3950 (Vernon, 1945). "Owner not liable. If it appears that the said fence is insufficient, then the owner of such cattle, horses, hogs or other stock, shall not be liable to make satisfaction for such damages." See generally arts. 3947-3954.
521 TEX. ANN REV. CIV. STAT. arts. 6928-6953 (Vernon, 1948).
522 TEX. ANN. REV. CIV. STAT. arts. 6954-6971 (Vernon, 1948 and Supp. 1949).
523 TEX. ANN. REV. CIV. STAT. art. 6954a (Vernon, 1948).

been adopted prohibiting hogs, goats or sheep from running at large, an owner or lessee "shall not be required to fence against the stock not permitted to run at large; and any fence in said county or subdivision which is sufficient to keep out ordinary stock permitted to run at large under this chapter shall be a lawful fence. Three barbed wires with posts not more than thirty feet apart, and one or more stays between them or pickets four feet high and not more than six inches apart, shall constitute a lawful fence. If boards or rails are used, then three boards to be not less than five inches wide and one thick, or four rails shall constitute a lawful fence; provided that all fencing built under the provision of this chapter shall be four feet high. Nothing in this subdivision shall prevent the freeholders of any county or subdivision of a county where the stock law prevails from deciding by a majority vote whether or not three barbed wires without a board shall constitute a lawful fence . . ."[524]

After adoption in a county or subdivision of a stock law prohibiting horses, mules, jacks, jennets and cattle from running at large, any fence within such county or subdivision shall be deemed a lawful fence if it be sufficient to keep out other classes of stock.[525]

Express agreement by landlord to repair. The landlord and not the tenant is bound to repair leased premises "where the landlord has by express agreement between the tenant and himself agreed to keep the premises in repair."[526] Further, a landlord's covenant to repair has been held to be binding during a renewal term "on the same terms"[527] and during all the months of a month-to-month renting, where the landlord expressly agreed to repair during the first month, and no new agreement was made thereafter.[528] The law presumes the tenant remaining in possession is holding upon the terms of the original demise, subject to the same rent and to all the covenants of the original lease.[529]

If the tenant desires to have the landlord make changes or repairs and to hold him responsible for failure, the tenant should have had such covenant incorporated in the agreement to lease.[530] A later agreement entered into by the landlord during the term, founded merely on the relation of the par-

524 TEX. ANN. REV. CIV. STAT. art. 6942 (Vernon, 1948).
525 Id., art. 6971.
526 See O'Connor v. Andrews, 81 Tex. 28, 16 S.W. 628, 629 (1891) (urban). See generally 27 TEX. JUR. 251 (sec. 142).
527 Sweetwater Cotton Oil Co. v. Birge-Forbes & Co., 160 S.W. 1125, 1127 (Tex. Civ. App. 1913) (Dallas, urban).
528 Pollack v. Perry, 217 S.W. 967, 971 (Tex. Civ. App. 1920) (Dallas, urban).
529 Pollack v. Perry, 217 S.W. 967, 971 (Tex. Civ. App. 1920) (Dallas, urban).
530 See Miller & Bro. v. Nigro, 230 S.W. 511, 513 (Tex. Civ. App. 1921) (Amarillo, urban).

ties, would be without consideration, and therefore unenforceable.[531] A covenant binding the landlord to repair relieves the tenant from any legal duty to do so.[532]

A proviso that the landlord "shall have a reasonable time to repair" has been held to import an understanding that the landlord would make repairs upon receiving notice; and it was held in that case to be his duty to repair a roof as agreed, and that obligation was not discharged by efforts to remedy the defects, his plea being that such efforts constituted reasonable diligence.[533] Further, the fact that a roof was in a defective condition when the lease was made will not relieve the landlord from liability for damages accruing from failure to repair as agreed.[534] "A person is not excused for an act of God where his own negligence is a concurrent cause of the injury."[535]

The landlord in repairing leased premises owes the tenant the duty to so conduct himself as not to injure the latter's property.[536] Though by the lease the tenant is to make repairs, the landlord is liable where he undertook to make repairs and, in making such repairs, he or his agent[537] damaged the tenant's goods.[538] One court stated that if a landlord, who originally was under no obligation to repair, subsequently makes a contract with the tenant for repair of premises for their mutual benefit, the work to be done, as agreed, by an independent contractor employed by the landlord, "they should look to him (the contractor), and not to each other, for compensation for damages caused by his negligence."[539]

Leases sometimes provide that the tenant shall notify the landlord of the need for repairs.[540] In one case where the lease, requiring the owner to make repairs, was silent as to notice, and as to who should determine the necessity for repairs and have them done, but it was the custom for the tenant to have the repairs made without consulting the owner, who paid such bills without protest or complaint, the latter

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531 Peticolas v. Thomas, 9 Tex. Civ. App. 442, 29 S.W. 166 (1895) (urban).

532 Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth, urban).

533 Ingram v. Fred, 210 S.W. 298, 301 (Tex. Civ. App. 1919), first appeal; 243 S.W. 598, 600 (Tex. Civ. App. 1922), second appeal (urban).

534 Lovejoy v. Townsend, 25 Tex. Civ. App. 385, 61 S.W. 331 (1901) (urban).

535 Lovejoy v. Townsend, 25 Tex. Civ. App. 385, 61 S.W. 331 (1901) (urban).

536 Dimotsis v. Waco Mill & Elev. Co., 9 S.W.2d 1047, 1048 (Tex. Civ. App. 1928) (San Antonio, urban).

537 Lynch v. Ortlieb, 28 S.W. 1017, 1019; writ of error refused, 87 Tex. 590, 30 S.W. 545 (1895) (urban).

538 Lasker Real Estate Ass'n v. Hatcher, 28 S.W. 404 (Tex. Civ. App. 1894) (urban).

539 See Lasker Real Estate Ass'n v. Hatcher, 28 S.W. 404 (Tex. Civ. App. 1894) (urban).

540 See Ingram v. Fred, 243 S.W. 598, 599 (Tex. Civ. App. 1922), second appeal; 210 S.W. 298 (Tex. Civ. App. 1919), first appeal (urban).

was held liable for certain necessary repairs ordered by the tenant without notice to the landlord.[541]

The tenant, on failure of the landlord to repair as agreed, may vacate the premises and thereby terminate his liability to pay rent;[542] he may remain in possession, pay rent, and maintain an action for damages suffered by reason of the landlord's failure to repair; and such claim for damages may be set up in a cross action against the landlord in the latter's suit for rent.[543]

The amount which the tenant can recover as damages on the landlord's failure to repair leased premises as agreed in his rent contract varies with the facts of the particular case. It has been held that "In some cases . . . the tenant being in possession, should make the repairs when the landlord fails to do so, and the measure of damages in such case is the reasonable cost of the repairs."[544] "The usual measure applied, however, is the reduced rental value; that is, the difference between the contract rental and the rental value in the unrepaired condition." This measure has been applied where the breach was but partial and the tenant had not been disturbed in his possession.[545] Under other circumstances, "recovery may be had for loss of profits resulting from a breached contract when the loss is such as might naturally be expected to follow the breach."[546] "Profits which would ordinarily, naturally, and in the usual course of things have been derived from performance and the loss of which flows directly and naturally from the breach, may be recovered, since they are naturally incident to the contract and may be fairly supposed to have been within the contemplation of the parties when it was made."[547] For example, where a landlord failed to repair a plantation cotton gin as agreed, the tenant was not allowed to prove as damages profits that might have been made by ginning cotton for other people, since it could not be inferred from the contract that the gin was to be used for any other purpose than that of ginning the cotton raised on the plantation.[548]

Where a leaky roof made a building untenantable as a

541 Terrell v. Otis Elevator Co., 248 S.W. 467, 468 (Tex. Civ. App. 1923) (San Antonio, urban).
542 Ingram v. Fred, 210 S.W. 298, 300 (Tex. Civ. App. 1919), first appeal; 243 S.W. 598 (Tex. Civ. App. 1922), second appeal.
543 Oscar v. Sackville, 253 S.W. 651, 653 (Tex. Civ. App. 1923) (Austin, urban); see Gilbert v. Young, 266 S.W. 1113, 1114 (Tex. Civ. App. 1924) (Texarkana). See generally 27 TEX. JUR. 247 (sec. 138), and 3 TEX. L. REV. 491 (1925).
544 Mitchell v. Weiss, 26 S.W.2d 699, 701 (Tex. Civ. App. 1930) (El Paso, urban). See generally 27 TEX. JUR. 255 (sec. 144).
545 Mitchell v. Weiss, 26 S.W.2d 699, 701 (Tex. Civ. App. 1930) (El Paso, urban). See generally 27 TEX. JUR. 255 (sec. 144).
546 Midkiff v. Benson, 225 S.W. 186, 187 (Tex. Civ. App. 1920) (El Paso); Oscar v. Sackville, 253 S.W. 651, 653 (Tex. Civ. App. 1923) (Austin, urban).
547 Midkiff v. Benson, 225 S.W. 186, 187 (Tex. Civ. App. 1920) (El Paso, urban).
548 Calhoun v. Pace, 37 Tex. 454, 455 (1872).

result of breach by the landlord of his covenant to keep the leased building in repair, the tenant was upheld in vacating the premises and thereafter refusing to pay rent.[549]

Express agreement by tenant to repair. A tenant who rented a house that was in bad repair and expressly agreed to bear the expenses of repairs during his occupancy, but who on request, when repairs became necessary, refused to do so, was held liable for the cost of those necessary repairs made by the landlord.[550] This rule has been applied though such repairs were made after expiration of the lease.[551] However, where the tenant rented for a certain term and agreed to pay for certain repairs to be made and was compelled to move because of the landlord's wrongful act after the repairs were made, the landlord was not entitled to apply advance rents already paid against repair costs.[552]

Although generally a tenant's covenant to repair excepts repairs of damage caused by wear and tear, a tenant can by his covenant bind himself to make all repairs, including damage from wear and tear,[553] and he may also bind himself to abate a nuisance on the premises.[554]

The measure of damages recoverable by the landlord for tenant's failure to repair as agreed, when the landlord makes the repairs, is the reasonable and necessary expenses thereof plus any other damages he may sustain by reason of the tenant's default. However, if the action is brought during the term of the lease and before the landlord has made the repairs, the measure of recovery is the injury to the market value of the reversion by reason of the tenant's neglecting to repair; or, in other words, the true criterion is the loss the landlord would sustain by reason of dilapidation if he went into the market to sell the reversion.[555] Where the lease has expired, the tenant is liable to the extent of the amount required to do what he agreed to do.[556]

Delay on the part of the tenant in making repairs, unless unreasonable under the circumstances, will not authorize the landlord to forfeit the lease.[557]

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549 Ingram v. Fred, 210 S.W. 298, 300 (Tex. Civ. App. 1919), first appeal; 243 S.W. 598 (Tex. Civ. App. 1922), second appeal (urban). See generally 27 TEX. JUR. 247 (sec. 139).
550 Martinez v. Thompson, 89 Tex. 568, 16 S.W. 334, 335 (1891) (urban).
551 Glickman v. DeBerry, 11 S.W.2d 367 (Tex. Civ. App. 1928) (Austin, urban).
552 Holtzclaw v. Moore, 192 S.W. 582, 583 (Tex. Civ. App. 1917) (Austin, urban). See generally 27 TEX. JUR. 257 (sec. 145).
553 Clark & Johnson v. Hamilton, 16 S.W.2d 833 (Tex. Civ. App. 1929) (El Paso, urban).
554 Keton v. Patton, 233 S.W. 128, 129 (Tex. Civ. App. 1921) (Austin, urban).
555 Fagan v. Whitcomb, 4 Willson Civ. Cas. Ct. App. sec. 27, 14 S.W. 1018, 1019 (1889); Glickman v. DeBerry, 11 S.W.2d 367 (Tex. Civ. App. 1928) (Austin, urban).
556 Glickman v. DeBerry, 11 S.W.2d 367 (Tex. Civ. App. 1928) (Austin, urban).
557 Gray v. Vogelsang, 236 S.W. 122, 126 (Tex. Civ. App. 1921) (Galveston, urban).

Obligation to rebuild after destruction of premises. The tenant is not responsible to the landlord for accidental destruction by fire of leased premises, nor bound to rebuild unless he has expressly agreed to that effect.[558] Further, covenants in a lease binding the tenant to "take good care of the property and its fixtures and suffer no waste," "to uphold and repair," "to repair," "to redeliver or restore to the lessor, in the same plight and condition, usual wear and tear excepted," or other words of like import, do not create liability on the part of the tenant to restore or rebuild premises destroyed by casualty without fault or negligence on the part of the tenant.[559]

Where the lease agreement permits the landlord to elect whether to rebuild or to terminate the lease should a fire render the premises untenantable, he must elect in good faith,[560] and do so within a reasonable time.[561] A provision granting the landlord the right to terminate the lease if he deems the premises damaged by fire to be unfit for occupancy, has been construed to permit both landlord and tenant to terminate.[562] Further, when destruction of the building by fire was so complete that it could not be used for the purposes for which it was leased it was deemed unfit for occupancy.[563]

A provision requiring the landlord to repair damage caused by fire was held to impose no obligation to make any repairs except those occasioned by the fire and necessary to restore the building to its condition just before the fire.[564]

Alterations on Leased Premises

In the absence of express permission in the lease, a tenant has no right to make material or permanent alteration in the leased premises.[565] "Ordinarily the word 'alteration' as applied to a building, means a substantial change therein."[566] A tenant, however, unless the lease forbids, may make small changes in the building so as to adapt it to his bus-

558 Miller Billups & Co. v. Morris, Ragsdale & Simpson, 55 Tex. 412, 422 (1881) (urban).
559 Norman v. Stark Grain & Elevator Co., 237 S.W. 963, 966 (Tex. Civ. App. 1922) (Dallas, urban).
560 Land v. Johnson, 189 S.W. 337, 339 (Tex. Civ. App. 1916) (San Antonio, urban).
561 Dallas Opera House Ass'n v. Dallas Enterprises Inc., 288 S.W. 656, 658 (Tex. Civ. App. 1926), affirmed, 298 S.W. 397 (Tex. Comm. App. 1927) (urban).
562 Senter v. Dixie Motor Coach Corporation, 67 S.W.2d 345, 347 (Tex. Civ. App. 1933); rehearing, 68 S.W.2d 1117 (Tex. Civ. App. 1934); affirmed, 97 S.W.2d 945 (Tex. Comm. App. 1936) (urban).
563 Senter v. Dixie Motor Coach Corporation, 67 S.W.2d 345, 347 (Tex. Civ. App. 1933) (Dallas); rehearing, 68 S.W.2d 1117 (Tex. Civ. App. 1934); affirmed, 97 S.W.2d 945 (Tex. Comm. App. 1936) (urban).
564 Mitchell v. Weiss, 26 S.W.2d 699, 701 (Tex. Civ. App. 1930) (El Paso, urban).
565 Halsell v. Scurr, 297 S.W. 524, 529 (Tex. Civ. App. 1927) (Fort Worth, urban).
566 Mayer v. Texas Tire & Rubber Co., 223 S.W. 874, 875 (Tex. Civ. App. 1920) (Fort Worth, urban). See 27 TEX. JUR. 249 (sec. 140).

iness;[567] and a right to sublet has been said to "carry with it the right of the tenant to make, or permit the making of, such changes and additions in the building as were reasonably necessary to the use of the building by such tenant, provided such changes did not constitute a substantial change . . . and could be removed at the expiration of the lease without injury to the building."[568]

Cutting a hole for a door in a party wall on leased premises without consent of the landlord constitutes waste, and it is no defense that it can be repaired at a trifling expense, or that the alteration will not diminish the value of the property, but may enhance it, for the reason that the landlord has the right to exercise his own judgment as to a change.[569]

In the absence of express covenant, the tenant need not remove improvements made with the landlord's consent, nor need he restore the premises to the landlord in their original condition.[570]

Improvements and Chattels

"Trade fixtures," i.e., show cases, shelves, booths, etc., "agricultural fixtures" and fixtures established for ornament, convenience or domestic use are removable on termination of the lease, if removal can be effected without substantial injury to the freehold. Such fixtures should be distinguished from "alterations, additions or improvements" entering integrally into and forming a part of the necessary reconstruction of a building. The term " 'improvements' comprehends all additions to the freehold, except 'trade fixtures' which can be removed without injury to the building."[571]

Agreement to construct improvements. Where a tenant agrees in the lease to make improvements upon the leased premises and controversy arises as to whether he has breached this covenant, the court, in construing the lease, if it does not contain full specifications, will give it a reasonable construction such as will render it equitable between the parties. For example, a tenant who undertook to clear, fence and put in cultivation 200 acres of land, to erect four tenant houses and eight cribs and to dig four wells, was held to be under obligation ". . . to put 200 acres thereof in a reasonably good

567 See Fred v. Moseley, 146 S.W. 343, 345 (Tex. Civ. App. 1912) (Dallas, urban).
568 Mayer v. Texas Tire & Rubber Co., 223 S.W. 874, 875 (Tex. Civ. App. 1920) (Fort Worth, urban).
569 Hamburger & Dreyling v. Settegast, 62 Tex. Civ. App. 446, 131 S.W. 639, 641 (1910) (urban). See generally 27 TEX. JUR. 339 (sec. 200).
570 Arkansas Fuel Oil Co. v. Connellee, 39 S.W.2d 99, 101 (Tex. Civ. App. 1931) (Eastland, urban). See 27 TEX. JUR. 339 (sec. 200).
571 Nine Hundred Main, Inc. v. City of Houston, 150 S.W.2d 468, 471, 472 (Tex. Civ. App. 1941) (Galveston, urban).

state of cultivation, and to surround the same with a reasonably good fence, such as was commonly done by persons of ordinary prudence . . ."[572] That court further stated: "As to the houses, cribs and wells, the same rule should be applied, in so far as the contract omitted to state the character of such improvements." Under this rule, the tenant was held by his contract under obligation to expend a reasonable amount of money or labor for the purpose of constructing such wells, tenant houses and cribs as were in general use in that locality, giving due consideration to the "attending circumstances, and to the contemplation of the parties, and the general character, uses, and purposes of such improvements."[573]

Similarly, if a landlord agrees to construct improvements but fails to do so, he is liable for the resulting injury. The measure of damages for failure to fence 100 acres of peanut land, as agreed, was held to be the reasonable market value of the peanuts that the tenant would be reasonably expected to have raised during the season, minus the cost of cultivating and marketing the crop.[574] However, a landlord who failed to build a cistern, as agreed, was not held liable for family sickness alleged to have been caused by use of poor quality water, nor for damage to the crop from loss of time used in hauling water.[575]

When a landlord agrees to drill a well on leased grazing land at some unspecified time, he must, according to one court decision, drill within a "reasonable time."[576] However,, a five-months' delay in obtaining water was not held unreasonable where the landlord made an honest and diligent effort by drilling two dry holes, which were abandoned, and finally developing water at a third well.[577]

The tenant, of course, has a cause of action for damages against the landlord when the latter fails to construct facilities for furnishing irrigation water for the rented premises, as agreed.[578] The measure of the tenant's damage for the failure of the landlord to furnish sufficient water to irrigate the tenant's crop has been held to be ". . . the difference between the value of the crop raised by him less the cost of rais-

572 Folmar v. Thomas, 196 S.W. 861, 864 (Tex. Civ. App. 1917) (Austin). See generally 27 TEX. JUR. 262 (sec. 148).
573 Folmar v. Thomas, 196 S.W. 861, 864 (Tex. Civ. App. 1917) (Austin).
574 Cockrell v. Ellison, 137 S.W. 150, 152 (Tex. Civ. App. 1911).
575 Turner v. Strange, 56 Tex. 141 (1882).
576 Adams v. Chadwick, 140 S.W.2d 524, 526 (Tex. Civ. App. 1940) (El Paso).
577 Adams v. Chadwick, 140 S.W.2d 524, 527 (Tex. Civ. App. 1940) (El Paso).
578 See Thibodeaux v. Boyt, 55 S.W.2d 117 (Tex. Civ. App. 1932) (Beaumont); Wells, Stillwell & Spears v. Mason, 258 S.W. 914 (Tex. Civ. App. 1924) (El Paso); Kincheloe Irrigation Co. v. Hahn Bros. & Co., 132 S.W. 78 (Tex. Civ. App. 1910); affirmed, 105 Tex. 231, 146 S.W. 1187 (1912). See generally 27 TEX. JUR. 241 (sec. 136).

ing, harvesting and marketing the same, and the value of the crop he would have raised if it had been properly watered, less the cost of raising, harvesting, and marketing."[579]

Ownership of improvements.[580] The following decisions relating to removel of improvements, although failing directly to mention their ownership, indirectly resolve that question. Generally, improvements of a permanent character made by the tenant on leased premises without the consent of the landlord and without an understanding that they might be removed from the premises at the expiration of the tenancy, may not be removed by the tenant.[581] "Fixtures," on the other hand, "set up by the tenant for the better enjoyment of trade are retained by the tenant," unless otherwise agreed.[582] Further, as one court stated: "The character of trade fixtures (whether removable or irremovable) does not depend on annexation to the soil, nor mere weight and bulk. . . . Indeed the intention of the tenant in making the annexation is . . . the controlling test. . . . It is natural that the intent of the owner should be to make permanent improvements. It is natural that the tenant, in making improvements to assist him in his trade, would make them with the intention to remove them to other land."[583]

Aside from an agreement or other facts evidencing a contrary intention, it was presumed in one decision to be the tenant's intention that a building erected on leased premises was not to be permanently affixed to or to become a part of the land.[584] However, where the lease provides that all alterations, additions or improvements should be and remain the landlord's property, all alterations or improvements, whether substantial or not, become the property of the landlord.[585] On the other hand, structures erected on leased land by a tenant under a lease providing for their removal, are the personal property of the tenant.[586] Further, improvements placed on the land of the landlord, with an agreement that they are to remain the property of the tenant, are regarded as personalty.[587]

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579 McFadden v. Sims, 43 Tex. Civ. App. 598, 97 S.W. 335, 337 (1906); Raywood Rice Canal & Milling Co. v. Langford Bros., 32 Tex. Civ. App. 401, 74 S.W. 926, 929 (1903).

580 See additional discussion under subtitle "Right of tenant to remove improvements," infra p. 92.

581 Williams v. Gardner, 215 S.W. 981, 984 (Tex. Civ. App. 1919) (Dallas). See generally 27 TEX. JUR. 264 (sec. 149).

582 Sanders v. Lefkovitz, 292 S.W. 596, 598 (Tex. Civ. App. 1927) (El Paso, urban).

583 See Menger v. Ward, 28 S.W. 821, 823, 824 (Tex. Civ. App. 1894), reversed on other grounds, 87 Tex. 622, 30 S.W. 853 (1895) (urban).

584 Ransberger v. Leach, 109 S.W.2d 331, 332 (Tex. Civ. App. 1937) (Eastland, urban).

585 Nine Hundred Main, Inc. v. City of Houston, 150 S.W.2d 468, 472 (Tex. Civ. App. 1941) (Galveston, urban).

586 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 909 (1895), reversing 27 S.W. 1024 (Tex. Civ. App. 1894) (mine).

587 Reader v. Christian, 234 S.W. 155, 157 (Tex. Civ. App. 1921) (Beaumont, urban).

Where a lease provided that improvements made by the tenant should become the landlord's property on the tenant's failure to remove them within 30 days after termination of the lease, and also authorized the landlord to reenter for nonpayment of rent, the improvements were held the landlord's property under the lease terms following termination of the lease for nonpayment of rent and failure of the tenant, after repeated demands, to effect their timely removal.[588]

Compensation for improvements. A tenant is not entitled to compensation from the landlord for improvements placed upon leased premises without the request of the landlord.[589] Under an agreement binding the landlord to pay for improvements, however, the tenant is entitled to credit for the value of improvements made by him as authorized and directed by the landlord.[590] Further, such covenant of the landlord to pay for improvements made by the tenant is not revoked by the death of the landlord, and compensation may be collected from his heirs.[591] Nor is the duty of the tenant to pay a share of the costs of improvements, as agreed, terminated by forfeiture of the lease for failure to meet obligations of the lease, including payment of rent.[592]

Right of tenant to remove improvements.[593] "The tenant may remove his fixtures at any time during the lease term . . . and, when the term is of uncertain duration . . . the tenant has a reasonable time after its termination to remove his fixtures."[594] Similarly, a tenant who reserves the right to remove at the expiration of the term all improvements placed by him upon leased premises has a reasonable time after the expiration thereof in which to remove such improvements.[595] However, fixtures of a permanent character, made without consent of the landlord, or understanding for removal, may not be removed from the leased premises at the termination of the tenancy.[596]

In one case, where the lease provided that the tenant should remove his improvements after termination of the lease within a stated time, he delayed. The court said in effect that: When the tenant places improvements on leased

588 Harris v. Panhandle & S.F. Ry. Co., 163 S.W.2d 647, 650 (Tex. Civ. App. 1942) (El Paso, urban).
589 Randolph v. Mitchell, 51 S.W. 297, 298 (Tex. Civ. App. 1899).
590 Randolph v. Mitchell, 51 S.W. 297, 298 (Tex. Civ. App. 1899).
591 Hazlewood v. Pennybacker, 50 S.W. 199, 201 (Tex. Civ. App. 1899), first appeal; 26 Tex. Civ. App. 183, 61 S.W. 153 (1901), second appeal, reversed on other grounds.
592 Wright v. Olive, 16 F.2d 270, 271 (C.C.A. 5th 1927) (urban).
593 See additional discussion under subtitle "Ownership of improvements," supra p. 91.
594 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 909 (1895) reversing 27 S.W. 1024 (Tex. Civ. App. 1894) (mine). See generally 19 TEX. JUR. 731-733 (secs. 24-26).
595 A. M. Petroleum Co. v. Friar, 152 S.W.2d 470, 471 (Tex. Civ. App. 1941) (El Paso, urban).
596 Williams v. Gardner, 215 S.W. 981, 984 (Tex. Civ. App. 1919) (Dallas).

land, with an agreement that they are to remain the property of the tenant, they are to be regarded as personalty and the tenant has the same time for removal as if the articles were in no way physically annexed to the land; that the tenant, though guilty of trespass on the land if he undertakes to remove the fixtures after relinquishing possession, retains title to them; and that in the absence of any provision for forfeiture, title is not divested, but the tenant is liable in damages for injury suffered by the landlord by reason of the delay in removal.[597]

Where the tenant sells his leasehold, and the original lease contained an agreement that improvements constructed by the tenant should belong to the landlord at the end of the term, the provision is binding upon the tenant's vendee who has no more right to remove them upon quitting the property than his vendor would have had.[598]

"The tenant is not required to remove improvement made by him with the consent of the landlord, or under authority of the lease, in the absence of express requirement thereof."[599] In other words, the tenant's right to remove improvements does not make removal mandatory in the absence of such express agreement; nor, in the absence of such covenant, is the tenant under a duty to restore the land, upon its abandonment, to the condition existing before the lease.[600] Further, where the lease clearly gives the tenant the right to remove improvements, the fact that the removal will result in injury to the leased premises is immaterial, since "the right to remove includes the right to do such damage to the freehold as such removal will naturally cause, and the tenant is liable only for such damages as are unnecessarily or wantonly caused."[601]

The measure adopted for evaluating damages caused by the wrongful removal of improvements by a tenant should be the one which will in each case most nearly compensate for the loss sustained.[602] The usual rule for the measure of damages to real property is the difference between its value immediately before and immediately after the injury, and it is applicable where fixtures are removed.[603] But, where the in-

597 Reader v. Christian, 234 S.W. 155, 157 (Tex. Civ. App. 1921) (Beaumont, urban).
598 Miller v. Gray, 29 Tex. Civ. App. 183, 68 S.W. 517, 518 (1902) (urban).
599 Arkansas Fuel Oil Co. v. Connellee, 39 S.W.2d 99, 101 (Tex. Civ. App. 1931) (Eastland, urban).
600 Arkansas Fuel Oil Co. v. Connellee, 39 S.W.2d 99, 101 (Tex. Civ. App. 1931) (Eastland, urban).
601 Gulf Oil Corporation v. Horton, 143 S.W.2d 132, 134 (Tex. Civ. App. 1940) (Amarillo, urban).
602 Sydney Webb & Co. v. Daggett, 39 Tex. Civ. App. 390, 87 S.W. 743, 744 (1905).
603 Sanders v. Lefkovitz, 292 S.W. 596, 598 (Tex. Civ. App. 1927) (urban); Sydney Webb & Co. v. Daggett, 39 Tex. Civ. App. 390, 87 S.W. 743, 744 (1905).

jury is susceptible of remedy at a moderate expense and can be shown with reasonable certainty, the cost of restoration may be the proper measure of the damage.[604] Further, the extent of the injury, or determination of the value of such property as houses, fences and other improvements, may be arrived at through the opinions of those acquainted with such matters.[605]

In the absence of agreement to the contrary, "fixtures placed upon leased premises by the tenant are personal property, subject, however, to become part of the realty, if not removed during the time allowed by law for their removal."[606] By agreement, of course, "they may become the property of the landlord, subject only to the lease;" or they may be the absolute property of the tenant. "In case of a special agreement, the rights of the parties are to be determined by their intention, as evidenced by the terms of the contract."[607] For example, where title was reserved in the tenant, a provision for removal within 90 days after premises were vacated, in the absence of any provision for forfeiture, was held not to entitle the landlord to forfeit the improvements on failure of the tenant to remove them within the agreed time, but only to damages.[608]

According to the weight of authority, when the parties enter into a new contract which is not a mere extension or renewal of the former lease, but which creates a new lease, and in which the right to fixtures annexed during the first lease is not reserved, the tenant loses his privilege of removal. This has not been announced by the Supreme Court as the Texas rule, however.[609] The Texas Supreme Court stated that this general rule of some jurisdicition is of doubtful soundness and "must yield to the intention of the parties to the lease, as deduced from the language employed, when viewed in the light of the circumstances attending the transaction." It is stated further, in criticism of the general rule, that "An intention on part of the tenant to surrender a valuable right ought not to be lightly implied."[610] The above general rule was held not applicable in a temporary leasing for 60 days, which was merely intended to cover the period

604 Sanders v. Lefkovitz, 292 S.W. 596, 598 (Tex. Civ. App. 1927) (urban).
605 Sydney Webb & Co. v. Daggett, 39 Tex. Civ. App. 390, 87 S.W. 743, 744 (1905).
606 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 909 (1895), reversing 27 S.W. 1024 (Tex. Civ. App. 1894) (mine).
607 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 909 (1895), reversing 27 S.W. 1024 (Tex. Civ. App. 1894) (mine).
608 Reader v. Christian, 234 S.W. 155, 158 (Tex. Civ. App. 1921) (Beaumont, urban). See generally 27 TEX. JUR. 267 (sec. 151).
609 See Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 911 (1895) reversing 27 S.W. 1024 (Tex. Civ. App. 1894) (mine).
610 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 911 (1895), reversing 27 S.W. 1024 (Tex. Civ. App. 1894). See generally 19 TEX. JUR. 724 (sec. 18).

of time needed for negotiating a more protracted lease.[611] Further, in one case where a tenant erected buildings on leased premises under an agreement that they were to be his property with the right to remove them at will, he was held to have the right to remove them although he later negotiated a new lease, which did not mention the buildings, with the landlord's vendee who had purchased the premises with knowledge of and subject to the original agreement.[612]

Right of tenant to remove chattels. A farm owner who unlawfully prohibits his outgoing tenant from removing his crops and chattels from the premises is liable in an action of damages for conversion.[613] "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion."[614] Moreover, wrongful withholding of the property of another, and refusal to deliver it up, so that the "owner cannot regain possession without incurring the danger of a breach of the peace, . . . and he is not required to make the attempt," is evidence of a conversion.[615] After rightful reentry, under the terms of the lease, the landlord's taking possession wrongfully of the tenant's personal property because rents are unpaid constitutes a conversion;[616] and so also does his locking the doors to leased premises on which slight rents are in arrears, when coupled with a wrongful refusal to permit the tenant, after rightful demand, to remove his personalty.[617] A landlord is guilty of conversion if he holds property of an outgoing tenant to compel payment of a sum which is not secured by a lien on that property.[618]

Although a landlord comes lawfully or without fault into possession of the tenant's property, he is a converter if he refuses to surrender it on proper demand.[619] For example, a landlord was held to be liable for conversion if, after repeated efforts by the tenant to secure a settlement, the landlord refused, on proper demand, to surrender the tenant's share of a hay crop on which the landlord had a furnish lien and which was stored by agreement in the landlord's barn to await a better market.[620] Liability would also be incurred by a landlord who refused to deliver, on demand and tender of the bal-

611 Wright v. Macdonnell, 88 Tex. 140, 30 S.W. 907, 912 (1895), reversing 27 S.W. 1024 (Tex. Civ. App. 1894).
612 Hertzberg v. Witte, 22 Tex. Civ. App. 320, 54 S.W. 921, 922 (1899) (urban).
613 Voss v. Bassett, 4 Willson Civ. Cas. Ct. App. sec. 116, 15 S.W. 503 (1890).
614 Henderson v. Beggs, 207 S.W. 565, 567 (Tex. Civ. App. 1918) (Fort Worth), quoting COOLEY on Torts, 524 2d ed. (urban).
615 Dozier v. Pillot, 79 Tex. 224, 14 S.W. 1027 (1891) (urban).
616 Henderson v. Beggs, 207 S.W. 565, 567 (Tex. Civ. App. 1918) (Fort Worth, urban).
617 Harnden v. McKinney, 103 S.W.2d 869, 870 (Tex. Civ. App. 1936) (San Antonio, urban).
618 Voss v. Bassett, 4 Willson Civ. Cas. Ct. App. sec. 116, 15 S.W. 503 (1890).
619 Gaw v. Bingham, 107 S.W. 931, 932 (Tex. Civ. App. 1908).
620 Gaw v. Bingham, 107 S.W. 931, 932 (Tex. Civ. App. 1908).

ance due, furniture turned over to him to secure unpaid rent.[621] However, since a conversion is "an illegal assumption of ownership," a landlord is not a converter where he makes no claim to ownership of personal property voluntarily left by the outgoing tenant but, instead, requests the tenant to remove his property, which the tenant refuses to do.[622]

The tenant whose goods are converted may recover in damages the value of the personalty withheld, and the fact that the landlord after withholding and refusing to surrender the property later tenders it to the tenant will not prevent the conversion from being complete.[623] The tenant may refuse the tender without abridging his right to recover damages.[624] Also, a tenant has been permitted to recover from a landlord, who wrongfully withheld personal property, the use value of the property during the period it was withheld and, in addition, if that wrong was done in malice, he may recover exemplary damages.[625] Although the statute does not limit the amount of exemplary damages that may be allowed, such damages, in order not to be deemed excessive, "should bear proportion to the actual damages sustained."[626]

Where a landlord wrongfully retook the leased premises and withheld the tenant's feed, stock, farming tools and implements at the opening of the farming season, it was held that a temporary injunction might properly be granted to the tenant, restraining the landlord from interfering with the tenant's taking peaceful repossession of his property.[627]

Landlords by taking possession of premises abandoned by the tenant make themselves responsible for the property left there and it becomes their duty to care for such property as they find there and, on demand, to deliver possession of it to the owner.[628] Similarly, one case held that tenants in abandoning the landlords' property upon expiration of the lease term were "bound by law not to expose the property to unreasonable risks of destruction."[629]

621 Schwulst v. Neely, 50 S.W. 608, 610 (Tex. Civ. App. 1899) (urban).
622 Wilson v. Moore, 57 Tex. Civ. App. 418, 122 S.W. 577, 579 (1909) (urban).
623 Harnden v. McKinney, 103 S.W.2d 870 (Tex. Civ. App. 1936) (San Antonio, urban).
624 Henderson v. Beggs, 207 S.W. 567 (Tex. Civ. App. 1918) (Fort Worth, urban).
625 Barry v. Thompson, 267 S.W. 309, 310 (Tex. Civ. App. 1924) (El Paso, urban).
626 Loftus v. Ray, 46 S.W.2d 1034, 1037 (Tex. Civ. App. 1932) (El Paso, urban).
627 Wicker v. Thomson, 242 S.W. 1106, 1107 (Tex. Civ. App. 1922) (Amarillo).
628 Alsbury v. Linville, 214 S.W. 492, 495 (Tex. Civ. App. 1919) (San Antonio, urban). See 27 TEX. JUR. 69 (sec. 19).
629 Texas Co. v. Gibson, 88 S.W.2d 757, 758; reversed on other grounds, 131 Tex. 598, 116 S.W.2d 686 (Tex. Comm. App. 1938) (Beaumont, urban).

Crops

"Crops" (sometimes referred to as "emblements" when left growing on the premises by an outgoing tenant)[630] in legal contemplation generally include products of the earth produced "by planting and culture, and which grow yearly and are raised by annual labor and expense," as distinguished from such "natural products of the earth, as growing trees, fruit, grass, etc."[631] "Emblements are said to be synonymous with crops."[632] "The term crops may mean either a gathered or a growing crop."[633]

However, the extent or limitation of the term "crops" as used in a lease depends upon the intent of the contracting parties, and one case held it "might reasonably be construed as including Johnson grass" growing up and harvested with grain. But in this decision, Johnson grass growing on parts of the farm not planted by the tenant was not included as "crops," in the absence of an allegation of ambiguity in the terms of the contract or of interpretation in the light of a local custom embracing such areas.[634] A lease of land for "grass and farm purposes" was held not to include within the meaning of the agreement the pecan crop.[635]

Tenant's Rights in Crops

Nature of tenant's interest in crops. The incidence of title to crops will be determined by the legal relationship between the parties created by the agreement, and will vary depending upon whether the relationship is "that of landlord and tenant, tenants in common, or of master and servant."[636] Where the relationship created is that of landlord and tenant, the right to possession of the crop and generally title to crops grown upon the leased premises is in the tenant, even though rent is payable in a part of the crop.[637] In other words, "The relation of landlord and tenant . . . may exist although rent is payable in kind in which case the entire title is in the tenant."[638] The person in whom title to the crop rests under any particular agreement is a question of intention to be determined from the whole contract,[639] but in the absence of a

630 McLemore v. Compton, 275 S.W. 487, 490 (Tex. Civ. App. 1925) (Fort Worth).
631 Cook v. Steel, Furrh & Co., 42 Tex. 53, 58 (1875).
632 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).
633 See 13 TEX. JUR. 4 (sec. 2).
634 Cooke v. Ellis, 196 S.W. 642, 644 (Tex. Civ. App. 1917) (Fort Worth).
635 McLemore v. Compton, 275 S.W. 487, 490 (Tex. Civ. App. 1925) (Fort Worth).
636 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896). See additional discussion under subtitles "Sharecropper's Rights in Crops," infra p. 107 et seq., and "Landlord's Rights in Crops—Landlord's Liens," infra p. 111 et seq.
637 Curlee v. Rogan, 136 S.W. 1126, 1127 (Tex. Civ. App. 1911).
638 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
639 See Rentfrow v. Lancaster, 10 Tex. Civ. App. 321, 31 S.W. 229, 231 (1895).

specific contract changing the general rule in the landlord-tenant relation, title to the crops is in the tenant.[640]

Where the agreement provides for a "division of the specific crops, with a reservation by the landlord of an undivided share, the parties become tenants in common" of the crop.[641] They are sometimes referred to as "joint owners" of the crop, each owning the proportionate interest agreed upon.[642]

However, if the landowner "retains the property in the crop, and the control thereof," the cropper is a servant of the landowner and, upon division of the crop by the landowner, the cropper "receives his share as the price of his labor."[643] Under such an agreement, title to the crop is in the landowner who owes the cropper (servant) a debt payable in a part of the crop, while the cropper (servant) has no title to any part of the crop before it is segregated and paid to him.[644]

It is not amiss to stress again that whether a landowner who lets a farm on shares becomes owner of any part of the growing crop or has merely a lien thereon for the share rent is a question to be determined from the terms of the contract between the parties;[645] and that where a share tenancy exists the landlord acquires no title to any part "until the crop is matured and divided,"[646] and the part reserved for rent set apart for him by the tenant.[647] In fact, for a landlord to take possession of a part of the crop without the tenant's permission is unlawful and a trespass.[648] Although a landlord leasing on shares is "not the owner of any portion of the crops until such portion is segregated and delivered to him," he has the vested right, secured by his landlord's lien, to become such owner when the time arrives for the agreed upon segregation and delivery.[649]

Since the rights of parties in a crop depend upon their contract and the applicable law, a tenant farming under a crop-share lease which provides for planting specified crops, and further provides that "as soon as the crop is gathered, or could have been gathered . . . the land returns to the possession of the landlord," such tenant, in the absence of a later

640 Curlee v. Rogan, 136 S.W. 1126, 1127 (Tex. Civ. App. 1911).
641 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
642 Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin).
643 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
644 See Rentfrow v. Lancaster, 10 Tex. Civ. App. 321, 31 S.W. 231 (1895).
645 Antone v. Miles, 47 Tex. Civ. App. 289, 105 S.W. 39, 41 (1907); Miles v. Dorn, 40 Tex. Civ. App. 298, 90 S.W. 707, 709 (1905).
646 Trinity & B.V. Ry. Co. v. Doke, 152 S.W. 1174, 1176 (Tex. Civ. App. 1913) (Austin).
647 St. Louis, Ark. & Tex. Ry. Co. v. Sam Heard, 3 Willson Civ. Cas. Ct. App. sec. 397 (1888).
648 Curlee v. Rogan, 136 S.W. 1126, 1128 (Tex. Civ. App. 1911).
649 Millingar v. Foster, 17 S.W.2d 768, 769 (Tex. Comm. App. 1929); affirming 8 S.W.2d 514 (Tex. Civ. App. 1928), second appeal; 293 S.W. 249 (Tex. Civ. App. 1927), first appeal (urban).

amendatory agreement, would not be entitled under the terms of the lease to a share of a volunteer crop of "Colorado grass" which might spring up after the usual crop failed from drouth.[650]

Tenants may mortgage or sell growing crops. A tenant has the right to mortgage his growing crop regardless of its growth toward maturity.[651] Further, he may mortgage his unplanted crop, the mortgage becoming effective when his crop is planted. In other words, not only his crops that have been planted but his crops to be planted, pursuant to a valid lease, may be mortgaged (or sold) by the tenant, since such crops, before planting, in legal theory are considered as having a potential existence.[652]

Where rental is payable in a share of the crop, either the tenant may execute a chattel mortgage upon his definite interest in such specific property or the landlord may assign his rights under the rental contract, although the crop is not at the time in existence, but is in contemplation of both parties.[653] Further, a tenant may mortgage a crop to be planted upon certain specific lands to which he has neither title nor a lease, and equity will enforce the mortgage, if at the time of the contract the parties contemplated acquisition or leasing of such lands.[654] The mortgage lien attaches in equity as soon as the tenant plants or acquires possession of the crop.[655]

The tenant may execute a chattel mortgage "not only upon the crop about to be planted for the current year" but on "crops for the succeeding year or years."[656] Such "lap-over mortgages," covering both the current crop and crops to be grown during succeeding years, are valid and enforceable.[657] However, a chattel mortgage on crops to be grown during a series of stated years until a named indebtedness is paid is not enforceable against crops grown on lands not under lease to the tenant or mortgagor at the time of the nego-

650 Jackson v. Taylor, 166 S.W. 413, 414 (Tex. Civ. App. 1914) (Fort Worth).
651 Cook v. Steel, Furr & Co., 42 Tex. 53, 58 (1875).
652 See Sanger Bros. v. Hunsucker, 212 S.W. 514, 516 (Tex. Civ. App. 1919) (Fort Worth); Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin). See generally 9 TEX. JUR. 122 (sec. 36).
653 Bowyer v. Beardon, 116 Tex. 337, 291 S.W. 219, 222 (Tex. Comm. App. 1927); Sanger Bros. v. Hunsucker, 212 S.W. 514, 516 (Tex. Civ. App. 1919) (Fort Worth); but see Williams v. King, 206 S.W. 106 (Tex. Civ. App. 1918).
654 Richardson v. Washington, 88 Tex. 339, 31 S.W. 614, 617 (1895); Caldwell, Hughes & Patterson v. Yarbrough, 186 S.W. 350, 352 (Tex. Civ. App. 1916) (Texarkana). See 13 TEX. JUR. 10 (sec. 8).
655 See Richardson v. Washington, 88 Tex. 339, 31 S.W. 614, 617 (1895); Caldwell, Hughes & Patterson v. Yarbrough, 186 S.W. 350, 352 (Tex. Civ. App. 1916) (Texarkana).
656 South Texas Implement & Machine Co. v. Anahuac Canal Co., 280 S.W. 521, 522 (Tex. Comm. App. 1926); affirming 269 S.W. 1097 (Tex. Civ. App. 1925).
657 Waters v. Ellington & Co., 289 S.W. 417, 419 (Tex. Civ. App. 1926) (Texarkana). See generally 9 TEX. JUR. 123 (sec. 37).

tiations and which the parties did not then contemplate he would cultivate.[658] A "lap-over mortgage" is not voided by the subsequent refusal of the mortgagee to finance the mortgagor's crop program during succeeding years.[659]

"If one sells or mortgages his potential interest in an unplanted crop, and afterwards loses his right to such crop prior to the time the crop is planted, his vendee or mortgagee acquires no interest therein."[660]

The owners of crops grown upon a homestead may execute a valid chattel mortgage thereon.[661] Although a tenant may execute a chattel mortgage upon his crops,[662] the landlord has a lien thereon for rents and advances furnished the tenant to make the crop,[663] which ordinarily is superior to the mortgage lien.[664]

Another potential asset of tenants available as a basis for obtaining annual credit is the conservation assistance payments which may be earned under the agricultural conservation program.[665]

"Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are, therefore, liable to voluntary transfer (sale) as chattels."[666] Sale of a growing crop is deemed a constructive severance of the crop from the soil.[667] Since such sale is a transfer of personalty, the transaction does not come within that part of the statute of frauds requiring transfer of an interest in land to be in writing.[668]

Harvesting crops after termination of lease or after end of rental period—"Emblements." The common law doctrine of "emblements" or "away-going crops" relates to the right of a tenant "under certain circumstances to enter upon the leased premises to cultivate, harvest, and remove his crops therefrom after the termination of the lease."[669] Three things

658 McDavid v. Phillips, 100 Tex. 73, 94 S.W. 1131, 1132 (1906); on certified question from 94 S.W. 1129, 1130 (Tex. Civ. App. 1906).
659 First Nat. Bank of Fabens v. American Trust and Savings Bank of El Paso, 1 S.W.2d 437, 438 (El Paso, 1927).
660 Zeigler v. Citizens Bank of Venus, 79 S.W.2d 662, 664 (Waco, 1935).
661 Silberberg v. Trilling, 82 Tex. 523, 18 S.W. 591, 592 (1891). See generally 9 TEX. JUR. 128 (sec. 41); also see additional discussion under subtitle "Tenant's Homestead Rights in Leased Premises," supra p. 47.
662 TEX. ANN. REV. CIV. STAT. arts. 5489-5499 (Vernon, 1941 and Supp. 1949).
663 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
664 Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo).
665 See additional discussion under subtitle "Right to Conservation Practice Payments," infra p. 158.
666 Willis v. Moore, 59 Tex. 628, 637 (1883) quoting FREEMAN on Executions, 113.
667 Kreisle v. Wilson, 148 S.W. 1132, 1134 (Tex. Civ. App. 1912) (San Antonio).
668 Cook v. Steel, Furrh & Co., 42 Tex. 53, 58 (1875); Stamps v. Ezell, 174 S.W. 944, 946 (Tex. Civ. App. 1915) (Amarillo). See generally 13 TEX. JUR. 5 (sec. 3) and 10 (sec. 9).
669 Miller v. Gray, 136 Tex. 196, 149 S.W.2d 582, 583; reversing 108 S.W.2d 265 (Tex. Civ. App. 1937).

must appear to entitle an outgoing tenant to emblements. A tenancy of uncertain duration, a termination of this tenancy by the act (of God or) of the landlord and the planting of the crop during the tenant's right of occupancy.[670]

The right to emblements does not authorize the tenant to extend the term of the lease,[671] or give the tenant the right to occupy the dwellings;[672] nor does it give him a right to possession of the land, but he acquires merely the right of ingress and egress to cultivate, harvest and remove the crop.[673] Emblements are crops which grow yearly, and are raised by annual expense or labor, such as grain; but not fruits which grow on trees, which are not planted yearly, and grasses and the like, though they are annual. It follows that a pecan crop produced by trees growing spontaneously and without cultivation along a stream would not be included.[674]

Since the emblements doctrine "has no application where the lease is definite as to the date of its termination," a landlord was not held liable in damages when, entitled to possession at the end of the lease term on October 16, he turned his cattle into the remaining maize and hegari crop then only partially harvested because of an unusually wet season.[675]

Right to crop after foreclosure or sale of leased premises.[676] Crops produced by annual cultivation, whether growing or mature, are no part of the realty and title to such crops may be constructively severed from ownership of the soil by voluntary transfer as chattels.[677] Such vestiture of title may be by assignment,[678] sale, mortgage or "any other transaction vesting in some other party than the (land) owner an interest therein."[679] A lease severs title to the standing crop, whether mature or not, from the land.[680] Crops may be severed in law from the land, by sale or otherwise, at any time before foreclosure on the land. Such severance is valid though made after the mortgage debt is due, if made before sale of

670 Dinwiddie v. Jordan, 228 S.W. 126, 127 (Tex. Comm. App. 1921); reversing 205 S.W. 862 (Tex. Civ. App. 1918); Miller v. Gray, 136 Tex. 196, 149 S.W.2d 582, 583. See generally 27 TEX. JUR. 304 (sec. 176) and 13 TEX. JUR. 17 (sec. 15).
671 See Dinwiddie v. Jordan, 228 S.W. 126, 128 (Tex. Comm. App. 1921), reversing 205 S.W. 826 (Tex. Civ. App. 1918).
672 See Reed v. McGouirk, 35 S.W. 527, 528 (Tex. Civ. App. 1896).
673 Dinwiddie v. Jordan, 228 S.W. 126, 128 (Tex. Comm. App. 1921). reversing 205 S.W. 862 (Tex. Civ. App. 1918).
674 See McLemore v. Compton, 275 S.W. 487, 490 (Tex. Civ. App. 1925) (Fort Worth). (The question of emblements was not specifically involved in this suit.) Also see 27 TEX. JUR. 304 (sec. 176).
675 Miller v. Gray, 136 Tex. 196, 149 S.W.2d 583 (1941); reversing 108 S.W.2d 265 (Tex. Civ. App. 1937).
676 See additional discussion under subtitle "Sale, Foreclosure, or Devolution of Landlord's Reversion," infra p. 171.
677 Willis v. Moore, 59 Tex. 628, 629, 637 (1883).
678 Roth v. Connor, 25 S.W.2d 246, 247 (Tex. Civ. App. 1930) (Dallas).
679 Standridge v. Vines, 81 S.W.2d 289, 290 (Tex. Civ. App. 1935) (Eastland).
680 Brown v. Leath, 17 Tex. Civ. App. 262, 42 S.W. 655 (opinion); 44 S.W. 42 (conclusion of facts) (1897).

the land. It is not essential to its validity that the crops, at time of constructive severance, are "even approaching maturity."[681]

Any person who leases land, with actual or constructive notice of a mortgage lien thereon, "takes the lease subject to the lien, and with the knowledge that his tenure terminates with the foreclosure of the lien and sale thereunder to another, at the option of the purchaser."[682] If the owner and his tenant are both made parties to a foreclosure proceeding of a mortgage or vendor's lien on the land given prior to the lease, the foreclosure terminates the lease.[683]

However, whether the purchaser of the land at the foreclosure sale also acquires the crop thereon is determined by whether title to annual crops has been constructively severed from the land prior to the foreclosure.[684] The general rule is that when crops "are harvested or severed in ownership, prior to sale of the land under foreclosure, title thereto will not pass by such sale."[685] Since a "lease severs the crop from the land," constructively the foreclosure of a mortgage on the land under a lease, though it may terminate the lease,[686] does not pass title to the annual crops to the purchaser.[687] The tenant whose lease has been terminated could not thereafter proceed to plant and occupy the land under the terms of such lease, but under the doctrine of emblements he could lawfully enter the premises for the purpose of harvesting and removing the wheat crop then growing upon the land.[688] Foreclosure of a paramount lien on a farm does not divest the right of a tenant under a crop-share lease to claim the agreed proportion of the crop.[689] Further, a purchaser at mortgage sale of the land on March 6 cannot claim immature crops (wheat and oats) previously sold, in good faith, to another by the mortgagor.[690]

Wood cut on the land prior to foreclosure of a paramount lien "ceased to be part of the realty, and the foreclosure passed no title thereto."[691]

681 Lombardi v. Shero, 14 Tex. Civ. App. 594, 37 S.W. 613, 614; modified in 37 S.W. 971 (1896).
682 Millingar v. Foster, 293 S.W. 249, 250; on second appeal, decision reversed on other grounds, 8 S.W.2d 514 (Tex. Civ. App. 1928), affirmed, 17 S.W.2d 768 (Tex. Comm. App. 1929). See generally 29 TEX. JUR. 1002 (sec. 157).
683 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo). See generally 27 TEX. JUR. 298 (sec. 172); also see 6 TEX. L. REV. 392 (1928).
684 Standridge v. Vines, 81 S.W.2d 289, 290 (Tex. Civ. App. 1935) (Eastland).
685 Roth v. Connor, 25 S.W.2d 246, 247 (Tex. Civ. App. 1930) (Dallas).
686 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).
687 Standridge v. Vines, 81 S.W.2d 289, 290 (Tex. Civ. App. 1935) (Eastland).
688 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).
689 Hanaway v. Wiseman, 39 Tex. Civ. App. 642, 88 S.W. 437, 438 (1905). See generally 13 TEX. JUR. 20 (sec. 18).
690 Lombardi v. Shero, 14 Tex. Civ. App. 594, 37 S.W. 613, 614; modified in 37 S.W. 971 (1896).
691 Chavez v. Schairer, 199 S.W. 892, 893 (Tex. Civ. App. 1918) (El Paso).

One decision holds that a "half-tenant," following foreclosure of a paramount lien on the land, was entitled to "emblements" in Johnson grass, though it might be a "natural growth of the soil" and was said to be "not produced by annual cultivation," when the land on which the Johnson grass was raised "had been cultivated and worked," since "working the ground helps Johnson grass for hay."[692]

Of course, should the foreclosing mortgagee elect not to join the tenant in the proceedings, the foreclosure decree will not terminate the lease.[693] Similarly, a lease existing at the time the premises are mortgaged is not invalidated by the mortgage or by its foreclosure, since the lease is "then a paramount interest, and the mortgage is subject to it."[694]

Since the right to emblements may be the subject of contract, the parties to a tenancy terminable after sale of the farm are free to bargain in that regard, but "in the absence of a stipulation in the lease contract dealing therewith, the tenant is . . . entitled to emblements" on sale of the farm and termination of the tenancy.[695]

At termination of a life tenancy by death, the subtenant, who is the one who rented from the deceased life tenant, is entitled to ingress and egress for the purpose of cultivating his crops already planted until maturity, and to harvest them.[696]

Gathering crops after end of rental period. Generally a tenant must gather his crops during the rental term and if he delays and the landlord repossesses the premises, the tenant is not entitled to claim damages for injury to the crop sustained after expiration of the period fixed by the lease.[697] However, a lease may be made with reference to a custom in the community which recognizes that normally crops will mature and be gathered within the life of the lease; but if unusual circumstances prevent complete harvesting, the tenant using suitable diligence will be authorized to finish the year's work after the lease term.[698] The tenant in such a situation must act promptly if he intends to claim the unharvested remnant of the crop.[699]

Where the end of the lease term does not depend upon a

692 Temple Trust Co. v. Pirtle, 198 S.W. 627, 628 (Tex. Civ. App. 1917) (Texarkana).
693 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).
694 Groos & Co. v. Chittim, 109 S.W. 1006, 1010 (Tex. Civ. App. 1907).
695 Dinwiddie v. Jordan, 228 S.W. 126, 127 (Tex. Comm. App. 1921); reversing 205 S.W. 862 (Tex. Civ. App. 1918).
696 Reed v. McGouirk, 35 S.W. 527, 528 (Tex. Civ. App. 1896). See generally 27 TEX. JUR. 302 (sec. 175).
697 Andrews v. Jones, 36 Tex. 149, 150 (1871).
698 Bowles v. Driver, 112 S.W. 440, 441 (Tex. Civ. App. 1908).
699 See Huggins v. Reynolds, 51 Tex. Civ. App. 504, 112 S.W. 116, 117 (1908).

contingency but the lease is to terminate by its provisions on a definite date, a tenant is not entitled to ingress and egress to reap a crop he planted knowing that it could not mature before the termination of the lease.[700] Similarly, a tenant who wrongfully withheld possession at the end of the lease term and, during the last month of the tenancy, planted a crop of corn and cotton, was held properly deprived of the crop.[701] Nor is a tenant entitled to compensation for a crop planted after the date of judgment obtained by the landlord in an eviction proceeding.[702] Further, a tenant who was evicted for failure to pay the agreed money rent each month, the court held, had no "equitable claim to emblements," and was "not entitled to the crops on the land."[703]

However, where the landlord consented to the grubbing and late planting of two acres to sweet potatoes, the tenant was held entitled to ingress to harvest the crop even though it was not mature when the lease expired, since "the privilege of planting the crop implied the power to enter and harvest it at maturity."[704] The equitable rule which sometimes permits a tenant a reasonable time after the lease term to complete harvesting will not be extended to permit transfer by the tenant of his right in a stalk field to a third person who purchased from the tenant a maize and kafir stubble field, some wheat stubble and native grasses to pasture his cattle after expiration of the lease.[705]

Abandonment of crop by tenant. When a tenant abandons a crop his landlord has "the right and authority to take charge of it, and gather and market it," and apply the proceeds to the tenant's indebtedness to the landlord.[706] In fact, where the tenant abandons both the crop and the premises, "the landlord has the right to enter upon the premises and care for them as if the lease had never been made."[707] In disposing of the crop, he is "required to use only ordinary care and diligence, and to exercise good faith."[708] The landlord, however, is under no legal obligation to gather an abandoned crop, nor is a crop mortgagee of the tenant obliged to gather it, and either may permit a part or all to go to waste.[709]

A landlord, upon completing harvest of a crop abandoned

700 Miller v. Lewis, 277 S.W. 796 (Tex. Civ. App. 1925) (San Antonio).
701 Duncan v. Jouett, 111 S.W. 981, 983 (Tex. Civ. App. 1908).
702 Rankin v. Hooks, 81 S.W. 1005, 1006 (Tex. Civ. App. 1904).
703 Calhoun v. Kirkpatrick, 155 S.W. 686, 688 (Tex. Civ. App. 1913) (San Antonio).
704 Crow v. Ball, 99 S.W. 583, 584 (Tex. Civ. App. 1907).
705 Tandy v. Fowler, 150 S.W. 481, 484 (Tex. Civ. App. 1912) (Amarillo).
706 Cunningham v. Skinner, 97 S.W. 509, 510 (Tex. Civ. App. 1906); Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo). See generally 13 TEX. JUR. 18 (sec. 16); 27 TEX. JUR. 303 (sec. 176).
707 Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo).
708 Taack v. Underwood, 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo).
709 McNeill v. Vickery, 26 S.W.2d 741, 742 (Tex. Civ. App. 1930) (Waco).

by "half-tenants" who were "tenants in common of the crop," was held entitled not only to an "undivided title and interest to one-half of the cotton and cotton seed," but, in addition, to whatever expense he incurred incidental to "finishing the undertaking of making and gathering the crop."[710] The reasonable expenses incurred by the landlord in completing, harvesting and marketing on abandonment of a crop by a tenant are deductible from the sale price of the crop,[711] as are sums owing to him for rents and advances.[712]

Intention to abandon a crop may be expressed, or it may be evidenced by an act legally sufficient to divest the tenant of ownership in the crop, as by failure to pick promptly the remnant of a cotton crop remaining unharvested after the end of the lease term.[713] It is not necessary that the tenant notify the landlord in person of his intention to abandon the crop, if such intent is manifest from the circumstances as a whole, including both the acts and the declarations of the tenant.[714] Further, the intent to abandon crops may be clear, even though the tenant remains on the premises.[715]

However, vacating the leased premises and contracting with a laborer or agent to harvest the crop is not an "abandonment" of such crop;[716] nor without other evidence, when no rent is in arrears, is moving from the premises for two months an abandonment, since there is "no rule of law which requires a tenant to remain at all times in physical possession of the leased premises."[717] Further, when such action is induced by threats of personal violence and refusal of the landlord to permit ingress for harvesting, an offer by a Negro "half-tenant" to sell an unharvested crop to another, in violation of the lease terms, is not a "voluntary abandonment;" and the landlord who later converts the crop cannot complain that his outlays for harvesting and marketing were not deducted from the judgment granted the tenant.[718]

Recovery of damages for injuries to crops. The right to recover damages for wrongful injury to a crop is in the owner of the crop and, therefore, not necessarily in the landowner.[719] Crops and growing grass under a tenancy are generally the property of the tenant. In such case, the tenant has the right

710 Jaco v. W. A. Nash & Co., 236 S.W. 235, 238 (Tex. Civ. App. 1921) (Dallas).
711 Holmes v. Klein, 59 S.W.2d 171, 173 (Tex. Civ. App. 1933) (Amarillo).
712 Cunningham v. Skinner, 97 S.W. 509, 510 (Tex. Civ. App. 1906).
713 Huggins v. Reynolds, 51 Tex. Civ. App. 504, 112 S.W. 116, 117 (1908).
714 Bettis v. Key, 60 Tex. Civ. App. 529, 128 S.W. 1160, 1161 (1910).
715 Bettis v. Key, 60 Tex. Civ. App. 529, 128 S.W. 1160, 1161 (1910).
716 Rainey v. Old, 189 S.W. 923, 925 (Tex. Civ. App. 1915) (Texarkana).
717 Obets & Harris v. Speed, 211 S.W. 316, 318 (Tex. Civ. App. 1919) (El Paso).
718 Barnett v. Govan, 241 S.W. 276, 277 (Tex. Civ. App. 1922) (Texarkana).
719 Telephone Telegraph Co. v. Forke, 2 Willson Civ. Cas. Ct. App. sec. 368 (1884). See generally 13 TEX. JUR. 38 (sec. 34).

of recovery for their wrongful destruction;[720] and the landlord is not a necessary party to the action.[721] The landlord should not be allowed to recover damages for injury to crops that belong to his tenant.[722]

The tenant whose growing crop is damaged wrongfully is entitled to recover the "entire damage caused by the injury" to the crop, and not merely a share proportionate to his interest therein, after his crop rent is deducted.[723] Further, a tenant on share rent has a sufficient interest in the crop upon which to base his action for damages, notwithstanding the landlord's liens for rent and supplies.[724] Although a tenant may recover in damages the value of grass destroyed, he has "no right of action for damages to the land itself."[725]

A landlord, however, who is "to receive a part of (a crop) as rent" has such an interest in it as to entitle him to sue if it is destroyed;[726] and, where the tenant wrongfully permits his cattle to enter a field and eat and destroy the landlord's share of a crop remaining stacked thereon, the landlord may recover from the tenant the total value of such share of the crop destroyed.[727] Similarly, where the landlord agreed but failed to protect the tenant's crop from injury by the landlord's cattle, the landlord was held liable to the tenant for the resulting damage.[728]

"The proper measure of damages for the wrongful destruction of a growing crop when it has been entirely destroyed, is the value of the crop just as it stood on the ground at the time and place of its destruction, such value to be determined by the probable yield of the crop and its reasonable market value when matured, less the cost of cultivating, harvesting and marketing. . . . Legal interest thereon is allowed from the date of destruction until the time of the trial. This is the measure of damages, also, where a matured crop has been totally destroyed."[729] This rule has been followed in a more recent decision. There it was held that such market value at the time and place of destruction may be ascertained by deducting the cost of cultivation, harvesting and marketing from the value of the probable yield when ma-

720 Gulf, C. & S.F. Ry. Co. v. Smith, 3 Tex. Civ. App. 483, 23 S.W. 89, 90 (1893).
721 St. Louis A. & T. Ry. Co. v. Heard, 3 Willson Civ. Cas. Ct. App. sec. 397 (1888).
722 Gulf C. & S.F. Ry. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S.W. 285, 286 (1893).
723 Texas & Pacific Ry. Co. v. Bayliss, 62 Tex. 570, 575 (1884).
724 Parker v. Hale, 78 S.W. 555, 556 (Tex. Civ. App. 1903).
725 Shell Petroleum Corporation v. Parker, 37 S.W.2d 1064, 1066 (Tex. Civ. App. 1931) (El Paso).
726 Gulf C. & S.F. Ry. Co. v. Caldwell, 102 S.W. 461, 462 (Tex. Civ. App. 1907).
727 Friemel v. Coker, 218 S.W. 1105, 1108 (Tex. Civ. App. 1920) (Amarillo).
728 Gloor & Co. v. West, 89 S.W. 783 (Tex. Civ. App. 1905).
729 Texas & Pacific Ry. Co. v. Bayliss, 62 Tex. 570, 572 (1884). See generally 13 TEX. JUR. 42 (sec. 37).

tured.[730] When the injury is only partial, "the measure of the damages is the difference between the value of the crop immediately before and its value immediately after the injury."[731]

Since a cause of action for damages to crops is assignable,[732] a tenant may assign his cause of action against the landlord for breach of a covenant to furnish sufficient water to irrigate a rice crop.[733]

Criminal liability in regard to crops. Injury to and destruction or theft of crops is punishable under Texas criminal laws. Any person willfully and mischievously injuring or destroying any "growing fruit, corn, grain or other like agricultural product," on conviction may be fined.[734] Further, willfully burning another's "stack of corn, hay, fodder, grain or flax" is punishable by fine and imprisonment.[735] Similarly, anyone willfully or negligently setting fire to any grass not his own or causing fire to spread to such grass so as to cause loss or injury to another upon conviction, may be punished by fine or imprisonment, or both.[736]

"Whoever shall fraudulently take or pluck, sever or carry away any Indian corn, or wheat, cotton, potatoes, rice or other agricultural product, growing, standing or remaining ungathered . . . shall be guilty of theft."[737] Punishable also under the State's criminal code is stealing cotton or cotton seed,[738] citrus fruits,[739] wool, mohair or edible meats.[740]

Sharecropper's Rights in Crops

Nature of cropper's interest in crops. The extent and nature of a sharefarmer's interest in the crops grown depends upon the terms of the agreement between the parties.[741] "The mutual intention of the parties . . . must determine the contract."[742] Where under the agreement a tenancy is created,

730 Gerhart v. Harris County, 244 S.W. 1103, 1107 (Tex. Civ. App. 1922); affirmed, 115 Tex. 449, 283 S.W. 139 (1926).
731 International & G. N. R. Co. v. Pape, 73 Tex. 501, 11 S.W. 526, 527 (1889). See generally 13 TEX. JUR. 44 (sec. 38).
732 Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 382, 17 S.W. 19, 24 (1891). See 5 TEX. JUR. 19 (sec. 16).
733 Raywood Rice Canal & Milling Co. v. Langford Bros., 32 Tex. Civ. App. 401, 74 S.W. 926, 929 (1903).
734 TEX. ANN. PEN. CODE art. 1350 (Vernon, 1925, Supp. 1949). See generally 13 TEX. JUR. 8 (sec. 7).
735 TEX. ANN. PEN. CODE art. 1318 (Vernon, 1925).
736 TEX. ANN. PEN. CODE art. 1388b-1 (Vernon, 1925, Supp. 1949).
737 TEX. ANN. PEN. CODE art. 1426 (Vernon, 1925).
738 TEX. ANN. PEN. CODE art. 1426a (Vernon, 1925, Supp. 1949).
739 Id., art. 1426b.
740 Id., art. 1426c.
741 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
742 Jaco v. W. A. Nash & Co., 236 S.W. 235, 237 (Tex. Civ. App. 1921) (Dallas).

although rent is payable in kind, the entire title to the crop is in the tenant, with a lien in favor of the landlord.[743]

However, if the contract provides for division of specific crops and the landlord reserves an undivided share, the parties become "tenants in common" of the crops raised.[744] Such "tenants in common" are at times referred to by the courts as "joint owners of the crop," in which each owns the interest agreed upon;[745] and under a "half and half" crop-sharing contract it has been held that "each acquires title to an undivided one-half interest in the crop grown upon the land."[746]

A landowner, of course, may retain entire title to the crop and pay the cropper a share of the crop for his labor. The cropper, under such agreement, is a servant (laborer) of the landowner and has no interest in the land or title in the crop before it is divided.[747] Such cropper-laborer wage agreements may provide for payment of wages in a share of the crops grown, in a share of livestock increase, milk sales or other joint efforts.[748]

Cropper's right to mortgage or sell interest in crop. Since under an agreement for "cropping on the shares" the cropper and the landowner each owns the interest in the crop agreed upon,[749] either may "execute a chattel mortgage upon his definite interest in such specific property."[750] However, a cropper farming on the "halves" can give a mortgage lien on only "that portion of one-half of the crop which would remain after paying for those advances made by the owner of the land."[751] Further, where a tenant on the shares has a right to sell in the field his portion of a matured cotton crop, the purchaser has "the right to gather it and sell it, subject to the landlord's lien for rent and advances, with the right of ingress and egress to do so."[752]

Another potential asset of croppers available as a basis for obtaining annual credit is the conservation assistance

743 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896); Jaco v. W. A. Nash & Co., 236 S.W. 235, 237 (Tex. Civ. App. 1921) (Dallas); see Curlee v. Rogan, 136 S.W. 1126, 1127 (Tex. Civ. App. 1911); see generally 27 TEX. JUR. 390 (sec. 235).
744 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
745 Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin); Texas Produce Exchange v. Sorrell, 168 S.W. 74, 76 (Tex. Civ. App. 1914) (San Antonio). See generally 13 TEX. JUR. 35 (sec. 32).
746 Rogers v. Frazier Bros. & Co., 108 S.W. 727, 728 (Tex. Civ. App. 1908).
747 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
748 See Hall v. White, 208 S.W. 669, 670 (Tex. Civ. App. 1919) (Beaumont).
749 Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1918) (Austin).
750 Bowyer v. Beardon, 116 Tex. 337, 291 S.W. 219, 222 (Tex. Comm. App. 1927). See generally 27 TEX. JUR. 392 (sec. 236).
751 McGee v. Fitzer, 37 Tex. 27, 29 (1872).
752 Elliott v. Dodson, 297 S.W. 520, 523 (Tex. Civ. App. 1927) (Fort Worth); see Davis v. Goldberg, 75 Tex. 48, 12 S.W. 952, 953 (1889).

payments which may be earned under the agricultural conservation program.[753]

Cropper's rights in crop on sale of farm. Upon sale of land, title to growing crops belonging to the landowner, unless reserved, passes to the purchaser.[754] If the land is under lease and the lease provides that the landlord should "receive one-fourth of the cotton as rent," then on sale of the premises the right to the rent, or to one-fourth of the cotton, would pass to the purchaser; and after the cotton is matured and gathered, title to one-fourth of it would vest in the purchaser.[755] On the other hand, if the lease provides that the landlord should "receive as rents one-fourth of the proceeds of the cotton instead of one-fourth of the cotton itself," then on sale of the premises legal title to the cotton remains in the share-rent tenant.[756] An employee-cropper's interest in the crop is personalty and, hence, does not pass with the deed conveying the land.[757]

Improper cultivation—abandonment of crop by cropper.[758] Where a farm is operated on the shares, and the landowner is to receive part of the crop for use of the land, there is an implied covenant that ordinary care should be exercised by the tenant (or cropper) to cultivate the premises in a farmer-like manner.[759] Unless the contract contains a forfeiture clause or authorizes reentry because of improper cultivation, the landowner has no right of reentry on that account but is "confined to his legal remedy through the courts."[760] And, where the landowner was to receive one-third of the wheat and oats grown as his share of the crop, a claim for damages for failure to cultivate in a workmanlike manner was held not too remote, speculative or uncertain.[761]

However, where a share-renter or cropper abandons a growing crop, the landowner may complete the undertaking of making and harvesting the crop and, after setting aside his own rent share, appropriate a sufficient amount of the share-renter's or cropper's share to defray the expenses necessitated by the abandonment and to repay any advances he

753 See additional discussion under subtitle "Right to Conservation Practice Payments," infra p. 158.
754 Ray v. Foutch, 50 S.W.2d 380, 381 (Tex. Civ. App. 1932) (Amarillo). See 27 TEX. JUR. 393 (sec. 237).
755 Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth).
756 Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth).
757 See Ray v. Foutch, 50 S.W.2d 380, 382 (Tex. Civ. App. 1932) (Amarillo).
758 See additional discussion under subtitle "Abandonment of crop by tenant," supra p. 104.
759 See Cammack v. Rogers, 32 Tex. Civ. App. 125, 74 S.W. 945, 948; certified question answered, 96 Tex. 457, 73 S.W. 795 (1903); see also 27 TEX. JUR. 395 (sec. 239).
760 Yarbrough v. Brookins, 294 S.W. 900, 904 (Tex. Civ. App. 1927) (Amarillo).
761 Shotwell v. Crier, 216 S.W. 262, 263 (Tex. Civ. App. 1919) (Fort Worth).

had made to the share-renter or cropper. The same rule applies where a tenancy in common in the crop exists.[762] The balance of the cropper's share of the crop, after deduction of the landowner's necessary outlays and advances, does not become the property of the landowner but belongs to the cropper.[763]

Cropper's remedies when landowner wrongfully takes possession of crop.[764] Where a landowner wrongfully takes possession of an employee-cropper's share of a crop raised under an agreement for a "tenancy in common," the cropper, in case the crop is matured and ready for division, may bring his action against the landowner for a partitioning or, if the crop cannot be had, for the value of his share.[765] If the crop has been sold, the cropper may bring an action for an accounting and for the amount due him out of the proceeds received from the sale.[766]

Each of a number of sharecroppers in one situation who, though only one instrument was executed, individually agreed to individually work separate tracts of land it was held could sue the landowner for breach of the agreement without joining the others;[767] but if the agreement is between the landowner and two lessee-croppers jointly, both croppers should join in an action against the landowner; and if one cropper refuses to join as a plaintiff, he should be made a party defendant.[768]

Although "exemplary damages are not allowed for the breach of an ordinary contract, or for the ordinary wrongful taking or conversion of property . . . the breach of a contract or the taking or conversion of property may be accompanied by such wilful acts of violence, malicious or oppressive conduct, as would subject the wrongdoer to exemplary damages."[769] So, where the landowner tortiously seizes the crop of his co-tenant, the wrongdoer cannot complain if the cost of gathering the crop is not deducted from the damages recovered by the cropper.[770]

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762 Rogers v. Frazier Bros. & Co., 108 S.W. 727, 729 (Tex. Civ. App. 1908); Jaco v. Nash, 236 S.W. 235, 238 (Tex. Civ. App. 1921) (Dallas). See 13 TEX. JUR. 34 (sec. 31).

763 Rogers v. Frazier Bros. & Co., 108 S.W. 727, 729 (Tex. Civ. App. 1908).

764 See additional discussion under subtitle "Interference with Occupancy of a Farmer on Shares," supra p. 41.

765 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896). See generally 27 TEX. JUR. 397 (sec. 240), and 13 TEX. JUR. 41 (sec. 36).

766 Folschinsky v. Rocha, 41 S.W.2d 333 (Tex. Civ. App. 1931) (Austin); Rhoades v. Pointer, 243 S.W. 583, 585 (Tex. Civ. App. 1922) (Beaumont).

767 Gazley v. Wayne, 36 Tex. 689, 690 (1872).

768 Dawson v. George, 193 S.W. 495, 496 (Tex. Civ. App. 1917) (El Paso).

769 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).

770 Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S.W. 664, 665 (1904); Barnett v. Govan, 241 S.W. 276, 277 (Tex. Civ. App. 1922) (Texarkana).

Cropper may sue third persons who injure or take possession of crop. A farmer tenant-on-shares has a sufficient interest in the crop to bring an action for damages against third persons for injuries to the crop,[771] or for wrongful taking or conversion of the crop,[772] notwithstanding the landlord's superior right to a share of the crop and his lien for advances.[773] However, to recover the entire damage done, the tenant in common should join the landowner in the suit; otherwise recovery may be obtained only for the cropper's proportionate interest.[774]

Where the conversion or wrongful taking of the crop is the result of a willful trespass by a third person, who harvested the crop, the cropper may recover in damages the full value of his share without deducting the trespasser's expense for harvesting and marketing the crop.[775]

Landlord's Rights in Crops—Landlord's Liens

"At common law a landlord had no lien for rent and it exists only by statute or contract."[776] Texas statutes, however, accord a lien to a landlord who leases buildings, lands or pastures to another.[777] Briefly, a landlord letting a residence, storehouse or other building is given a preference lien on all property of the tenant therein to secure the payment of rent, such lien to continue so long as the tenant is in possession and for one month thereafter.[778] Similarly, a landlord who rents lands has a statutory preference lien on the crops grown, and on property supplied the tenant to make the crops, for rent and for advances furnished by the landlord.[779] Also, owners of pastures are given a special lien on all animals placed with them for pasture for the amount of the charges.[780]

"There is no constitutional provision protecting landlords in the lien given by the statute, and . . . it is in the power of the Legislature to restrict this lien in such manner as it deems

771 Parker v. Hale, 78 S.W. 555, 556 (Tex. Civ. App. 1903). See 13 TEX. JUR. 38 (sec. 34).
772 Ray v. Foutch, 50 S.W.2d 380, 381, 382 (conversion by assignee of landlord). See 27 TEX. JUR. 403 (sec. 243).
773 Parker v. Hale, 78 S.W. 555, 556 (Tex. Civ. App. 1903).
774 See Gulf C. & S.F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S.W. 43, 45 (1894); and Texas & N.O.R. Co. v. Smith, 35 Tex. Civ. App. 351, 80 S.W. 247 (1904), holding that in a suit to recover the entire damages to a common estate in real property all the tenants in common must join.
775 See Ray v. Foutch, 50 S.W.2d 382 (Tex. Civ. App. 1932) (Amarillo). (Conversion by assignee of landlord.)
776 See 6 TEX. L. REV. 393 (1928); 8 TEX. L. REV. 154 (1929); 27 TEX. JUR. 101 (sec. 39).
777 TEX. ANN. REV. CIV. STAT. arts. 5238 and 5222 (Vernon, 1947), and TEX. ANN. REV. CIV. STAT. art. 5502 (Vernon, 1941).
778 TEX. ANN. REV. CIV. STAT. art. 5238 (Vernon, 1947).
779 Id., art. 5222.
780 TEX. ANN. REV. CIV. STAT. art. 5502 (Vernon, 1941).

best for the public interest, or to entirely abolish such . . . lien."[781]

The existence of a statutory landlord's lien for rent on a crop raised by a tenant does not make the crop the landlord's property, though the tenant told the landlord to attach it in the field, which was never done.[782] Nor does the statutory landlord's lien confer upon the landlord the right to possession of the crop.[783] The lien gives the landlord "no right of his mere motion to enter and take, or retain in his possession, the property of his debtor tenant," but it does confer a right "to make subject to the payment of his debt the property of his tenant, and this he must do by the means the law provides."[784] Even "where the rent is payable in kind from the crops to be grown, the landlord does not become the owner of any portion of the crops until such portion is segregated and delivered to him; but . . . he has the fixed right to become the owner when the time for segregation and delivery arrives. To secure this right he holds the landlord's lien."[785]

Where a landlord could not claim a statutory lien, the court inferred he might have provided for a lien by express contract with the tenant.[786] Further, such a contract lien may be enforced where the statutory lien on the crop has lapsed.[787] A contract lien may be created by provisions in the lease contract.[788] A tenant may by the usual chattel mortgage contract create a lien on the crop in addition to the statutory liens.

Of the various types of landlords' liens discussed above, the statutory liens for rent and advances are of greatest interest to Texas farmers. Therefore, only these statutory liens are developed in detail below.

Landlord's statutory lien on the crop for rent. The landlord has a preference lien on the current crop raised upon the premises and on animals, tools and other property supplied the tenant, for rent and for necessary supplies furnished by the landlord to enable the tenant to make, harvest and prepare

781 Dunbar v. Texas Irr. Co., 195 S.W. 614, 616 (Tex. Civ. App. 1917) (Galveston). See 27 TEX. JUR. 102 (sec. 39).
782 Burke v. Holmes & Hargis, 80 S.W. 564, 565 (Tex. Civ. App. 1904).
783 Evans v. Groesbeck, 42 Tex. Civ. App. 43, 93 S.W. 1005, 1006 (1906), third appeal; 40 Tex. Civ. App. 216, 88 S.W. 889 (1905) second appeal; 40 Tex. Civ. App. 216, 83 S.W. 430 (1904), first appeal.
784 Laux v. Glass, Moffitt, Armstrong & Co., 1 White & W. Civ. Cas. Ct. App. sec. 1182 (1881). See generally 27 TEX. JUR. 104 (sec. 41).
785 Millingar v. Foster, 17 S.W.2d 768, 769 (Tex. Comm. App. 1929), affirming 8 S.W.2d 514 (Tex. Civ. App. 1928); 293 S.W. 249 (Tex. Civ. App. 1927), first appeal.
786 See Citizens State Bank of Alvarado v. Schmauder, 139 S.W.2d 619, 621 (Tex. Civ. App. 1940) (Waco).
787 Carlile v. Taub, 283 S.W. 570, 571 (Tex. Civ. App. 1926) (Texarkana).
788 See Pair v. Scoggins, 54 S.W.2d 841, 842 (Tex. Civ. App. 1932) (Amarillo, urban).

such crop for market;[789] except that this preference lien does not apply where a tenant who provides everything except the land is charged a rental of more than one-third of the value of the grain and more than one-fourth of the value of the cotton raised, nor does it apply where a tenant who provides only the labor is directly or indirectly charged a rental of more than one-half the value of the grain and cotton raised.[790] The landowner does not have a lien for rent on the share of the crop belonging to a "cropper on the shares."[791]

The statutory landlord's lien[792] is created by statute and "springs by operation of law from the relationship of landlord and tenant."[793] In other words, where a tenancy is created there exists "perforce of that relationship a preference lien under the law" in favor of the landlord.[794] The "landlord's lien upon the crops grown upon the rented premises is given by statute, and exists without any instrument in writing, and, therefore, is not required to be placed upon record."[795] Since the "landlord's lien arises by operation of law from facts which bring the transaction within the terms of the statute,"[796] no recordation is necessary to give notice of such lien to purchasers of the crop.[797]

The landlord's lien is given by statute and exists independent of seizure under the distress warrant.[798] "Seizure by distress warrant only serves to secure the property that the lien on it may be made effective."[799] "A distress warrant is but a mode of enforcing the lien, but does not create it. The law does that."[800]

In a decision in 1903, the court stated: "While the statute does not, in express terms, restrict the lien given the landlord to the crop raised during the year in which the rent accrues, . . . we are of opinion that such is the proper construction to be given the statute."[801] The rule in this case is now em-

789 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
790 See additional discussion under subtitle "Statutory regulation of rent," supra p. 58.
791 See additional discussion under subtitle "Landowner's interest in crops grown by cropper," infra p. 114.
792 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
793 Noska v. Mills, 141 S.W.2d 429, 431 (Tex. Civ. App. 1940) (Dallas).
794 Stoma v. Filgo, 26 S.W.2d 1100, 1102 (Tex. Civ. App. 1930) (Dallas, urban).
795 Caswell v. Lensing & Bennett, 183 S.W. 75, 77 (Tex. Civ. App. 1915) (Austin).
796 Gillett v. Talley, 60 S.W.2d 868, 870 (Tex. Civ. App. 1933) (Austin).
797 First Nat. Bank of Quitaque v. Pointer, 51 S.W.2d 781, 783 (Tex. Civ. App. 1932) (Amarillo).
798 Templeman v. Gresham, 61 Tex. 50, 52 (1884); Berkey & Gay Furniture Co. v. Sherman Hotel Co., 81 Tex. 135, 16 S.W. 807, 810 (1891) (urban); Newman v. Ward, 46 S.W. 868, 870 (1898); Polk v. King, 19 Tex. Civ. App. 666, 48 S.W. 601, 602 (1898); Crutcher v. Wolfe, 269 S.W. 841, 843 (Tex. Civ. App. 1925) (Waco); Newburg v. Spinhirne, 35 S.W.2d 1084, 1086 (Tex. Civ. App. 1931) (Amarillo).
799 Templeman v. Gresham, 61 Tex. 50, 52 (1884).
800 Berkey & Gay Furniture Co. v. Sherman Hotel Co., 81 Tex. 135, 16 S.W. 807, 810 (1891) (urban).
801 Walker v. Patterson's Estate, 33 Tex. Civ. App. 650, 77 S.W. 437, 438 (1903). See 27 TEX. JUR. 124 (sec. 56).

bodied in the landlord lien statute.[802] Under this rule and under the present statute a landlord would not have a statutory lien on the current year's crop for rents due for the following year. A contract lien on the previous year's crops for such future rents might possibly be enforceable.[803]

The statutory lien given to persons leasing lands to secure the payment of rent "applies only to animals, tools, and other property furnished by the landlord to the tenant, and to crops raised on the rented premises" during the crop year, and does not give the landlord a lien on the tenant's furniture.[804] Nor is the landlord entitled to a preference lien on the tenant's share of AAA payments, since Federal subsidies or bonuses for idle land cannot be construed as "crops grown upon the premises," within the meaning of the lien statute.[805]

Where the landlord expressly waived his lien on the subtenant's crop and looked alone to the head-tenant for rent, the head-tenant was held to have a landlord's lien against his sub-tenants for the benefit of both himself and his landlord.[806] Similarly, if a tenant in common of land leases his interest therein to his co-tenant, he is entitled to a preference lien for the rent, etc., on the portion so rented.[807]

Assignment by the landlord of a written obligation by the tenant to pay rent carries with it the landlord's lien.[808] The same rule was applied where a landlord assigned a note received from the tenant in payment for livestock and tools used in making the crop.[809]

The lien of the landlord on the crops for rent and advances will attach for the whole rental and is enforceable against all persons who buy any of the crop grown on the rented premises during the period of time within which the lien is operative.[810]

Landowner's interest in crops grown by cropper. A landowner, of course, may reserve a specific interest in the crops grown on the premises and in such event he has something more than a landlord's lien for rent. He has title at all times to that part of the crop which he reserved in the contract.[811]

802 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
803 See Carlile v. Taub, 283 S.W. 570, 571 (Tex. Civ. App. 1926) (Texarkana).
804 See Constantine v. Fresche, 17 Tex. Civ. App. 444, 43 S.W. 1045, 1046 (1897) (urban).
805 Noska v. Mills, 141 S.W.2d 429, 431 (Tex. Civ. App. 1940) (Dallas).
806 Frith v. Wright, 173 S.W. 453, 456 (Tex. Civ. App. 1915) (Amarillo).
807 Grabfelder v. Gazetti, 26 S.W. 436, 437. Decision construes art. 3107, Code of 1879, which as amended appears in TEX. ANN. REV. CIV. STAT. as art. 5222 (Vernon, 1947).
808 Hatchett v. Miller, 53 S.W. 357 (Tex. Civ. App. 1899).
809 McCollum v. Hammit, 279 S.W. 881, 882 (Tex. Civ. App. 1925) (Eastland).
810 Koontz v. Savely, 233 S.W. 540, 543 (Tex. Civ. App. 1921) (San Antonio).
811 See Horsley v. Moss, 5 Tex. Civ. App. 341, 23 S.W. 1115, 1116 (1893).

If the agreement provides that the landowner is to receive one-fourth of the cotton as rent, then title to one-fourth of the cotton when mature and harvested vests in the landowner; but if it was agreed that he should receive one-fourth of the proceeds of the cotton as rent, then title to the cotton vests in the tenant[812] and the landlord has a lien for his rent.[813] Ownership of part of the crop and a lien for rent "are inconsistent interests, and cannot exist together in the same person as to the same subject matter."[814] Therefore, where the parties are tenants in common in the crops, a statutory lien does not exist to secure the landowner his fractional part, which may at times be referred to as "rent."[815] The landowner, however, is entitled to a lien on the cropper's share of the crop to secure money advanced by the landowner to make and gather the crop.[816]

Landlord's statutory lien on crop of tenant's assignee or of his cropper or of subtenant. Under Texas statutes,[817] as construed, the "landlord has a lien on all the crops raised on the rented premises, unless this be surrendered by contract; and it matters not whether the premises be cultivated by the original lessee, his assignee, or a subtenant."[818] This statutory lien on the crop, unless waived, exists whether the landlord's consent to the assignment or subletting is or is not given.[819] In other words, unless waived, the landlord has a statutory lien for rent "on all the products grown upon his farm," whether raised by his tenant or by the tenant's subtenant or assignee, and whether the landlord did or did not consent to the subletting.[820] In another decision to the same effect the court held that "the landlord has a lien on all crops raised on the rented premises whether the land was cultivated by the tenant in person or by his agent, or subtenant." The court there based its decision on the statute then in effect,[821] which gives the landlord a preference lien for rents and advances, and said that "this lien extends to all of the crop raised, and the lien is not satisfied until all of

812 Mason v. Ward, 166 S.W. 456 (Tex. Civ. App. 1914) (Fort Worth).
813 Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
814 Antone v. Miles, 47 Tex. Civ. App. 289, 105 S.W. 39, 41 (1907).
815 Rosser v. Cole, 226 S.W. 510, 511 (Tex. Civ. App. 1921) (Amarillo). See 27 TEX. JUR. 110 (sec. 44).
816 Penn. v. Hare, 223 S.W. 527, 529 (Tex. Civ. App. 1920) (Texarkana).
817 CIV. STAT. art. 3122 (Sayles, 1879) now appearing in TEX. ANN REV. CIV. STAT. as art. 5237 (Vernon, 1947); and CIV. STAT. art. 3107 (Sayles, 1879), now appearing as amended in TEX. ANN. REV. CIV. STAT. as art. 5222 (Vernon, 1947).
818 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894). See generally 27 TEX. JUR. 110 (sec. 45).
819 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894). See additional discussion under subtitle "Assignment or subletting of leasehold," infra p. 173.
820 Edwards v. Anderson, 36 Tex. Civ. App. 611, 82 S.W. 659 (1904).
821 TEX. ANN. REV. CIV. STAT. art. 5475 (Vernon, 1918), now appearing as art. 5222 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947).

the rent and advances have been paid."[822] In the latter case, the crop was raised by the tenant's "help," a son who lived on the farm.

An early court had held that in the absence of consent to sublease, as required by statute,[823] "all produce raised on the rented premises, whether by the tenant or a so-called 'subtenant,' is subject to the statutory lien for rent and advances."[824] Both under this early statute and under the present one, re-renting of leased premises to an assignee or under-tenant is illegal without the consent of the landlord.[825] "If the consent of the landlord be not given, such assignees or subtenants, in so far as the landlord and his rights are concerned, must be treated simply as employee of the lessee."[826] Such assigning or subletting of leased premises, without the consent of the landlord, is voidable at his option.[827]

The mere fact that the landlord "consents for the tenant to sublease, and that the subtenant may pay rent to the tenant," does not release the sub-tenant's crop from the landlord's statutory lien for rent.[828] Under an earlier statute, essentially like the present one, the court stated: "The subtenant's crop may be under a double lien—that of the owner of the land, and that of his immediate lessor—but the former is paramount, and the rent due on the primary lease must be satisfied."[829] However, "If the subtenant in such case, where the landlord agreed to the subtenant, pays rent to the landlord, he would be entitled to a credit for the amount paid on the claim of the original tenant against him."[830] A landlord who leases a pasture has a statutory lien for rent on the cattle[831] of his tenant, and, the court concluded, on the cattle of the tenant's assignee as well. Such a landlord's lien also applies to the cattle of a subtenant.[832]

Although not required under the landlord lien statute, a landlord may, in the written lease contract with the original

822 Green v. Scales, 219 S.W. 274, 275 (Tex. Civ. App. 1920) (Fort Worth); see Mauritz v. Markloff, 268 S.W. 230, 231 (Tex. Civ. App. 1925) (Galveston).
823 CIV. STAT. art. 3122 (Sayles, 1879), listed in TEX. ANN. REV. CIV. STAT. (Vernon, 1947) as art. 5237.
824 Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S.W. 126, 127 (1893).
825 CIV. STAT. art. 3122 (Sayles, 1879), listed in TEX. ANN. REV. CIV. STAT. (Vernon, 1947) as art. 5237.
826 See Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894).
827 Elliott v. Dodson, 297 S.W. 520, 522 (Tex. Civ. App. 1927), second appeal; 272 S.W. 263, 265 (Tex. Civ. App. 1925), first appeal.
828 Trout v. McQueen, 62 S.W. 928 (Tex. Civ. App. 1915).
829 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894).
830 See Marrs v. Lumpkins, 22 Tex. Civ. App. 448, 54 S.W. 775, 777; also see Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894).
831 TEX. ANN. REV. CIV. STAT. art. 5665 (Vernon, 1911), now appearing in TEX. ANN. REV. CIV. STAT. (Vernon, 1941) as art. 5502.
832 Russell v. Old River Co., 210 S.W. 705, 708 (Tex. Civ. App. 1919) (Beaumont).

tenant, expressly reserve his lien for rent upon all the crops raised upon the rented premises.[833]

Landowner's statutory lien for advances or furnish. A landlord has a statutory preference lien for advances "for all money and the value of all animals, tools, provisions and supplies furnished or caused to be furnished by the landlord to the tenant to make a crop on such premises; and to gather, secure, house and put the same in condition for marketing. . . . This lien shall apply only to animals, tools and other property furnished or caused to be furnished by the landlord to the tenant and to the crop raised on such premises."[834]

The statute applies and a lien for advances exists only where the contract between the parties creates the relationship of landlord and tenant. The statute applies in cases of cash tenancies and to share-farming agreements, where such share agreements create the relation of landlord and tenant.[835] Under another type of share-farming or cropping agreement, the cropper is the mere employee of the landowner. The landowner, under these cropping contracts, retains title to the entire crop, which, of course, is more than a lien.[836] But the landlord-tenant relationship does not exist[837] and no landlord's statutory lien arises.[838] This is equally true in those share-farming agreements which create a tenancy in common in the crop but are not rental contracts creating the landlord-tenant relationship. Here, also, no statutory landlord's lien for advances arises.[839]

The statutory lien for advances, like the lien for rent, is not absolute, but exists only if the landlord's proportional "rent"-share of the crop does not exceed the maximum permitted under the act.[840] The lien inures to the benefit of the "landlord," so that another who furnishes supplies or makes advances is not entitled to a statutory landlord's lien.[841]

The act provides that the landlord's furnish "lien shall apply only to the crop or crops grown on the premises for the year in which the same is furnished or caused to be furnish-

833 See Land v. Roby, 56 Tex. Civ. App. 333, 120 S.W. 1057 (1909).
834 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
835 Spurlock v. Hilburn, 32 S.W.2d 396 (Tex. Civ. App. 1930); see Jaco v. W. A. Nash & Co., 236 S.W. 235, 237 (Tex. Civ. App. 1921).
836 See Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S.W. 881, 882 (1896).
837 Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543, 545 (1929).
838 See Rentfrow v. Lancaster, 10 Tex. Civ. App. 321, 31 S.W. 229, 231 (1895).
839 Jaco v. W. A. Nash & Co., 236 S.W. 235, 237, 238 (1921). But see 27 TEX. JUR. 391, where it is said that: "While a farming on shares does not give rise to a lien in favor of the land owner to secure the payment of rental, a lien in his behalf on the share of the cropper may exist for advances and furnishings."
840 See additional discussion under subtitle "Statutory regulation of rent," supra p. 58.
841 Houston Nat. Exch. Bank v. Osceola Irrigating Co., 261 S.W. 561, 563 (Tex. Civ. App. 1923) (Galveston). See generally 27 TEX. JUR. 107 (sec. 43).

ed."[842] Differently stated, "The lien is given for supplies furnished and advances made to the tenant to enable him to make the crop, and only attaches to the crop for the making of which such advances were made or supplies furnished."[843]

The landlord has no statutory lien, on either the current crop or on livestock or farming implements furnished, to secure a debt owed by the tenant for "a span of horses, a wagon, a cultivator, a turning plow, a cotton planter, a set of harness, etc.," transferred prior to negotiation of the lease.[844] Nor has the landlord such a lien on the current crop for debts owing because of advances made to make the previous year's crop.[845] "Of course, the tenant could give a mortgage lien on his crop raised in one year to secure the landlord in the payment of amounts due him for supplies or advancements in previous years."[846] Similarly, no statutory "landlord's lien could exist as against a crop raised in 1909 for advances made or supplies furnished the same tenant during the year 1910."[847] However, a lien in favor of the landlord on the last year's cotton for the following year's debts could have existed had the parties by agreement created such an express contractual lien.[848]

A landlord will not be entitled to a statutory lien on the crop for advances unless it is shown that the crop in controversy was grown by the tenant on the land turned over to him by the landlord.[849]

Supplies "furnished" must be necessary to make the crop. The statute conferring on the landlord a preference lien for advances or furnish requires that "the money, animals and tools and provisions and supplies so furnished or caused to be furnished" to the tenant be "necessary" to make the crop on the premises or "to gather, secure, house and put the same in condition for marketing."[850]

A number of decisions allowing or disallowing statutory liens indicate what advances of moneys, animals, tools, provisions or supplies, under the facts of these cases, were deemed "necessary" by the courts to make the crop.

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842 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
843 Walker v. Patterson's Estate, 33 Tex. Civ. App. 650, 77 S.W. 437, 438 (1903); Lasater v. Streetman, 154 S.W. 657, 658 (Tex. Civ. App. 1913) (Fort Worth). See generally 27 TEX. JUR. 124 (sec. 56); and 8 TEX. L. REV. 154 (1929).
844 Liles v. Price, 51 S.W. 526, 527 (Tex. Civ. App. 1899).
845 See TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947); and Precker v. Slayton, 138 S.W. 1160, 1161 (Tex. Civ. App. 1911) (Austin).
846 Walker v. Patterson's estate, 33 Tex. Civ. App. 650, 77 S.W. 437, 438 (1903).
847 McMullen v. Green, 149 S.W. 762, 765 (Tex. Civ. App. 1912) (Amarillo).
848 McMullen v. Green, 149 S.W. 762, 765 (Tex. Civ. App. 1912) (Amarillo).
849 See Sewell v. Pierce, 245 S.W. 745 (Tex. Civ. App. 1922); reversing on rehearing 244 S.W. 1034 (Tex. Civ. App. 1922) (Texarkana).
850 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947); see Sewell v. Pierce, 245 S.W. 745 (Tex. Civ. App. 1922); reversing on rehearing 244 S.W. 1034 (Tex. Civ. App. 1922) (Texarkana); also see 27 TEX. JUR. 128 (sec. 58).

A statutory lien on the crop was allowed a landlord in one case for supplies and advances furnished to the tenant to make the crop, including a plow, meal, 10 yards of calico, cash, bagging and ties, flour, pasturage for work stock used in cultivating the crop and pasturage for cows from which the tenant obtained milk for his family during the time he was cultivating the farm. However, a lien covering a charge of "$4 for hire of team," used for purposes not connected with cultivation of the farm, was denied.[851] Another landlord was granted a statutory preference lien on the tenant's share of the crop for money supplied, one mule, one set of wagon lines and for cottonseed, all furnished to the tenant for the purpose of making and gathering the crop. A similar lien for the value of a wagon supplied but allegedly paid for by the tenant through clearing land was denied.[852] Hogs furnished the tenant "as food for himself and family while making the crop" were held subject to the landlord's statutory lien.[853]

A landlord who sold his tenants two tractors, one wheat drill and one cylinder plow to enable them to plant and sow a wheat crop, taking notes reserving a lien on the machinery, was held to have a statutory preference lien on the implements and on the tenants' interest in the crop produced, which lien on transfer of the notes for value was likewise transferred to the assignee.[854] Another landlord sold to his tenant on credit, secured by a mortgage, 17 head of work stock, farm implements, machinery and some stock feed for the purpose of enabling the tenant to make, harvest, secure and market the crop. Only 6 of the 17 head of livestock were found necessary to make and finish the crop. The court held the statutory landlord's lien attached to only 6 head, and to tools, implements and the crop. However, the landlord was allowed to select, from the 17 head sold, those on which the landlord's lien should attach and to have his statutory lien foreclosed thereon.[855]

Where a tenant owed a balance due from the previous year, which he had at hand and stood ready to pay, but insisted and urged that he be permitted to borrow this sum to use in making and gathering the following year's crop, the

851 Thomas v. Tucker, Zeve & Co., 40 Tex. Civ. App. 337, 89 S.W. 802 (1905), second appeal; 35 Tex. Civ. App. 449, 80 S.W. 649 (1904), first appeal.
852 Guaranty Bond State Bank of Timpson v. Redding, 24 S.W.2d 457, 458, 461 (Tex. Civ. App. 1929) (Beaumont).
853 Stephens v. Cox, 255 S.W. 241, 242 (Tex. Civ. App. 1923) (Austin); on rehearing, 256 S.W. 643 (Tex. Civ. App. 1923).
854 First Nat. Bank of Quitaque v. Pointer, 51 S.W.2d 781, 783 (Tex. Civ. App. 1932) (Amarillo).
855 Griffin v. Mangrum, 267 S.W. 279 (Tex. Civ. App. 1924) (Dallas).

landlord who agreed to the loan was held entitled to a statutory lien for the sum as an advancement on the following year's crop.[856] However, in another decision where a tenant owed 30 bushels of corn as rent for the previous year, which, instead of delivering to the landlord, he was permitted to keep on his representation that he would need it to use that winter and in making a crop for the following year, the landlord was denied a statutory lien on the new crop for its value. The court held that the landlord did not "furnish" the corn, but merely waived his right to have it turned over to him and granted an extension of time in which to pay as rent the amount represented by the corn.[857] The soundness of this decision has been questioned.[858]

A landlord who, in a suit to foreclose a lien for rents and advances, wrongfully sued out a distress warrant (which was quashed) and levied on and seized the tenant's crops, was denied recovery as "advancements" of sums advanced to the sheriff to complete harvesting the crops and preparing them for market. "Liability for advances is based on contract, express or implied." Expenditures on the crop without the tenant's consent and without lawful authority were held not money furnished the tenant "to enable him to gather the crop and prepare it for market."[859] But where the tenant abandoned the crop, the landlord was held entitled to a preference lien on the crop for amounts paid for labor for hauling and harvesting, and for supervising and looking after the gathering of the crop. In addition, the landlord was allowed a lien for the price of a truck necessary for the harvesting, sold to the tenant before he abandoned the lease.[860]

In a decision involving lease of a farm for "dairy farming," the court held that the landlord's statutory lien for rent under the landlord's lien statute[861] did not extend to 15 head of cattle placed on the premises by the tenant, "as the lien created by said article only extends to such animals, tools, and other property furnished by the landlord to the tenant and to the crops raised on the rented premises."[862] Nor could the landlord claim a statutory lien on the tenant's 15 head of cattle under that article which secured to operators of pas-

856 Guaranty Bond State Bank of Timpson v. Redding, 24 S.W.2d 457, 459 (Tex. Civ. App. 1929) (Beaumont).
857 Garden Valley Mercantile Co. v. Falkner, 189 S.W. 300, 301 (Tex. Civ. App. 1916) (Texarkana).
858 Gillett v. Talley, 60 S.W.2d 868, 870 (Tex. Civ. App. 1933).
859 Vaughn v. Anderson, 296 S.W. 332 (Tex. Civ. App. 1927) (Waco).
860 Roden v. Farmer's Nat. Bank of Arlington, 19 S.W.2d 331, 333 (Tex. Civ. App. 1929) (Fort Worth).
861 TEX. ANN REV. CIV. STAT. art. 5475 (Vernon's Sayles' 1914, Supp. 1918), now appears as amended as art. 5222 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947).
862 Sharp v. Jester, 239 S.W. 655, 657 (Tex. Civ. App. 1922) (Dallas).

tures a lien for the amount of charges against animals placed with them for pasturage.[863] Under the facts here existing the cattle were not placed with the landlord for pasturage, the pasture land being leased to the tenant for dairy purposes, which excluded the landlord from exercising any control over the land during the term of the lease.[864] Nor could the landlord in this case claim a statutory lien on the tenant's 15 head of cattle under the article which conferred a preference lien to secure the rent upon all property of the tenant "in such (leased) residence, storehouse, or other building."[865] It was held that the legislative intent was that the lien under this article should attach only to property owned by the tenant and located within the walls of a leased residence, storehouse or other building, or ordinarily used therein.[866]

Landlord to have statutory lien must be primarily liable for "furnish." "A landlord who has not himself furnished advances essential to the tenant's operations, but instead has merely become surety upon the obligations incurred by the tenant in procuring such advances, does not thereby acquire a lien superior to that of other creditors."[867] To entitle the landlord to the statutory lien on the crop for furnish supplied indirectly, the landlord primarily must be liable for the advancements made solely upon his own credit and he must not be merely secondarily liable as a surety. Necessarily, the landlord need not furnish direct from his own stores to raise a lien, but when advances are made to the tenant by a third party at the request of the landlord, it is essential to the existence of a lien that the third party shall look to the landlord for payment.[868] Where "the tenant remains bound to the third party for the debt, the lien does not attach."[869] In other words, the landlord alone must furnish the advances (directly or indirectly) and the tenant must be indebted alone to the landlord therefor.[870] Moreover, in order that a landlord who supplied a tenant through another's store may fix a lien on the tenant's crop for the advances, the tenant must know that the landlord, and not the tenant, is primarily liable for the

863 TEX. ANN. REV. CIV. STAT. art. 5664 (Vernon's Sayles' 1914) now appears as art. 5502 in TEX. ANN. REV. CIV. STAT. (Vernon, 1941).

864 Sharp v. Jester, 239 S.W. 655, 657 (Tex. Civ. App. 1922) (Dallas).

865 TEX. ANN. REV. CIV. STAT. art. 5490 (Vernon's Sayles' 1914, Supp. 1918) now appears as amended as art. 5238 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947).

866 Sharp v. Jester, 239 S.W. 655, 658 (Tex. Civ. App. 1922) (Dallas).

867 Matthews v. Melasky, 240 S.W. 641, 642 (Tex. Civ. App. 1922) (San Antonio). See generally 27 TEX. JUR. 121 (sec. 55).

868 Monroe v. Gaylor, 268 S.W. 724, 725 (Tex. Comm. App. 1925); reversing 260 S.W. 929 (Tex. Civ. App. 1924), second appeal; 221 S.W. 330, 332 (Tex. Civ. App. 1920), first appeal.

869 Kelley v. King, 18 Tex. Civ. App. 360, 44 S.W. 915, 916 (1898); 50 S.W. 629 (1899).

870 Kelley v. King, 18 Tex. Civ. App. 360, 44 S.W. 915, 916 (1898); judgment reformed in 50 S.W. 629 (Tex. Civ. App. 1899).

payment, and the tenant must consent or acquiesce in such arrangement.[871]

Since under the general rule a landlord who merely becomes a surety for the payment of the debt incurred by his tenant for supplies does not have a lien on the tenant's crop for such advances,[872] endorsing the tenant's note for money borrowed at the bank and used in crop operations does not create a crop lien in favor of the landlord, even though he signed with that understanding.[873] It has been held that neither the endorsement as a surety of a tenant's note given for mules,[874] nor the purchase by the landlord of such notes given by the tenant for mules, constituted mules "furnished" within the meaning of the landlord's lien statute.[875] However, a landlord's lien on the tenant's crop for advances was held to exist where money necessary to make a crop was loaned to the landlord on his note signed as a principal, even though the landlord "instructed the bank to pay it to his renter as it might be needed;" and the fact that the bank later, without the landlord's knowledge, obtained the signature of the tenant merely to show how the money was expended did not make the landlord a surety.[876] Similarly, a landlord was deemed as a matter of law to have furnished his tenant and was entitled to a landlord's lien for advances where, after the bank had refused the tenant a loan, the landlord took the tenant's notes to the bank, endorsed them and obtained money from the bank on the notes, and furnished it to the tenant.[877]

Hiring of implements, tools and animals. Sometimes in the leasing of a farm, farming implements, tools and even livestock are leased along with the farm. Although "rent cannot issue out of chattels,"[878] it has been said in cases where rent is claimed for personal property leased with land that the chattels "should be considered as merely incidental to the realty leased, and that the rent issued, not out of the personalty, but out of the realty, to which it was an appurtenance."[879] In an urban situation where a furnished hotel was leased, the court said that "the fact that the rent of a house might be increased by the furniture contained therein

871 Monroe v. Gaylor, 268 S.W. 724, 725 (Tex. Comm. App. 1925); reversing 260 S.W. 929 (Tex. Civ. App. 1924), second appeal; 221 S.W. 330 (Tex. Civ. App. 1920), first appeal.
872 Ranger Mercantile Co. v. Terrett, 106 S.W. 1145, 1146 (Tex. Civ. App. 1907).
873 Matthews v. Melasky, 240 S.W. 641, 642 (Tex. Civ. App. 1922) (San Antonio).
874 England v. Brinson, 1 White & W. Civ. Cas. Ct. App. sec. 321 (1883).
875 Garden Valley Mercantile Co. v. Falkner, 189 S.W. 300, 301 (Tex. Civ. App. 1916) (Texarkana); see also Roche v. Dale, 43 Tex. Civ. App. 287, 95 S.W. 1100, 1101 (1906).
876 Hall v. Henry, 239 S.W. 1015, 1016 (Tex. Civ. App. 1922) (San Antonio).
877 Spurlock v. Hilburn, 32 S.W.2d 396, 397 (Tex. Civ. App. 1930) (Waco); see 27 TEX. JUR. 121 (sec. 55).
878 TIFFANY, LANDLORD AND TENANT 1021 (1912).
879 Stein v. Stely, 32 S.W. 782, 783 (Tex. Civ. App. 1895) (urban).

would not demand separation of the rent of the house unfurnished from the increase by reason of the use of the furniture." The landlord was allowed a preference lien for the entire rent.[880] Although no decisions have been found involving this same question in a rural situation, the same conclusion probably would be reached under Article 5222, giving landlords a preference lien on the crop for rents and advances. Further, should a separation of rents for land and moneys due for hire of farm implements or livestock be shown, the landlord could claim a lien on the crop for the amount of that hire as for advances if the chattels hired were used to make and harvest the crop.[881]

In cases where the lease of a farm includes the use of implements or livestock thereon, the tenant "is bound to return the chattels, as well as the land, at the end of the term named, in the absence of any provision to the contrary."[882]

A hirer of either inanimate objects (chattels) or of animals is bound only to ordinary diligence in the care and preservation of the property, and he is responsible, consequently, only for ordinary negligence. In other words, he is required only to exercise the care which prudent men, that is, the generality of mankind, exercise in keeping their own goods. The degree of care and diligence varies according to the species of property over which it is to be exercised; but in all cases it must be the same which a person of ordinary prudence or discretion would exercise in relation to the particular thing were it his own property.[883] And so, it has been held that "The hirer of a horse for any specified time, journey or service . . . is bound to exercise ordinary diligence in the use and care of the property hired to him, and is responsible for all injurious consequences resulting from a culpable neglect so to do."[884] But one hiring a jack which was killed without the hirer's fault after expiration of the time of hiring, was held liable for the result of his negligence in not returning the animal, though "he had used the same care with the animal that he would have used with his own property."[885]

Mortgage liens for advances[886]—exemption laws.[887] A landlord or other creditor, under Texas chattel mortgage

880 Stein v. Stely, 32 S.W. 782, 783 (Tex. Civ. App. 1895) (urban).
881 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
882 TIFFANY, LANDLORD AND TENANT 1668 (1912).
883 Sims & Smith v. Chance, 7 Tex. 561, 571 (1852). See generally 5 TEX. JUR. 1023-1025 (secs. 13-14).
884 Haralson v. Hahl, 85 S.W. 1008 (Tex. Civ. App. 1905). See generally 2 TEX. JUR. 747 (secs. 13-14).
885 Cochran v. Walker, 49 S.W. 403 (Tex. Civ. App. 1899).
886 See discussion under subtitle "Right to Conservation Practice Payments," infra p. 158, for law regarding use of such claims as security for loans.
887 See discussion under subtitle "Homestead Rights in Leased Premises," supra p. 45, et seq.

statutes,[888] may agree with a farmer who is to be furnished to the sale of chattels with title retained until payment,[889] and to the creation of a mortgage lien on the farmer's crops and chattels to secure the repayment of the advances. However, a chattel mortgage on such crops or chattels will be void as to creditors of the mortgagor or *bona fide* purchasers of the crops or chattels thereof unless the mortgage is in writing and is registered with the county clerk, as provided in the act.[890]

Generally, any property which is capable of being sold may be mortgaged.[891] A growing crop (cotton) may be mortgaged regardless of its growth toward maturity,[892] and so may a crop not yet planted but thereafter planted, which the parties contemplated at the time of the mortgaging would be raised on certain lands.[893] Similarly, "one may execute a valid chattel mortgage not only upon his crop about to be planted for the current year . . ." but also ". . . upon crops for the succeeding year or years."[894]

A chattel mortgage on a crop "to secure an indebtedness which may be incurred by reason of future advances, or other future indebtedness, is valid."[895] A chattel mortgage may be given on farm machinery, horses and crops to secure "indebtedness now due and owing" as well as for indebtedness to become due.[896]

It has been held that the taking of a chattel mortgage as additional security on two mules sold to a tenant to make a

888 TEX. ANN. REV. CIV. STAT. arts. 5489-5499 (Vernon, 1941 and Supp. 1949).

889 TEX. ANN. REV. CIV. STAT. art. 5489 (Vernon, 1941). "Vendor's security. All reservation of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages. Nothing in this law shall be construed to contravene the landlord and tenant law."

890 TEX. ANN. REV. CIV. STAT. art. 5490 (Vernon, 1941 and Supp. 1949). "Chattel mortgages. Every chattel mortgage, deed of trust or other instrument of writing, intended to operate as a mortgage, or lien upon personal property, and every transfer thereof which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the property mortgaged, pledged, or affected by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making same, as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this State, then, of the county of which he shall at that time be a resident; . . ."

891 Dupree v. McClanahan, 1 White & W. Civ. Cas. Ct. App. sec. 595 (1877). See Citizens State Bank of Houston v. O'Leary, 140 Tex. 345, 167 S.W.2d 719, 721, reversing 155 S.W.2d 677 (Tex. Civ. App. 1941) (urban).

892 Cook v. Steel, Furrh & Co., 42 Tex. 53, 58 (1875).

893 Richardson v. Washington, 88 Tex. 339, 31 S.W. 614, 617 (1895). See generally 9 TEX. JUR. 122 (sec. 36).

894 South Texas Implement & Machine Co. v. Anahuac Canal Co., 280 S.W. 521, 522; affirming 269 S.W. 1097 (Tex. Civ. App. 1925). See discussions under subtitles "Tenants may mortgage or sell growing crops," supra p. 99, and "Cropper's right to mortgage or sell interest in crop," supra p. 108.

895 Carleton Bros. & Co. v. Bowen, 193 S.W. 732, 733 (Tex. Civ. App. 1917) (Austin).

896 See Askey v. Stroud, 240 S.W. 339 (Tex. Civ. App. 1922) (Fort Worth).

crop "did not, as a matter of law, operate as a waiver of the landlord's lien conferred by statute."[897] Nor does the taking of a chattel mortgage, as additional security on teams and tools furnished to make a crop, to secure the purchase price and to secure payment of an open account for necessaries and supplies furnished for the same purpose, operate as a waiver of the landlord's statutory lien on the crop, in the absence of an intent to do so.[898]

Under Texas exemption statutes general creditors cannot by forced sale reach for payment of debt certain personal property which, under Texas laws, is exempt from forced sale to every family,[899] and to others than a family.[900] Also exempt from liability for most debts is the surrender value of life insurance policies,[901] the family homestead[902] and the

897 Gulf C. & S.F. Ry. Co. v. Enloe, 5 S.W.2d 545 (Tex. Civ. App. 1928) (Texarkana).

898 Smith v. Miller, 300 S.W. 953, 954 (Tex. Civ. App. 1927) (Austin), citing Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo); and Griffin v. Mangrum, 267 S.W. 279, 280 (Tex. Civ. App. 1924) (Dallas).

899 TEX. ANN. REV. CIV. STAT. art. 3832 (Vernon, 1945). "Property exempt to family. The following property shall be reserved to every family, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:
1. The homestead of the family.
2. All household and kitchen furniture.
3. Any lot or lots in a cemetery held for the purpose of sepulture.
4. All implements of husbandry.
5. All tools, apparatus and books belonging to any trade or profession.
6. The family library and all family portraits and pictures.
7. Five milk cows and their calves.
8. Two mules.
9. Two horses and one wagon.
10. One carriage or buggy.
11. One gun.
12. Twenty hogs.
13. Twenty head of sheep.
14. All saddles, bridles, and necessary harness for the use of the family.
15. All provisions and forage on hand for home consumption.
16. All current wages for personal services.
17. All wearing apparel.
18. Twenty head of goats.
19. Fifty head of chickens.
20. Thirty head of turkeys.
21. Thirty head of ducks.
22. Thirty head of geese.
23. Thirty head of guineas.
24. One dog."

900 TEX. ANN. REV. CIV. STAT. art. 3835 (Vernon, 1945). "Exempt to others than family. The following property shall be reserved to persons who are not constitutents (constituents) of a family, exempt from attachment, execution and every other species of forced sale:
1. A lot or lots in a cemetery, held for the purpose of sepulture.
2. All wearing apparel.
3. All tools, apparatus and books belonging to any trade or profession.
4. One horse, saddle and bridle.
5. Current wages for personal services."
See generally on Exemptions, 18 TEX. JUR. 799 et seq.

901 TEX. ANN. REV. CIV. STAT. art. 3832a (Vernon, 1945). "Insurance policies. The cash surrender value of any life insurance policy which has been in force more than two years, shall be exempt from liability for any debt, and shall not be subject to forced sale, or other process to satisfy any debt, provided a member or members of the family of the insured are the beneficiaries under such policy, and in event they are only partially the beneficiaries then such policies shall be so exempt to the extent of their beneficiary interest. This act shall not apply to debts arising under the policy nor to debts secured by lawful assignment of the policy."

902 TEX. ANN. REV. CIV. STAT. art. 3833 (Vernon, 1945).

proceeds of the voluntary sale of a homestead during the six months following the sale.[903]

The exemption of personal property from forced sale for payment of debt, however, does not apply when the debts are secured by a lien on such property.[904] In this connection, it has been held that a tenant has the right to mortgage property exempt by law from forced sale (corn, one horse, one mule), and such mortgage creates a valid lien upon it which may be enforced.[905] In fact, a landlord's mortgage lien upon all goods, chattels and property of every kind belonging to his tenant, given to secure payment of all indebtedness owing or which might thereafter be owing, including rentals, during the existence of the lease, has been upheld.[906]

Mortgaged property may not be sold or removed from the county without consent of the mortgagee, and, if sold or removed without such consent, the mortgagee is entitled to its possession and he may then have it sold for payment of his debt whether it is then due or not.[907] Further, the sale or removal out of the county or State, with intent to defraud, of any "personal or movable property or growing crop of farm produce" on which a written mortgage or other lien has been given is a crime punishable by imprisonment for a term of two to five years.[908]

A chattel mortgage filed with the county clerk is presumed paid six years after maturity of the debt, unless timely

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903 TEX. ANN. REV. CIV. STAT. art. 3834 (Vernon, 1945). "Proceeds exempt. The proceeds of the voluntary sale of the homestead shall not be subject to garnishment or forced sale within six months after such sale."

904 TEX. ANN. REV. CIV. STAT. art. 3840 (Vernon, 1945). Claims for rent, etc. "The exemption of personal property above provided for shall not apply when the debt is due for rents or advances made by a landlord to his tenant, or to other debts which are secured by a lien on such property."

905 Rose v. Martin, 33 S.W. 284, 285 (Tex. Civ. App. 1895). See Mason v. Bumpass, 1 White & W. Civ. Cas. Ct. App. secs. 1338, 1339 (1880). See generally 9 TEX. JUR. 128 (sec. 41) and 18 TEX. JUR. 849 (sec. 42).

906 Pair v. Scoggins, 54 S.W.2d 841, 842 (Tex. Civ. App. 1932) (Amarillo).

907 TEX. ANN. REV. CIV. STAT. art. 5496 (Vernon, 1941). "Property not to be removed. The person making any such instrument shall not remove the property pledged from the county, nor otherwise sell or dispose of the same, without the consent of the mortgagee; and in case of any violation of the provisions of this article, the mortgagee shall be entitled to the possession of the property, and to have the same then sold for the payment of his debt, whether the same has become due or not."

908 TEX. ANN. PEN. CODE art. 1558 (Vernon, 1925, Supp. 1949). "Fraudulent disposition of mortgaged property. If any person has given or shall hereafter give any mortgage, deed of trust or other lien, in writing, upon any person (personal) or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the State, or out of the county in which it was located at the time the mortgage or lien was created, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be confined in the penitentiary for not less than two nor more than five years. Proof that the mortgagor removed such property out of the county in which it was located at the time the mortgage or lien was created or that he sold or otherwise disposed of the same either originally or by transfer and that the mortgagor failed to pay the debt or any part thereof when due for which the mortgage or lien was given, or shall fail to deliver possession of said property upon demand of the mortgagee, shall be prima facie evidence that such property was removed or disposed of with intent to defraud as provided in this Act."

and proper notice by affidavit to the contrary is given the county clerk.[909]

Interest rates—usury laws. The Texas Constitution provides that contracts for a rate of interest exceeding 10 percent annually are usurious, and when no rate is agreed on the rate shall not exceed 6 percent.[910] Under a correlative Texas statute, written contracts providing directly or indirectly for a rate of interest exceeding 10 percent are void as to the interest, but the principal may be recovered.[911]

Although the legislative act limiting the legally permissible rate of interest applies only to written contracts, the Constitution provides that "All contracts for a greater rate of interest than ten per centum per annum shall be deemed usurious," [912] which provision has been held to include contracts "partly oral and partly written,"[913] and, necessarily, would include oral contracts.[914] One court said that "This provision (Art. XVI, sec. 11) seems to be self-executing, without the need of a legislative act to make it effective,"[915] and "everything done in violation of it is void."[916] As construed, however, the usury statutes rendering usurious contracts void as to interest are applied only to executory, not executed, contracts, and render them not void but voidable.[917]

In compliance with the directive in Art. XVI, sec. 11, the Legislature has enacted a statute, Article 5073 of the present code, which provides that "within two years after the time that a greater rate of interest than ten per cent shall have been received or collected upon any contract," the person paying the same may recover double the amount of such interest paid.[918] The "usurious interest" referred to in Article 5073

909 TEX. ANN. REV. CIV. STAT. art. 5499 (Vernon, 1941).

910 TEX. CONST. Art. XVI, sec. 11. "All contracts for a greater rate of interest than ten percentum per annum, shall be deemed usurious, and the first Legislature after this amendment is adopted, shall provide appropriate pains and penalties to prevent the same; but when no rate of interest is agreed upon, the rate shall not exceed six per centum per annum."

911 TEX. ANN. REV. CIV. STAT. art. 5071 (Vernon, 1947). "Limit on rate. The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract; and all written contracts whatsoever, which may in any way, directly or indirectly, provide for a greater rate of interest shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered."

912 TEX. CONST. Art. XVI, sec. 11.

913 People's Building, Loan & Savings Ass'n v. Keller, 20 Tex. Civ. App. 616, 50 S.W. 183, 186 (1899) (urban).

914 See 42 TEX. JUR. 897 (sec. 17) and 954 (sec. 58).

915 People's Building, Loan & Savings Ass'n v. Keller, 20 Tex. Civ. App. 616, 50 S.W. 183, 186 (1899) (urban).

916 Hemphill v. Watson, 60 Tex. 679, 681 (1884).

917 Palmetto Lumber Co. v. Gibbs, 52 S.W.2d 120, 122 (Tex. Civ. App. 1932); affirmed, 124 Tex. 615, 80 S.W.2d 742, 745 (Tex. Comm. App. 1935).

918 TEX. ANN. REV. CIV. STAT. art. 5073 (Vernon, 1947). "Action on usurious rate. Within two years after the time that a greater rate of interest than ten per cent shall have been received or collected upon any contract, the person paying the same or his legal representative may by an action of debt recover double the amount of such interest from the person, firm or corporation receiving the same . . ."

"means the whole amount of the interest received and not the excess above what might lawfully have been received."[919] Further, it is immaterial, under the statute, "whether the usurious interest was paid in property or money. In either case the party paying has a right to recover . . . double the amount so paid."[920] In fact, "If there be an intention to charge usury, no matter how the transaction may be veiled or disguised, the courts will look through the form to the substance of the transaction and condemn the contract as usurious."[921] On the other hand, "A seller may demand one price for cash and another and greater price upon credit, and it would not be usury."[922]

In an action to recover for a share of the proceeds of a crop, where usury was alleged, one court held the statutory penalty, allowing recovery of double the interest paid, "is limited to transactions where usury is collected or received, and such penalty is not recoverable merely because in an account or otherwise a usurious claim is made; the party suing to recover the penalty must show that the other party has not only claimed, but has collected or received, usury."[923]

As has been indicated above, "a usurious contract is void (voidable) as to the interest only,"[924] and the "principal sum of the money or value of the contract may be received and recovered."[925] Moreover, "The taint of usury forfeits any further interest under the statute, and leaves thereafter the principal of the debt as what is really due and owing" the creditor.[926]

Should the borrower make any payment of usurious interest, all such payments of interest made under the usurious contract are applied by law to the discharge of the principal debt.[927] Where the usurious contract had been in effect for several years, the court, in one decision, held that: "The

919 Taylor v. Shelton, 63 Tex. Civ. App. 626, 134 S.W. 302, 304 (1911).
920 Taylor v. Sturgis, 29 Tex. Civ. App. 270, 68 S.W. 538, 539 (1902); Palmetto Lumber Co. v. Gibbs, 124 Tex. 615, 80 S.W.2d 742, 745 (Tex. Comm. App. 1935), affirming 52 S.W.2d 120 (Tex. Civ. App. 1932). See generally 42 TEX. JUR. 970 (sec. 71).
921 Wellfare v. Realty Trust Co., 85 S.W.2d 1067, 1069 (Tex. Civ. App. 1935) (Eastland, urban); see Adleson v. Dittmar Co., 124 Tex. 564, 80 S.W.2d 939, 940 (Tex. Comm. App. 1935); reforming and affirming 75 S.W.2d 1100 (Tex. Civ. App. 1934); see generally 42 TEX. JUR. 885 (sec. 8).
922 Burkitt v. McDonald, 26 Tex. Civ. App. 426, 64 S.W. 694, 695 (1901) (urban).
923 Driscoll v. Dennis, 220 S.W. 576, 577 (Tex. Civ. App. 1920) (Austin), first appeal; 240 S.W. 1049 (Tex. Civ. App. 1922), second appeal.
924 Schmidt v. Citizens Industrial Bank of Austin, 89 S.W.2d 847, 849 (Tex. Civ. App. 1935) (Austin, urban).
925 TEX. ANN. REV. CIV. STAT. art. 5071 (Vernon, 1947). See 42 TEX. JUR. 939 (sec. 45).
926 Taylor v. Shelton, 63 Tex. Civ. App. 626, 134 S.W. 302, 305 (1911).
927 International Bldg. & Loan Ass'n v. Biering, 86 Tex. 476, 25 S.W. 622, 623 (1894) on motion for rehearing. Motion overruled 26 S.W. 39 (Tex. Sup. Ct. 1894); reversing 23 S.W. 621, 1025 (Tex. Civ. App. 1893) (urban); El Paso Building & Loan Ass'n v. Lane, 81 Tex. 369, 17 S.W. 77, 78 (1891) (urban); see generally 42 TEX. JUR. 949 (sec. 55).

borrower was entitled to have all payments of usurious interest made more than two years next prior to filing his suit credited upon the principal debt; and under Article 5073, R. S.,[928] to recover double the amount paid by him within such two years as interest if same were usurious."[929]

"The rule in ordinary usury cases is that the borrower voluntarily making payments is not in pari delicto with the lender,"[930] and, therefore, a voluntary payment of usurious interest will not defeat the debtor's right to have it appropriated to the reduction of the principal.[931]

The maximum rate of interest that may be legally collected by a national bank in Texas is that allowed by the laws of the State,[932] or 10 percent per annum.[933] On suit under Federal statute by one who had paid usurious interest, the measure of recovery here also was held to be twice the full amount of interest paid, and not limited to twice the excess of interest paid over the legal rate.[934]

Under another Texas statute, unless a specific interest rate is agreed upon, only 6 percent per annum shall be allowed on the sum payable under *written contract* "from and after the time when the sum is due and payable." The same rate, unless otherwise agreed, is allowed on *open accounts*, "from the first day of January after the same are made."[935] In an action involving this statute, however, where the owner of a general merchandise and supply store advanced provisions, supplies and money on open account to a farmer, and without the farmer's knowledge or consent included interest upon said accounts at the rate of 10 per cent per annum from the dates of the accrual of the various items, recovery of the statutory penalty of double the interest charged for infraction of the usury statute was denied. The court held that, although Article 5070 allowed interest at the rate of 6 percent per annum when no specific interest was agreed upon, no penalty had been provided by the Legislature when a greater rate of interest, but not over 10 percent, was collected. The statutory

928 See TEX. ANN. REV. CIV. STAT. art. 5073 (Vernon, 1947), footnote 918 on p. 127 supra.
929 Temple Trust Co. v. Stobaugh, 59 S.W.2d 916, 920 (Tex. Civ. App. 1933) (Austin, urban). See Adleson v. Dittmar Co., 124 Tex. 564, 80 S.W.2d 939, 941 (Tex. Comm. App. 1935); reforming and affirming 75 S.W.2d 1100 (Tex. Civ. App. 1934).
930 Hampton v. Guaranty State Building & Loan Ass'n, 63 S.W.2d 873, 876 (Tex. Civ. App. 1933) (Amarillo, urban).
931 Ware's Adm'rs v. Bennett, 18 Tex. 794, 807 (1857) (urban).
932 12 U.S.C.A. sec. 85 (1945). See generally 30 TEX. JUR. 631 (sec. 10).
933 TEX. ANN. REV. CIV. STAT. art. 5071 (Vernon, 1947).
934 Boerner v. Trader's National Bank, 90 Tex. 443, 446; 39 S.W. 285 (1897) (urban).
935 TEX. ANN. REV. CIV. STAT. art. 5070 (Vernon, 1947). "Legal rate applicable. When no specified rate of interest is agreed upon by the parties, interest at the rate of six per cent per annum shall be allowed on all written contracts ascertaining the sum payable, from and after the time when the sum is due and payable; and on all open accounts from the first day of January after the same are made."

penalty prescribed in Article 5073, permitting recovery of double the interest paid, was held to apply only when the rate of interest received exceeded 10 percent per annum.[936]

A recent Texas statute authorizes the Attorney General of the State of Texas, or any district or county attorney, to bring suit to enjoin anyone habitually charging usurious interest, that is, interest at a rate in excess of 10 percent per annum. Under this statute, in addition to interest there is permitted the charging of necessary expenses of making loans and, in case of a suit to enjoin usurious loans, there is the presumption that a charge made by the lender was made to cover actual expenses, if it was not more than $1 for each $50 loaned.[937] The burden rests on the State to prove that any charges made by the lender were not for legitimate expenses of making the loan.[938]

The Texas Legislature has enacted enabling legislation authorizing the organization of various types of credit organizations empowered to lend money to their members, including rural credit unions,[939] agricultural and livestock pools,[940] mutual loan associations,[941] co-operative credit associations[942] and farmers' co-operative societies.[943]

Federal peonage statutes. The holding of any person in involuntary service until his debts are paid is an unlawful act under Federal law.[944] It is punishable by fine or imprisonment, or both, to hold a person in peonage, or to arrest any person to aid his being held in peonage by another, or to aid in any manner in the return of any person to peonage[945] or to obstruct enforcement of the peonage act.[946]

Peonage is a status or condition of compulsory service, based upon the indebtedness of the peon to the master. How-

936 Carder v. Knippa Mercantile Co., 1 S.W.2d 462, 463 (Tex. Civ. App. 1928) (San Antonio). See 42 TEX. JUR. 955 (sec. 59).
937 TEX. ANN. REV. CIV. STAT. art. 4646b (Vernon, 1940, Supp. 1949).
938 Wooldridge v. State, 183 S.W. 746, 749 (Tex. Civ. App. 1944) (Fort Worth).
939 TEX. ANN. REV. CIV. STAT. art. 2461, et seq. (Vernon, 1942, Supp. 1949).
940 TEX. ANN. REV. CIV. STAT. art. 2485, et seq. (Vernon, 1942).
941 Id., art. 2500, et seq.
942 Id., art. 2508, et seq.
943 Id., art. 2514, et seq.
944 8 U.S.C.A. sec. 56 (1942). "Peonage abolished. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."
945 18 U.S.C.A. sec. 444 (1927). "Holding or returning persons to peonage. Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than $5,000, or imprisoned not more than five years, or both."
946 18 U.S.C.A. sec. 445 (1927). "Same; obstructing enforcement of law. Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of section 444 of this title, shall be liable to the penalties therein prescribed."

ever created, it is compulsory service, involuntary servitude.[947] In other words, peonage is "service performed against the will of the party who performs it, and as a result of force or compulsion exerted by the party who requires the service."[948] "The law takes no account of the amount of the debt or the means of coercion. It is sufficient to constitute the crime that a person is held against his will and made to work to pay a debt."[949]

However, a clear distinction exists between peonage and the voluntary performance of labor or rendering of service in payment of the debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, can elect at any time to break his contract and pay damages, there being no law or force compelling performance or a continuance of the service.[950]

Removal from leased premises of property subject to the landlord's statutory lien. In addition to the statute giving a landlord under some circumstances a preference lien on certain property of his tenant,[951] other correlative statutes also have been enacted. These statutes, discussed below, forbid tenants, while their debts are unpaid, removing lien-property from leased premises,[952] limit the duration under certain circumstances of landlord liens,[953] provide for continuance of the lien while crops are stored in a warehouse,[954] permit removal of the lien-crop for preparation for market[955] and define the landlord's remedies in event of unauthorized removal of the crop from the leased premises.[956]

Tenant not to remove lien property. While rents and advances remain unpaid, a tenant may not remove from leased premises, without consent of the landlord, agricultural

947 United States v. Cole, 153 F. 801, 805 (W. D. Tex. 1907), citing Clyatt v. United States, 197 U.S. 207, 215, 25 Sup. Ct. 429, 49 L. Ed. 726 (1905).

948 United States v. Cole, 153 F. 801, 806 (W. D. Tex. 1907).

949 Bernal v. United States, 241 F. 339, 342 (C.C.A. 5th 1917), cert. denied, 38 Sup. Ct. 192, 245 U.S. 672, 62 L. Ed. 540 (1918).

950 United States v. Cole, 153 F. 801, 805 (W. D. Tex. 1907).

951 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947); see additional discussion under subtitle "Statutory regulation of rent," supra p. 58, and "Landlord's statutory lien on the crop for rent," supra p. 112.

952 TEX. ANN. REV. CIV. STAT. art. 5225 (Vernon, 1947); see additional discussion under subtitle "Tenant not to remove lien property," p. 131.

953 TEX. ANN. REV. CIV. STAT. art. 5223 (Vernon, 1947); see additional discussion under subtitle "Place and duration of landlord's statutory lien," infra p. 133.

954 TEX. ANN. REV. CIV. STAT. arts. 5223, 5606 (Vernon, 1947 and 1941); see additional discussion under subtitle "Storage of lien crops in warehouses," infra p. 134.

955 TEX. ANN. REV. CIV. STAT. art. 5226 (Vernon, 1947); see additional discussion under subtitle "Removal of lien crops for preparation for market," infra p. 134.

956 TEX. ANN. REV. CIV. STAT. art. 5227 (Vernon, 1947); see additional discussion under subtitle "Landlord's remedies if unauthorized removal—distress warrant," infra p. 135.

products produced thereon or animals, tools or property furnished by the lessor.[957]

The landlord has a right to have rent crops remain on the leased premises until the rents are paid.[958] The same rule forbids such removal before payment of "rents and advances."[959] Further, while any part of the rent remains unpaid, it is not lawful for the tenant to remove, or permit to be removed from the rented premises, any portion of such crops, without the consent of the landlord;[960] and an unauthorized removal of a portion, leaving enough upon the premises to pay the rent, will not defeat the landlord's lien on that portion, since the lien extends to all the crop, regardless of the amount due the landlord or the value of the crop remaining.[961]

Unless the tenant receives the landlord's consent before removing any such lien-crop from the leased premises, the landlord may seize it for his rent; and it was so held, even where the tenant came to the landlord's house to inquire as to the place of delivery and was ordered "out of his yard." The inquiry was repeated later that day at the local store, when the tenant was told to "shut up;" though this conduct on the part of the landlord, according to the court, "is by no means to be commended."[962]

"The law imposes no restraint whatever upon the right of the tenant to sell or otherwise dispose of the crops upon which the landlord may have a lien. It is the removal of those crops from the rented premises without the landlord's consent which the statute forbids."[963] In other words, a tenant has the right to sell a crop (cotton) matured in the field, and the purchaser has the right of ingress and egress to gather it, and to sell it, subject to the landlord's lien for rent and advances.[964]

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957 TEX. ANN. REV. CIV. STAT. art. 5225 (Vernon, 1947) "Tenants not to remove property. The tenant, while the rent and advances remain unpaid, shall not without the consent of the landlord remove or permit to be removed from the premises so leased or rented any agricultural product produced thereon, or any of the animals, tools or property furnished as aforesaid."

958 Crider v. McIntyre, 20 S.W.2d 242, 243 (Tex. Civ. App. 1929) (Waco); see generally 27 TEX. JUR. 128 (sec. 59).

959 Leverett v. Meeks, 29 Tex. Civ. App. 523. 68 S.W. 302. 303 (1902) citing REV. CIV. STAT. art. 3236 (1895) now TEX. ANN. REV. CIV. STAT. art. 5225 (Vernon, 1947); Beckham v. Collins, 54 Tex. Civ. App. 241, 117 S.W. 431. 433 (1909), citing ANN. CIV. STAT. art. 3236 (Sayle's, 1897), now TEX. ANN. REV. CIV. STAT. art. 5225 (Vernon, 1947).

960 Watson v. Cox, 2 Willson Civ. Cas. Ct. App. sec. 277 (1884), citing REV. CIV. STAT. art. 3108 (1879) now shown as art. 5225 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947).

961 Wilkes v. Adler, 68 Tex. 689, 5 S.W. 497, 499 (1887).

962 Holt v. Miller, 32 S.W. 823, 824 (Tex. Civ. App. 1895), construing REV. CIV. STAT. arts. 3108-3112 (1879), now TEX. ANN. REV. CIV. STAT. arts. 5223-5227 (Vernon, 1947).

963 Adams v. A. A. Paton & Co., 173 S.W. 546, 548 (Tex. Civ. App. 1915) (Texarkana).

964 Elliott v. Dodson, 297 S.W. 520, 523 (Tex. Civ. App. 1927) (Fort Worth), second appeal; 272 S.W. 263 (Tex. Civ. App. 1925), first appeal.

Place and duration of landlord's statutory lien. The landlord's preference lien for rent and advances on crops grown on the rented premises and on animals, tools and other products furnished continues so long as the crops or the furnished chattels remain on the rented premises, and for one month thereafter.[965]

Under this statute,[966] it has been held that a landlord lost his preference lien when he allowed a subtenant, after ginning the cotton, to haul it to his own home, which was not on the rented premises, where it was stored for more than a month. The court said "the cotton being off the rented premises for more than a month the landlord's lien expired by operation of the statute."[967] Another decision held it was an error to render judgment foreclosing a landlord's lien on cotton which had been removed from the rented premises for a period exceeding one month.[968] However, removal of hay from rented premises and storage, with the tenant's consent, in a barn on other premises owned by the landlord, to await an advance in the market price, was held not to forfeit the landlord's lien for advances by failure to foreclose within a month from the date of removal.[969] Nor was removal of certain cotton from the rented premises and storage for a period exceeding one month in a private warehouse partly owned by the landlord, under an agreement that it remain there under the landlord's dominion to await an advance in price, held such a "removal" as would, under the act,[970] destroy the landlord's lien for advances.[971] Also, where the tenant removed the cotton from the leased premises for ginning and baling, and thereafter delivered to the landlord the "cotton yard receipts" under an agreement that the landlord should control and sell the cotton and, after deducting rents and advances, pay the balance to the tenant, the landlord's lien was held to have remained in full force and effect.[972]

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965 TEX. ANN. REV. CIV. STAT. art. 5223 (Vernon, 1947). "When lien expires. Such preference lien shall continue as to such agricultural products and as to animals, tools and other property furnished to the tenant, as aforesaid, so long as they remain on such rented or leased premises, and for one month thereafter; and such lien as to agricultural products, if stored in public or bonded warehouses controlled or regulated by the laws of the State within thirty days after the removal of said products from said rented premises, shall continue so long as they remain in such warehouses; and such lien, as to agricultural products and as to animals and tools furnished as aforesaid, shall be superior to all laws exempting such property from forced sale."

966 TEX. ANN. REV. CIV. STAT. art. 5223 (Vernon, 1947), previously ANN. CIV. STAT. art. 5477 (Vernon's Sayles', 1914).

967 Morris v. Burrows, 180 S.W. 1108, 1113 (Tex. Civ. App. 1915) (Texarkana). See generally 27 TEX. JUR. 129 (sec. 60).

968 Horton v. Lee, 180 S.W. 1169, 1170 (Tex. Civ. App. 1915) (Dallas).

969 Gaw v. Bingham, 107 S.W. 931 (Tex. Civ. App. 1908).

970 TEX. ANN. REV. CIV. STAT. art. 5223 (Vernon, 1947), cited in decision as REV. CIV. STAT. art. 5477.

971 Smith v. First State Bank of Fate, 255 S.W. 511, 512 (Tex. Civ. App. 1923) (Dallas).

972 McMullen v. Green, 149 S.W. 762, 765 (Tex. Civ. App. 1912) (Amarillo).

Storage of lien crops in warehouses. If within 30 days after removal of lien-crops from the rented premises they are stored in a public or bonded warehouse, the landlord's lien, under Texas laws, continues so long as they remain in such warehouse.[973] Another act, Article 5606, provides for continuance of the landlord's lien on cotton or other farm products so long as such crops remain stored in any warehouse, public or private, provided that a negotiable warehouse receipt has not been issued therefor.[974]

A warehouse has been construed to be "a house of some character," and when cotton after ginning was stored on "open school grounds," which "are not a house," for a period in excess of 30 days, the landlord, under Article 5606[975] was held to have lost his lien.[976] Similarly, where a part of a wheat crop was removed from the rented premises and stored for two months in a warehouse not shown to be operated as "a public or bonded warehouse controlled or regulated by the laws of this state," the court said "this statute (Article 5223) determines the existence of a landlord's lien, and at the expiration of the time therein named the lien ceases to exist, in the absence of a foreclosure proceedings."[977]

A receipt simple in form, giving the date the cotton was stored, but stating no time of delivery of the cotton stored, giving number of receipt, weight, class and number of the bale, has been held not a "negotiable receipt" under Article 5606.[978]

Removal of lien crops for preparation for market. The landlord may consent to the removal of agricultural products raised on leased premises for the purpose of being prepared for market without losing his lien thereon.[979]

Under this act[980] the landlord's lien was held to continue on cotton removed from the premises for ginning the same

973 TEX. ANN. REV. CIV. STAT. art. 5223 (Vernon, 1947).
974 TEX. ANN. REV. CIV. STAT. art. 5606 (Vernon, 1941). "Landlord's lien. The landlord's lien on cotton or other farm products shall continue so long as the same are in storage in any warehouse, whether the same be a warehouse operated under this law or a private warehouse, provided a negotiable receipt has not been issued therefor."
975 TEX. ANN. REV. CIV. STAT. art. 5606 (Vernon, 1941), cited in this decision as ANN. CIV. STAT. art. 7827u (Vernon, Supp. 1918).
976 Carwile v. Bryson, 251 S.W. 522 (Tex. Civ. App. 1923) (Austin); see generally 27 TEX. JUR. 132 (sec. 63) and 131 (sec. 61).
977 Cribbs v. Polk County, 56 S.W.2d 685 (Tex. Civ. App. 1933) (Eastland).
978 Morris v. Burrows, 180 S.W. 1108, 1112 (Tex. Civ. App. 1915) (Texarkana); see TEX. ANN. REV. CIV. STAT. art. 5606 (Vernon, 1941), cited in this decision as Acts 33d Leg. 2d Called Sess. 1914, c. 5, sec. 42.
979 TEX. ANN. REV. CIV. STAT. art. 5226 (Vernon, 1947). "Removal not a waiver. The removal of the agricultural products with the consent of the landlord for the purpose of being prepared for market shall not be considered a waiver of such lien, but such lien shall continue and attach to the products so removed the same as if they had remained on such rented or leased premises."
980 TEX. ANN. REV. CIV. STAT. art. 5226 (Vernon, 1947), listed in this decision as ANN. CIV. STAT. art. 5478a (Vernon's Sayles', 1914).

as if it had remained on the rented premises.[981] "When products are removed from the rented premises with the consent of the landlord for preparation for market, the lien is not restricted to one month after removal, but it continues in the landlord; for how long the statutes do not say."[982]

"Carrying cotton to the gin for the purpose of being baled, and then returning it to the premises, thereby subjecting it to the control of the landlord, and the mere use by the tenant of a reasonable amount of feed (corn) produced upon the premises for the purpose of feeding the stock used in producing the crop, would not be such a removal or appropriation of the products produced upon the rented premises as would justify the issuance and levy of a distress warrant" permitting the seizure of the crop by the sheriff.[983] But the removal of cotton (one bale) from the rented premises, and sale of the same without the consent of the landlord, the proceeds being used by the tenant in part for his individual purposes and in part for paying off hands who assisted in picking the cotton, is an unauthorized removal within the meaning of the law.[984]

Storing cotton, when ginned and baled, for purpose of future sale, is not, under Article 5226, a removal for the purpose of preparation for market.[985]

Landlord's remedies if unauthorized removal—distress warrant. When any rent or advances become due, or the tenant is about to move from the rented premises or to remove his property from such premises, the person to whom rents or advances are payable may apply to a justice of the peace having jurisdiction for a distress warrant to seize the statutory-lien-property of such tenant.[986] "A distress war-

981 Green v. Scales, 219 S.W. 274, 275 (Tex. Civ. App. 1920) (Fort Worth); but see Gilliam v. Smither, 33 S.W. 984, 985 (Tex. Civ. App. 1896); see generally 27 TEX. JUR. 132 (sec. 62).

982 See Childress v. Harmon, 176 S.W. 154, 155 (Tex. Civ. App. 1915).

983 Riggs v. Gray, 31 Tex. Civ. App. 268, 72 S.W. 101, 102 (1903).

984 Riggs v. Gray, 31 Tex. Civ. App. 268, 72 S.W. 101, 102 (1903).

985 Morris v. Burrows, 180 S.W. 1108, 1113 (Tex. Civ. App. 1915) (Texarkana).

986 TEX. ANN. REV. CIV. STAT. art. 5227 (Vernon, 1947). "Distress warrant. When any rent or advances shall become due, or the tenant shall be about to remove from such leased or rented premises, or to remove his property from such premises, the person to whom the rents or advances are payable, his agent, attorney, assigns, heirs or legal representatives may apply to a justice of the peace of the precinct where the premises are situated, or in which the property upon which a lien for rents or advances exists may be found, or to any justice having jurisdiction of the cause of action for a warrant to seize the property of such tenant. If a distress warrant shall be issued by any justice, other than the justice of the peace of the precinct in which the rented premises may be situated or in which the defendant may reside, such warrant shall be made returnable to, and the affidavit and bond upon which it is issued shall be transmitted by the justice issuing such distress warrant to some justice of the precinct in which the rented premises may be situated, or in which the defendant may reside." (Acts 1881, p. 98).

rant is but a mode of enforcing the lien, but does not create it. The law does that."[987]

Under this act it has been held that if the tenant, while owing his landlord for rents and advances on the crop in question, was removing any of the agricultural products from the rented premises without the consent of the landlord, the landlord was authorized to sue out a distress warrant.[988] The same rule applies "If the tenant, without the consent of the landlord, be about to remove his property from the rented premises, the rent being unpaid . . ." and it applies "whether the rent be then due or not."[989] And, as held in another decision, the rule holds when such property, upon which the landlord's lien exists, is wrongfully removed from the premises, although the rent is not due.[990]

A landlord may seize in a distress proceeding all the property on which he has a lien, though it is more than sufficient to pay the rent;[991] or by distress warrant he may levy on, and have his landlord's lien foreclosed on, only a part of the animals furnished to make the crop, as well as on the tools and implements furnished and on the crop.[992]

The fact that the tenant, removing a portion of the crops, still had enough of the crops on the rented premises set apart to pay the rent will not defeat the landlord's right to the distress warrant, the latter not having consented to such an arrangement or to the removal of any of the crop;[993] nor will the fact that the landlord and tenant had agreed to a division of the cotton, which was to be put in separate pens on the premises, each later to carry his share to the gin, preclude the landlord from suing out a distress warrant if he finds that the tenant is removing the cotton from the premises with a view to evading a settlement according to the agreement.[994]

A subletting without consent of the landlord, under an

987 Berkey & Gay Furniture Co. v. Sherman Hotel Co., 81 Tex. 135, 16 S.W. 807, 810 (1891) (urban).
988 Beckham v. Collins, 54 Tex. Civ. App. 241, 117 S.W. 431, 433 (1909), citing art. 3240, ANN. CIV. STAT. (Sayles', 1897), now TEX. ANN. REV. CIV. STAT. art. 5227 (Vernon, 1947).
989 Watson v. Cox, 2 Willson Civ. Cas. Ct. App. sec. 277 (1884), citing REV. CIV. STAT. art. 3112 (1879), now shown as art. 5227 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947); see also Neinast v. Doeckle, 1 White & W. Civ. Cas. Ct. App. sec. 219 (1882), citing REV. CIV. STATS. arts. 3108, 3112 (1879), shown as arts. 5225 and 5227 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947); and DuBose v. Battle, 34 S.W. 148 (Tex. Civ. App. 1896).
990 DuBose v. Battle, 34 S.W. 148 (Tex. Civ. App. 1896).
991 McKee v. Sims, 92 Tex. 51, 45 S.W. 564, 565 (1898), reversing 45 S.W. 37 (Tex. Civ. App. 1898) (urban). Case cites REV. CIV. STAT. art. 3240 (1895) now TEX. ANN. REV. CIV. STAT. art. 5227 (Vernon, 1947).
992 Griffin v. Mangrum, 267 S.W. 279 (Tex. Civ. App. 1924) (Dallas).
993 Watson v. Cox, 2 Willson Civ. Cas. Ct. App. sec. 277 (1884).
994 Tucker v. Hasson, 32 Tex. 536, 538 (1870).

agreement by which the parties were to share the crops, was held to preclude the tenant from bringing distress proceedings to secure his "rent" due from the party to whom he sublet, because, lacking such consent, the relation of landlord and tenant, necessary under the act to bring distress,[995] was not created between the tenant and the third party, who was held to be a mere cropper.[996]

When crops are removed from rented premises and sold by the tenant without the consent of the landlord, the landlord may, if he acts seasonably, have either of two remedies: "(a) he may ignore the sale, pursue the property itself and subject it to his superior lien; or (b) he may abandon his right to foreclose and sue the purchaser thereof for damages for conversion."[997] However, the landlord's lien on crops grown on rented premises does not extend to the "proceeds" after sale of the property.[998] A different rule applies when personal property, highly perishable in its nature, is sold, pending litigation, under order of a court. In such a situation it has been held that the landlord's "lien on the property sold was destroyed by the sale, but vested in its proceeds."[999]

Since a landlord is not required to resort to the property converted (cotton) to enforce his preference lien, he may sue the converter for its value at the time the conversion took place.[1000] "One who purchases agricultural products produced upon rented premises, or other property liable to the landlord's lien for rent, within the time the lien continues thereon, and converts the same to his own use, may be sued by the landlord for the value of the property, if it does not exceed the rent due, and, if it should exceed the rent, then for the amount of the rent."[1001] And, further, the right to recover damages, to the extent of the sum secured by the lien, from the purchaser of property on which the landlord has a lien, is not barred by failure to sue within 30 days after removal of the property from the leased premises.[1002]

Similarly, "where a creditor of a tenant has the tenant's crops levied upon and sold under execution, he thereby be-

995 TEX. ANN. REV. CIV. STAT. arts. 5222, 5237, et seq. (Vernon, 1947).
996 Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543, 545 (Tex. Comm. App. 1929).
997 Smith v. Miller, 300 S.W. 953, 954 (Tex. Civ. App. 1927) (Austin).
998 Farmer's Elevator Co. v. Advance Thresher Co., 189 S.W. 1018, 1020 (Tex. Civ. App. 1916) (Dallas); see Smith v. Miller, 300 S.W. 953, 955 (Tex. Civ. App. 1927) (Austin), and Estes v. McKinney, 43 S.W. 556, 557 (Tex. Civ. App. 1897).
999 Betterton v. Eppstein, 78 Tex. 443, 14 S.W. 861, 863 (1890) construing TEX. REV. CIV. STAT. art. 171 (1879), now appearing unchanged in FRANKI, Vernon's Tex. Rules of Civ. Proc. (1948) as Rule 600 and reworded as Rule 615.
1000 Cotton Finance & Trading Corporation v. Henderson, 293 S.W. 881, 883 (Tex. Civ. App. 1927) (El Paso).
1001 Zapp v. Johnson, 87 Tex. 641, 30 S.W. 861 (1895).
1002 Zapp v. Johnson, 87 Tex. 641, 30 S.W. 861 (1895).

comes liable to the landlord for conversion . . . to the extent of so much of the converted crop as may be necessary to satisfy the landlord's claim" for rents and advances.[1003]

In one decision where statutory-lien-cotton had been sent by the tenant to his mortgage creditor without consent of the landlord, with the understanding that it was to be applied on the mortgage debt, it was held that there was a conversion of the cotton when it was received, and the mortgage creditor could not defeat the landlord's preference lien by a claim that he held the cotton for more than a month as the property of the tenant.[1004] In a similar vein, another court said that the receipt of preference-lien-rice for the purpose of using it to satisfy a crop mortgage, within 30 days after its removal, without the landlord's consent, from the leased premises, was a conversion with respect to the landlord's lien. Further, the fact that the landlord did not bring suit within 30 days after removal, or assert a claim or take other steps, makes no difference.[1005]

Under the statutes giving the landlord a preference lien for rent and advances on agricultural products of the tenant raised on leased premises, the doctrine of *caveat emptor* applies in all sales by the tenant of crops grown upon the rented premises, and a buyer cannot claim the defense of innocent purchaser for value, without notice, as to produce raised on the premises and purchased within 30 days after its removal therefrom.[1006] It has been held also that the doctrine of innocent purchasers for value cannot be invoked to defeat a landlord's lien on mules "furnished" by the landlord and sold by the tenant without the landlord's knowledge or consent.[1007] In a comparatively recent decision where a buyer of cotton knew, or had every reason to believe, that the landlord had a lien thereon for the payment of rent, and with knowledge thereof purchased and converted the cotton, that buyer was held personally liable for the damage to the landlord. This liability was said to exist whether the buyer acted as agent or servant of another, and whether as buyer he acted in obedience to the command of his master or principal.[1008]

On the other hand, where the landlord, although rent

1003 Crider v. McIntyre, 20 S.W.2d 242, 243 (Tex. Civ. App. 1929) (Waco).
1004 Mensing Bros. & Co. v. Cardwell, 38 Tex. Civ. App. 16, 75 S.W. 347, 348 (1903), construing REV. CIV. STAT. art. 3236 (1895), now TEX. ANN. REV. CIV. STAT. art. 5225 (Vernon, 1947).
1005 Sexton Rice & Irrigation Co. v. Sexton, 48 Tex. Civ. App. 190, 106 S.W. 728, 734 (1911).
1006 American Cotton Co. v. Phillips, 31 Tex. Civ. App. 79, 71 S.W. 320, 321, citing ANN. STAT. arts. 3235-3237 (Batt) now shown as art. 5222, et seq. in TEX. ANN. REV. CIV. STAT. (Vernon, 1947).
1007 Winsett v. Harrison, 101 S.W.2d 1053, 1055 (Tex. Civ. App. 1937) (Texarkana).
1008 Renshaw v. Sullivan, 14 S.W.2d 919, 921 (Tex. Civ. App. 1929) (Fort Worth).

was not due, wrongfully and without probable cause, to vex and annoy the tenant, seized the tenant's crop under a distress warrant, the landlord would be liable for the actual damages caused and for exemplary damages if the proof should warrant it.[1009] In a more recent decision involving similar facts, actual damages were allowed plus $500 exemplary damages.[1010] The measure of actual damages recoverable by a tenant in case of seizure of his crop under a distress warrant illegally sued out is the value of the crop seized and converted, and does not include other damages the tenant might have sustained by being deprived of his crop.[1011] And, where a landlord in attempting to recover a sum due for rent on a residence, seized, under a distress warrant, personal property (household furniture, automobile, etc.) of the tenant, exempt to the head of a family from forced sale,[1012] the court held that the measure of damages recoverable by the tenant for the wrongful withholding was "the value of the use of the goods during the delay."[1013]

Waiver of landlord's statutory lien — estoppel. As we have seen, the landlord's lien for rents and advances continues so long as the lien property remains on the leased premises, and for one month thereafter. The lien also continues during preparation for marketing and during storage in public warehouses.[1014] In preceding pages there also has been discussed certain conduct in dealing with the lien property which will defeat the lien.[1015] For example, if the lien crop under some circumstances is removed from the rented premises for more than one month, the lien expires by operation of law.[1016] There are, of course, a number of other ways that the landlord's statutory lien may be terminated. The landlord, certainly, may waive his lien by express agreement.[1017]

"A waiver has been defined to be the intentional relinquishment of a known right . . . ."[1018] However, "the intention

1009 Smith v. Jones, 11 Tex. Civ. App. 18, 31 S.W. 306, 307 (1895).
1010 McAfee v. Chandler, 7 S.W.2d 623, 624 (Tex. Civ. App. 1928) (Amarillo).
1011 Majors v. Goodrich, 54 S.W. 919, 920 (Tex. Civ. App. 1900).
1012 See discussion under subtitle "Mortgage liens for advances—exemption laws," supra p. 123, for present exemption laws.
1013 Scott v. Byers, 275 S.W. 1088 (Tex. Civ. App. 1925) (Waco, urban). Decision cited REV. CIV. STAT. arts. 3785 and 5490 (1911) now listed as art. 3832 in TEX. ANN. REV. CIV. STAT. (Vernon, 1945) and as art. 5238 in TEX. ANN. REV. CIV. STAT. (Vernon, 1947). See additional discussion under subtitle "Suit to recover rent," supra p. 77.
1014 TEX. ANN. REV. CIV. STAT. arts. 5222-5227 (Vernon, 1947), and TEX. ANN. REV. CIV. STAT. art. 5606 (Vernon, 1941).
1015 See discussion under subtitle "Removal from leased premises of property subject to the landlord's statutory lien," supra p. 131.
1016 Morris v. Burrows, 180 S.W. 1108, 1113 (Tex. Civ. App. 1915) (Texarkana).
1017 Orange County Irr. Co. v. Orange Nat. Bank, 62 Tex. Civ. App. 19, 130 S.W. 869, 870 (1910). See generally 27 TEX. JUR. 113 (sec. 47) and 6 TEX. L. REV. 393 (1928).
1018 Adams v. Paton & Co., 173 S.W. 546, 547 (Tex. Civ. App. 1915) (Texarkana).

to waive the right must be proved like any other fact;"[1019] or be deduced from the circumstances of the particular case.[1020] "The law will not imply a waiver against the landlord's intent where there is no element of estoppel."[1021] Further, the burden of establishing that the landlord waived his lien rests upon the tenant's creditor, creditor in execution[1022] or purchaser from the tenant,[1023] when claiming against the lien.[1024]

In the following three sections, circumstances both affecting and not affecting a waiver are discussed.

Circumstances affecting waiver. The landlord, of course, may waive his lien in the lease contract or in subsequent letters.[1025] And it has been held that if by the terms of the rental contract the tenant is to gather and market the cotton and turn over to the landlord one-fourth of the proceeds as rent, the landlord has waived his rent lien. Further, acceptance of proceeds under such facts tends to show a ratification.[1026] Similarly, in another decision where the landlord and tenant agreed, as an essential part of the rental contract, that the tenant should have the right and authority to sell the crop and pay the landlord his part of the proceeds, and the tenant sold and the landlord accepted the agreed share, it was held that there was a waiver of the landlord's lien.[1027]

Although "the law will not imply a waiver . . . in opposition to the actual intent of the lienholder, there being no grounds for invoking an estoppel,"[1028] it has been held that "a landlord may so act as to waive his lien upon the products of the rented premises, and thereby confer power upon the tenant to sell such products discharged from the landlord's lien, even without an express waiver . . . ."[1029] And in another case it was held that where the landlord authorizes, permits, acquiesces in or ratifies the removal of such crops from the rented premises, by the tenant or any one else, for the purpose of sale in open market, he thereby waives his landlord's lien.[1030] For example, if the landlord expressly or impliedly authorized the tenant to sell the crop in the open

1019 Adams v. Paton & Co., 173 S.W. 546, 547 (Tex. Civ. App. 1915) (Texarkana).
1020 Gilliam v. Smither, 33 S.W. 984, 985 (Tex. Civ. App. 1896).
1021 Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo); Adams v. Paton & Co., 173 S.W. 546, 547 (Tex. Civ. App. 1915) (Texarkana).
1022 Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo).
1023 Adams v. Paton & Co., 173 S.W. 546, 547 (Tex. Civ. App. 1915) (Texarkana).
1024 Bivins v. West, 46 S.W. 112 (Tex. Civ. App. 1898).
1025 See Harris v. McGuffey, 185 S.W. 1024 (Tex. Civ. App. 1916) (Texarkana).
1026 Planter's Compress Co. v. Howard, 35 Tex. Civ. App. 300, 80 S.W. 119, 120 (1904), first appeal; 41 Tex. Civ. App. 285, 92 S.W. 44 (1906), second appeal.
1027 Keahey v. Bryant, 134 S.W. 409, 410 (Tex. Civ. App. 1911); but see Jarrell-Evans Dry Goods Co. v. Allen, 229 S.W. 920, 923 (Tex. Civ. App. 1921) (El Paso).
1028 Adams v. Paton & Co., 173 S.W. 546, 547 (Tex. Civ. App. 1915) (Texarkana).
1029 Melasky v. Jarrell, 131 S.W. 856, 857 (Tex. Civ. App. 1910).
1030 Gilliam v. Smither, 33 S.W. 984, 985 (Tex. Civ. App. 1896).

market, and instructed him to deposit the portion due for rent to the landlord's credit at the local bank, "such conduct would strongly tend to show a waiver of his landlord's lien."[1031] Moreover, a number of other courts have held that a landlord who agreed to the sale of the crop by his tenant, who was thereafter to account for the proceeds, waived his lien,[1032] and that by accepting part of the proceeds of such sale he ratified the sale.[1033] In one decision involving an unauthorized sale in the open market of lien cotton, acceptance by the landlord of one-fourth of the proceeds as full payment of rent due was held a waiver of the landlord's lien, and the landlord thereafter was denied the right to foreclose on the cotton sold to satisfy a claim for advances, which he had overlooked. The court said it was the landlord's business to know the extent of his tenant's obligation.[1034] Also, where the landlord, without objecting, saw the tenant sell lien cotton in the open market and receive the purchase price, he was held to be estopped from later claiming a landlord's lien thereon, as against the innocent purchaser.[1035] Similarly, a landlord who for eight years permitted the tenant to exercise absolute control over the land, raising, gathering and selling the crops without molestation or intereference, was held estopped from claiming a lien on cotton as against purchasers.[1036]

In another decision, on second appeal, the evidence showed that the tenant over a period of several months, although unauthorized, had on ten or more occasions sold lien cotton, sending the landlord his share of the proceeds of each sale as rent. No payment was made on the furnish account. The court, in holding that the landlord had waived his lien, said that "the receipt of a part of each successive sale necessarily constituted a ratification of all such sales and amounted in legal effect to original authority in the tenant to sell."[1037] It has also been held that receipt by the landlord of money from the tenant with knowledge that it was part of the proceeds derived from the sale of lien cotton "amounted to a consent to, or ratification of, the sale," and estopped the landlord from asserting his lien on the cotton in the hands of the purchasers.[1038]

1031 Melasky v. Jarrell, 131 S.W. 856, 857 (Tex. Civ. App. 1910).
1032 Gilliam v. Smither, 33 S.W. 984, 985 (Tex. Civ. App. 1896).
1033 Brod v. Luce, 225 S.W. 553 (Tex. Civ. App. 1920) (Austin); Smith v. Miller, 300 S.W. 953, 955 (Tex. Civ. App. 1927) (Austin).
1034 Jarvis v. Spangler, 251 S.W. 525, 526 (Tex. Civ. App. 1923) (Texarkana).
1035 Johnson & Son v. Kincaid, 81 S.W. 536 (Tex. Civ. App. 1904).
1036 Knight v. Barton, 38 S.W.2d 1107, 1108 (Tex. Civ. App. 1931) (San Antonio).
1037 Planter's Compress Co. v. Howard, 41 Tex. Civ. App. 285, 92 S.W. 44, 46 (1906) second appeal; 35 Tex. Civ. App. 300, 80 S.W. 119 (1904) first appeal.
1038 McCollum v. Wood, 33 S.W. 1087, 1088 (Tex. Civ. App. 1896).

Although consent by the landlord for the tenant to sell lien cotton in the open market may be held a waiver of the landlord's lien, it has been held that "the lien was not waived until the sale was made, and when made, the lien was only waived in favor of the purchaser so that he obtained a good title to the interest of the landlord in the cotton." The cotton did not thereupon become subject to execution in favor of the tenant's creditors unencumbered by the lien.[1039] Another similar holding refused to extend the waiver of the landlord's lien in favor of a judgment creditor who levied upon a portion of the unsold crop.[1040]

The landlord's consent to the sale of part of a lien crop to pay the rent is a waiver of his lien to the extent of the value of the cotton so sold, but his lien would not be affected on the residue of the crop, the cotton sold not being sufficient to pay all the rent.[1041]

Circumstances not affecting waiver. Since the law imposes no restraint upon the right of the tenant to sell lien crops on the rented premises, a waiver of the landlord's lien is not to be inferred from the mere transfer of the ownership of the property by the tenant. "If the sale by the tenant does not carry with it the implication that the property is to be removed from the rented premises without consent of the landlord, the latter is not called upon to signify whether he assents or dissents."[1042] Of course, "the removal of agricultural products (from the leased premises) for the purpose of being prepared for market does not constitute a waiver of the landlord's lien."[1043]

A landlord does not waive his lien by the mere taking of a mortgage, as additional security, on livestock, tools and machinery furnished to make the crop,[1044] and on the crop.[1045] Further, the landlord's taking as evidence of his rent the tenant's promissory note "to be paid from the proceeds of the first of the crop gathered" does not show as a matter of law that the landlord has waived his lien.[1046] Nor does a landlord's acceptance from a third party, a purchaser of goods

1039 Sparks v. Ponder, 42 Tex. Civ. App. 431, 94 S.W. 428, 430 (1906).
1040 Jarrell-Evans Dry Goods Co. v. Allen, 229 S.W. 920, 923 (Tex. Civ. App. 1921) (El Paso).
1041 Walhoefer v. Hobgood, 18 Tex. Civ. App. 291, 44 S.W. 566, 568 (1898); motion for rehearing overruled, 19 Tex. Civ. App. 629, 48 S.W. 32 (1898).
1042 Adams v. Paton & Co., 173 S.W. 546, 548 (Tex. Civ. App. 1915) (Texarkana).
1043 Green v. Scales, 219 S.W. 274, 276 (Tex. Civ. App. 1920) (Fort Worth).
1044 Griffin v. Mangrum, 267 S.W. 279, 280 (Tex. Civ. App. 1924) (Dallas); Gulf C. & S.F. Ry. Co. v. Enloe, 5 S.W.2d 545 (Tex. Civ. App. 1928) (Texarkana).
1045 Smith v. Miller, 300 S.W. 953, 954 (Tex. Civ. App. 1927) (Austin); Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo).
1046 Henneman Grain & Seed Co. v. Hill, 68 S.W.2d 525, 526 (Tex. Civ. App. 1934) (Amarillo).

from the tenant, of his voluntary written collateral promise to pay the tenant's rent, by itself operate to release the landlord's lien.[1047]

The mere fact that the landlord consents that the tenant may sublease is not a waiver of the landlord's lien on any of the crops raised on the premises.[1048] "The crops of the subtenant in such case would be subject to the landlord's lien for rent to the extent of his claim against the original tenant."[1049] Further, it has been said that consent to a subletting, by the terms of which the subtenant agrees to pay rent to the tenant and makes no agreement to pay rent to the landlord, is not sufficient to prove an agreement on the part of the landlord to waive his lien.[1050]

The landlord's consent for the tenant to use part of the crop or its proceeds is not a waiver of the landlord's lien on the rest of the crop.[1051] In a similar holding another court came to the same conclusion and said that "The mere fact that a landlord permits a tenant to sell some portion of his crops in the market without objection is not alone a sufficient reason for purchasers to conclude that he had waived his lien on the entire crop."[1052] This was said in another case to be particularly true where the buyer was not influenced by the previous sales to other purchasers.[1053]

The facts in one case showed that the landlord had authorized a Negro tenant to sell lien cotton to a furnish merchant, a creditor of the tenant, under an agreement that the landlord's lien for rents and advances should be satisfied out of the proceeds. Although the Negro tenant asked for cash to pay his landlord the rents and advances, the purchaser, over the tenant's objection, gave him a check for the landlord for rents only, and payment was refused on the check for lack of funds. The landlord later, by threatening prosecution, obtained from the purchaser a sum of money in payment of the rent only. The court held that under these facts there was no waiver of the landlord's lien or ratification of the sale; that there was, in fact, not a voluntary sale on the part of the tenant, but rather an unlawful taking of the property

1047 Block, Oppenheimer & Co. v. Latham, 63 Tex. 414, 417 (1885) (urban).

1048 Marrs v. Lumpkins, 22 Tex. Civ. App. 448, 54 S.W. 775, 777 (1900); Land v. Roby, 56 Tex. Civ. App. 333, 120 S.W. 1057, 1058 (1909).

1049 Marrs v. Lumpkins, 22 Tex. Civ. App. 448, 54 S.W. 775, 777 (1900).

1050 Trout v. McQueen, 62 S.W. 928 (Tex. Civ. App. 1901).

1051 Daugherty v. White, 257 S.W. 976, 979 (Tex. Civ. App. 1924) (Amarillo); Johnston v. Kleinsmith, 33 Tex. Civ. App. 236, 77 S.W. 36, 37 (1903).

1052 Antone v. Miles, 47 Tex. Civ. App. 289, 105 S.W. 39, 42 (1907).

1053 Sanger v. Magee, 29 Tex. Civ. App. 397, 69 S.W. 234, 235 (1902).

by the purchaser, without the consent and over the protest of the tenant.[1054]

In one case a landlord permitted his tenant to trade two of four mules furnished, and waived his landlord's lien on the two traded, but agreed that the lien should attach to the two mules received in trade. These facts, the court held, were not sufficient for concluding that he waived his lien on the two mules retained.[1055]

Effect on waiver of legal proceedings to enforce lien. If a lien crop is removed from leased premises (except for preparation for market or storage in a public warehouse), the landlord's lien ceases to exist 30 days after removal, in the absence of foreclosure proceedings taken during the 30-day interval.[1056] However, legal steps taken by the landlord in foreclosing his lien, as, for example, suing out a writ of sequestration and a distress warrant under which he levied upon part of the lien property, as such, are not a waiver of the lien.[1057] In fact, as one court put it, seizure of personal property under writ in a distress is for security, to hold the property in *status quo* pending suit for foreclosure.[1058] Another court, speaking in the same vein, said that the landlord's suit to foreclose the lien, if once commenced in time, "will prevent any loss of it by the expiration of the time limited for its continuance."[1059]

As has been seen, seizure of personal property under writ in a distress is for security, to hold the property in *status quo* pending suit for foreclosure, and also quashing of the distress and return of the property taken thereunder to the tenant does not impair the landlord's lien;[1060] nor does the fact that cotton seized by distress warrant was replevied by the tenant discharge it of the landlord's lien.[1061] It has likewise been held that adoption of the wrong method of enforcing a landlord's lien (attachment instead of a distress warrant) does not operate as a waiver.[1062] Further, "Where the landlord cannot exercise his right of seizure by reason of the act of the law, (property held by sheriff under an attachment to enforce a mechanic's lien) he does not lose his lien or his right to en-

1054 Caswell v. Lensing & Bennett, 183 S.W. 75, 77 (Tex. Civ. App. 1916) (Austin).
1055 Winsett v. Harrison, 101 S.W.2d 1053, 1055 (Tex. Civ. App. 1937) (Texarkana).
1056 Cribbs v. Polk County, 56 S.W.2d 685 (Tex. Civ. App. 1933) (Eastland); Horton v. Lee, 180 S.W. 1169, 1170 (Tex. Civ. App. 1915) (Dallas); Jenkins v. Patton, 21 S.W. 693 (Tex. Civ. App. 1893).
1057 Lovelady v. Harding, 207 S.W. 933, 936 (Tex. Civ. App. 1918) (Fort Worth, urban).
1058 Spann v. Trumpf, 83 S.W.2d 1043, 1045 (Tex. Civ. App. 1935) (Dallas).
1059 Bourcier v. Edmondson, 58 Tex. 675, 679 (1883) (urban).
1060 Spann v. Trumpf, 83 S.W.2d 1043, 1045 (Tex. Civ. App. 1935) (Dallas, urban).
1061 McBride v. Puckett, 66 S.W. 242, 243 (Tex. Civ. App. 1901).
1062 Stephens v. Cox, 255 S.W. 241 (Tex. Civ. App. 1923); motion for rehearing overruled, 256 S.W. 643, 644 (1923).

force it by not exercising it within the specified time required after the property is removed from the premises."[1063] However, a landlord waives his lien on property seized under a distress warrant where he proceeds to take merely a personal judgment, without foreclosure of his lien on the property.[1064]

Procedures for enforcing landlord's statutory lien. Under Texas statute, when any rent or advances become due, or the tenant is about to move from the rented premises or to remove his property from his premises,[1065] the landlord may apply to a justice of the peace having jurisdiction for a distress warrant to seize the preference-lien-property of such tenant.[1066]

The law does not compel the landlord to take the tenant's property to secure his debt by enforcing his lien; "it merely allows him to resort to it in case . . . he wishes to seize the tenant's property and hold it till he can obtain a judgment and order for its sale."[1067] As one court put it, "The only office of a distress warrant is to impound the property during the pendency of the suit."[1068] Moreover, "The institution of distress proceedings is not a necessary prerequisite to a foreclosure of a landlord's lien. The lien is preserved by the bringing of the suit to foreclose, if brought in time."[1069]

Some early Texas decisions held that a subtenant's crops were not subject to distress proceedings to secure the payment of rent owed by the tenant to the landlord.[1070] This early rule no longer holds true since, by statute, the tenant is forbidden to sublease any part of the premises without the landlord's consent.[1071] A statute now in force informs subtenants or assignees that they can acquire no right to use the premises without the landlord's consent,[1072] and of the further fact that the law gives the landlord a lien on all the products of the

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1063 Cook v. Yandell Realty Co., 275 S.W. 850, 853 (Tex. Civ. App. 1925) (El Paso, urban).
1064 Wise v. Old, 57 Tex. 514, 515 (1882); Haymes v. Gray, 2 Willson Civ. Cas. Ct. App. sec. 252 (1884); Bond v. Carter, 73 S.W. 45, 46 (Tex. Civ. App. 1903).
1065 See discussion under subtitle "Landlord's remedies if unauthorized removal—distress warrant," supra p. 135.
1066 TEX. ANN. REV. CIV. STAT. art. 5227 (Vernon, 1947). See TEX. ANN. REV. CIV. STAT. art. 5239 (Vernon, 1947) on distress for rent of leased buildings.
1067 Bourcier v. Edmondson, 58 Tex. 675, 678 (1883) (urban).
1068 Stephens v. Cox, 255 S.W. 241, 242 (Tex. Civ. App. 1923) (Austin); rehearing denied, 256 S.W. 643 (1923).
1069 Randall v. Rosenthal, 27 S.W. 906, 907, subsequent action 31 S.W. 822 (Tex. Civ. App. 1894) (urban), citing Bourcier v. Edmondson, 58 Tex. 675, 679 (1883) (urban). See 27 TEX. JUR. 107 (sec. 42); and on proceeding to enforce liens, 27 TEX. JUR. 146 et seq. (secs. 74-79).
1070 Knight v. Old and Ragland, 2 Willson Civ. Cas. Ct. App. sec. 79 (1883); Sansing v. Risinger, 2 Willson Civ. Cas. Ct. App. sec. 713 (1885); Lea v. Hogue, 1 White & W. Civ. Cas. Ct. App. sec. 607 (1877); Gibson v. Mullican, 58 Tex. 430, 432 (1883).
1071 See Gibson v. Mullican, 58 Tex. 430, 433 (1883); Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 482 (1894).
1072 TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1947); see discussion under subtitle "Rent Liability When Tenant Assigns or Sublets Premises," supra p. 63.

land to secure the rent.[1073] "Under such circumstances, whatever contract an assignee or under-tenant may make with the original lessee, he must be understood impliedly to assume towards the lessor the relation of tenant, and to consent that the lien given by statute shall exist."[1074] Even under the early rule, the landlord could seize under a distress warrant the crop that had been worked by a cropper who was a mere employee of the head-tenant.[1075] Purchase from subtenants of cotton raised by them does not release it from the landlord's lien.[1076]

Rent payable in kind, which is by a portion of the crops, should be delivered to the landlord as the crops are gathered; and if the tenant refuses so to deliver such rent, and retains it beyond a reasonable time, the landlord may distrain and sue for its money value.[1077]

Procedure for suing out a distress warrant [1078] is as follows: The landlord or his agent or his attorney must make an oath that the amount sued for is rent or is advances such as are mentioned in Article 5222, or he must produce a writing signed by his tenant to that effect. The landlord must further swear that the warrant is not sued out to vex and harass the tenant-defendant.[1079] It is also necessary for the person applying for the warrant to execute a bond with two sureties, conditioned to protect the defendant in damages in case the warrant is illegally or unjustly sued out.[1080] Upon the filing of the oath and bond, the justice of the peace shall issue the warrant commanding the proper officer "to seize the property of the defendant, or so much thereof as will be sufficient to satisfy the plaintiff's demand." The warrant shall be made returnable to the court having jurisdiction of the amount in controversy on the Monday next after the expiration of 15 days from the date of issuance of the writ.[1081]

A landlord in a distress proceeding may seize all the property on which he has a lien, though it is more than sufficient to pay the rent.[1082] However, the property levied on in foreclosing a landlord's lien must be the same or part of the property furnished by the landlord to the tenant to make the

1073 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947).
1074 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894).
1075 Sansing v. Risinger, 2 Willson Civ. Cas. Ct. App. sec. 713 (1885).
1076 Walhoefer v. Hobgood, 19 Tex. Civ. App. 629, 48 S.W. 32 (1898); for prior decision see 18 Tex. Civ. App. 291, 44 S.W. 566 (1898).
1077 Brown v. Adams, 35 Tex. 447, 450 (1871-72).
1078 See generally on distress proceedings, 27 TEX. JUR. 184 et seq. (secs. 96-124).
1079 FRANKI, JULIUS F., Vernon's Tex. Rules of Civ. Proc., Rule 610 (1948).
1080 Id., Rule 611.
1081 Id., Rule 612.
1082 McKee v. Sims, 92 Tex. 51, 45 S.W. 564, 565 (1898), reversing 45 S.W. 37 (Tex. Civ. App. 1898) (urban).

crop, and which was necessary for such purpose, or crops raised on the leased premises during the year the debt was incurred.[1083]

The officer directed to seize the property must seize and keep it safely in his possession, unless replevied, and make due return to the proper court.[1084]

The defendant whose property has been seized may, within 10 days from the levy, replevin the property by giving a bond with two or more sureties, in double the amount of the debt, "or at his election, for the value of the property so seized," conditioned that he will satisfy the judgment that may be rendered against him.[1085]

Whenever property seized under distress is perishable and "is in danger of serious and immediate waste or decay," or keeping it until the trial will entail "such expense or deterioration in value as greatly to lessen the amount likely to be realized therefrom," the judge to whom the writ is returnable may order it sold.[1086] If the application for prompt sale of perishables was made by other than the defendant, the applicant must file with the court a bond, with two or more sureties, payable to the defendant, conditioned to protect him in damages in case the sale was illegally or unjustly applied for or made.[1087] Such sale of perishables shall be conducted in the same manner as sale of personal property under execution (Rule 649), except that the time of advertisement and of the sale may be fixed by the judge at a time earlier than 10 days, according to the exigency of the case.[1088] After such sale the proceeds shall be promptly paid into court.[1089]

If the cause is to be tried in the justice court, the defendant is required to answer on the first day of the next succeeding term, or, if jurisdiction is in some other court, the defendant must answer before that court at or before 10 o'clock a.m. on the Monday next after the expiration of 20 days from the date of service.[1090] When the warrant is made returnable to the district or county court, the plaintiff shall file his petition within 10 days from the date of issuance of the writ.[1091]

1083 Griffin v. Mangrum, 267 S.W. 279, 280 (Tex. Civ. App. 1924) (Dallas).
1084 FRANKI, JULIUS F., Vernon's Tex. Rules of Civ. Proc., Rule 613 (1948).
1085 FRANKI, JULIUS F., Vernon's Tex. Rules of Civ. Proc., Rule 614 (1948).
1086 Id., Rule 615.
1087 Id., Rule 616.
1088 Id., Rule 617.
1089 Id., Rule 618.
1090 Id., Rule 619.
1091 Id., Rule 620.

After trial of the cause, the judgment of the court shall be enforced by execution or other appropriate process. Such execution shall be returnable in 30, 60 or 90 days as requested by the plaintiff, his agent or attorney.[1092] "Personal property levied on under execution shall be offered for sale on the premises where it is taken in execution, or at the courthouse door of the county, or at some other place if, owing to the nature of the property, it is more convenient to exhibit it to purchasers at such place. Personal property susceptible of being exhibited shall not be sold unless the same be present and subject to the view of those attending the sale . . ."[1093] Notice of the time and place of such sale shall be given by posting notice thereof for 10 days successively immediately prior to the day of sale at the courthouse door and at the place where the sale is to be made.[1094]

It has been held proper for a landlord who had an unpaid rent claim to enjoin execution creditors from selling a crop found upon the rented premises and seized by them for debt owed by the tenant.[1095] Moreover, a landlord with a lien on a crop for rent and advances may maintain an action for damages against a purchaser from the tenant who converts the lien crop;[1096] or the landlord may foreclose his lien upon the crop, if found.[1097] Furthermore, where a chattel mortgagee with knowledge of the landlord's lien for rent and advances, and in defiance of the landlord's protest, went on the landlord's premises, removed the baled cotton and sold it, such conduct amounted to willful trespass, and the landlord's right to exemplary damages was held properly submitted to the jury.[1098]

Under the Texas homestead laws,[1099] exemption of personal property from forced sale for debt "shall not apply when the debt is due for rents or advances made by a landlord to his tenant . . ."[1100] In other words, a tenant is not entitled to claim exempt from forced sale by the landlord crops raised on leased premises and farm implements and cattle furnished by that landlord to make the crop so as to

1092 FRANKI, JULIUS F., Vernon's Tex. Rules of Civ. Proc., Rule 621 (1948).
1093 Id., Rule 649.
1094 Id., Rule 650.
1095 Click v. Steward, 36 Tex. 280, 281 (1871-72).
1096 Taylor v. Felder, 5 Tex. Civ. App. 417, 23 S.W. 480, 481 (1893); on rehearing, motion overruled, 24 S.W. 313 (1893). See Newman v. Ward, 46 S.W. 868, 870 (Tex. Civ. App. 1898).
1097 Farmers' Elevator Co. v. Advance Thresher Co., 189 S.W. 1018, 1021 (Tex. Civ. App. 1916) (Dallas).
1098 Guaranty Bond State Bank of Timpson v. Redding, 24 S.W.2d 457, 461 (Tex. Civ. App. 1929) (Beaumont).
1099 See discussion under subtitle "Tenant's Homestead Rights in Leased Premises," supra p. 47; and "Mortgage liens for advances—exemption laws," supra p. 123.
1100 TEX. ANN. REV. CIV. STAT. art. 3840 (Vernon, 1945); see 18 TEX. JUR. 849 (sec. 42) and 27 TEX. JUR. 142 (sec. 71).

prevent the enforcement of the landlord's lien for rents and advances.[1101]

Assignment by the landlord of the right to receive rent from the tenant carries with it the landlord's statutory lien.[1102]

Other Liens on Crops—Priorities

Except for liens for taxes[1103] and for irrigation water,[1104] the landlord's statutory lien for rent[1105] and advances,[1106] unless waived,[1107] or otherwise lost,[1108] takes precedence over other liens on crops grown on the leased premises. The landlord's statutory lien is prior to warehousemen's liens,[1109] chattel mortgage liens,[1110] farm laborers' liens[1111] and other miscellaneous liens on the crop.[1112]

Irrigation lien on crops. A Texas statute accords to every person or agency supplying water for the purpose of irrigation a lien upon the crops raised on the land so irrigated. This lien is "a preference lien superior to every other lien upon the crop or crops raised upon the land thus irrigated."[1113]

This lien for water furnished for irrigation purposes is enforceable against crops of a tenant, and is superior, or

1101 See Stephens v. Cox, 256 S.W. 643 (Tex. Civ. App. 1923) second appeal; 255 S.W. 241 (Tex. Civ. App. 1923) (Austin) first appeal.

1102 Hatchett v. Miller, 53 S.W. 357 (Tex. Civ. App. 1899); McCollum v. Hammit, 279 S.W. 881, 882 (Tex. Civ. App. 1926) (Eastland); First Natl. Bank of Quitaque v. Pointer, 51 S.W.2d 781, 783 (Tex. Civ. App. 1932) (Amarillo).

1103 See discussion under subtitle "Priority between landlord's liens and other miscellaneous liens or claims," infra p. 156.

1104 See discussion under subtitle "Irrigation lien on crops," p. 149.

1105 See discussion under subtitle "Landlord's statutory lien on the crop for rent," supra p. 112.

1106 See discussion under subtitle "Landowner's statutory lien for advances or furnish," supra p. 117.

1107 See discussion under subtitle "Waiver of landlord's statutory lien—estoppel," supra p. 139.

1108 See discussions under subtitles "Statutory regulation of rent," supra p. 58; "Removal from leased premises of property subject to landlord's statutory lien," supra p. 131; and "Landowner's statutory lien for advances or furnish," supra p. 117.

1109 See discussion under subtitle "Warehousemen's liens on stored crops," infra p. 150.

1110 See discussion under subtitle "Chattel mortgage liens on tenant's and cropper's crops and on furnishings," infra p. 150.

1111 See discussion under subtitle "Laborer's or farm hand's liens on crops," infra p. 151.

1112 See discussion under subtitle "Priority between landlord's liens and other miscellaneous liens or claims," infra p. 156.

1113 TEX. ANN. REV. CIV. STAT. art. 7596 (Vernon, 1937). "Preference lien. Every person, association of persons, corporation, water improvement or irrigation district who has heretofore constructed, or may hereafter construct any ditch, canal, dam, lake or reservoir for the purpose of irrigation, and who shall lease, rent, furnish or supply water to any person, association of persons, water improvement district or corporation, for the purpose of irrigation, shall, irrespective of contract, have a preference lien superior to every other lien upon the crop or crops raised upon the land thus irrigated.

"Provided, however, that when any such irrigation, conservation or reclamation district shall obtain a water supply under contract with the United States, the Board of Directors of such district may, by resolution duly entered upon the minutes of the board, and with the consent of the Secretary of the Interior, waive such preference lien, in whole or in part."

See also TEX. ANN. REV. CIV. STAT. arts. 7880-109 and 7553 (Vernon, 1937). Tex. Laws 1949, c. 601 granted similar preference liens to navigation districts that supply irrigation water.

prior, to the landlord's lien for unpaid rents[1114] or advances.[1115] The lien is also superior to a chattel mortgage lien on the crop.[1116] The lien on the crop for water furnished is enforceable in the same manner that a landlord's lien may be enforced.[1117]

Warehousemen's liens on stored crops. Warehousemen, under Texas statutes, are given a lien on stored goods for lawful charges for storage and preservation, and also for lawful "claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods . . . ."[1118] Further, a warehouseman having a lien may refuse to deliver the goods stored until the lien is satisfied.[1119]

Nowhere does the warehouse law directly give the warehouseman's lien priority over a landlord's lien on products stored by the tenant. On the contrary, the act specifically provides that the landlord's preference lien for rents and advances shall continue while farm products are in storage, provided a negotiable warehouse receipt has not been issued.[1120] And in one decision where nonnegotiable receipts were issued on cotton in storage, the landlord's preference lien was held to continue.[1121] Further, it has been held that the landlord's lien for moneys expended in finishing a crop abandoned by a tenant is superior to a lien for storage.[1122] The same court held that a warehouseman's lien on stored wheat is not prior or superior to a pre-existing contract lien or chattel mortgage lien on the wheat.[1123]

Chattel mortgage liens on tenant's and cropper's crops and on furnishings. In previous sections, the right of tenants and croppers to mortgage an unplanted or growing

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1114 Texas Bank & Trust Co. of Beaumont v. Smith, 192 S.W. 533, 536 (Tex. Sup. Ct. 1917), answering certified question, 195 S.W. 617, 618 (Tex. Civ. App. 1917) (Decisions construe a similar previous statute). See generally 13 TEX. JUR. 33 (sec. 30); 44 TEX. JUR. 368 (sec. 234).

1115 Dunbar v. Texas Irr. Co., 195 S.W. 614, 616 (Tex. Civ. App. 1917) (Galveston) (Decision construes a similar previous statute).

1116 Texas Bank & Trust Co. of Beaumont v. Smith, 192 S.W. 533, 536 (Tex. Sup. Ct. 1917), answering certified question, 195 S.W. 617, 619 (Tex. Civ. App. 1917). (Decisions construe a similar previous statute.)

1117 TEX. ANN. REV. CIV. STAT. art. 7597 (Vernon, 1937); Tex. Laws 1949, c. 601; see discussion under subtitle "Procedures for enforcing landlord's statutory lien," supra p. 145.

1118 TEX. ANN. REV. CIV. STAT. arts. 5604, 5638 (Vernon, 1941). Also in regard to warehouse liens and procedures for enforcement, see arts. 5576, 5601-5606, 5639-5647 (Vernon, 1941).

1119 TEX. ANN. REV. CIV. STAT. art. 5642 (Vernon, 1941).

1120 Id., art. 5606.

1121 Morris v. Burrows, 180 S.W. 1108, 1112 (Tex. Civ. App. 1915) (Texarkana). See generally 43 TEX. JUR. 974 (sec. 55).

1122 Holmes v. Klein, 59 S.W.2d 171, 173 (Tex. Civ. App. 1933) (Amarillo).

1123 Holmes v. Klein, 59 S.W.2d 171, 173 (Tex. Civ. App. 1933) (Amarillo).

crop has been discussed.[1124] Such chattel mortgage liens given on a tenant's (including the cropper-tenant's) crops, however, are inferior to the landlord's liens for rents[1125] and advances,[1126] unless the landlord's liens have been waived or surrendered.[1127] The same rule as to priorities of liens applies where the general chattel mortgage given by the tenant covers the crop and also mules and other chattels furnished by the landlord to make the crop.[1128] The landlord, in addition to his senior lien for rents and for advances made to the tenant before he abandons the crop, also can assert a priority over a chattel mortgage lien for amounts he expended in completing a crop abandoned by his tenant.[1129]

The landlord's lien for advances furnished to make a crop is senior to a mortgage lien on the crop, whether the landlord furnished the supplies directly or through a third person,[1130] provided, of course, that the landlord is primarily liable for the advances.[1131]

It is also agreed that "A tenant may mortgage an unplanted crop, and the same will be effective as soon as he plants the crop . . . A landlord has a lien on such crop for rents and advances . . . ."[1132] Such chattel mortgage on a tenant's future crop, though registered prior to the time the landlord "furnished" the tenant, does not render the landlord's lien subordinate to the mortgage.[1133]

An employee-cropper on the "halves" also may mortgage his share of a growing crop, and again the mortgage lien will be subject to the prior contract claims of the landlord for advances.[1134]

Laborer's or farm hand's lien on crops. Texas statutes give common laborers and farm hands a lien upon crops

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1124 See discussions under subtitles "Tenants may mortgage or sell growing crops," supra p. 99, and "Cropper's right to mortgage or sell interest in crop," supra p. 108.

1125 Cotton Finance & Trading Corporation v. Henderson, 293 S.W. 881, 883 (Tex. Civ. App. 1927) (El Paso).

1126 Durham v. Flannagan, 2 Willson Civ. Cas. Ct. App. sec. 25 (1883); Koontz v. Savely, 233 S.W. 540, 542 (Tex. Civ. App. 1921) (San Antonio); see generally 27 TEX. JUR. 168 et seq. (secs. 86, 87).

1127 See discussion under subtitle "Waiver of landlord's statutory lien—estoppel," supra p. 139, et seq. Also see Orange County Irr. Co. v. Orange National Bank, 62 Tex. Civ. App. 19, 130 S.W. 869, 870 (1910).

1128 Gorman Co. v. Jones, 245 S.W. 448, 449 (Tex. Civ. App. 1922) (Dallas).

1129 Roden v. Farmers' Nat. Bank of Arlington, 19 S.W.2d 331, 333 (Tex. Civ. App. 1929) (Fort Worth); Taack v. Underwood. 266 S.W. 618, 620 (Tex. Civ. App. 1924) (Amarillo).

1130 Frith v. Wright, 173 S.W. 453, 456 (Tex. Civ. App. 1915) (Amarillo); Ross v. Schultz, 198 S.W. 672, 673 (Tex. Civ. App. 1917) (Texarkana).

1131 See discussion under subtitle "Landlord to have statutory lien must be primarily liable for furnish," supra p. 121.

1132 Williams v. King, 206 S.W. 106, 107 (Tex. Civ. App. 1917) (Austin).

1133 Neblett v. Barron, 160 S.W. 1167, 1169 (Tex. Civ. App. 1911) (Fort Worth), answering certified question, 104 Tex. 111, 134 S.W. 208 (1911).

1134 McGee v. Fitzer, 37 Tex. 27, 29 (1872).

"created in whole or in part" by their labor. This lien of farm workers, however, is subordinate to the landlord's lien for rents and advances.[1135]

To fix such a lien on a crop it must be clear that the person claiming such lien is in one of the categories of persons named in the act. The statute gives a lien to a number of different groups, including "common laborers" and "farm hands" and only those can benefit by the statute.[1136] It has been held that "common laborers" within the purview of this statute refers to "one who labors with his hands for wages."[1137] Under this interpretation, a farm manager, both performing labor and directing planting, irrigation and cultivation, was held not entitled to a lien on the crop as a common laborer, nor as under the class of a farm hand.[1138] Nor was one with a contract to cut and haul spinach, who did not do the work of cutting and hauling, but rather hired the men, furnished the equipment and supervised the work, held to have a lien as a "laborer" on the produce he cut and hauled.[1139] Similarly, one who contracted to thresh wheat had no laborer's lien on the wheat threshed, since he "was not an employee or farm laborer within the meaning of the statute."[1140] A lien on threshed grain was even denied common laborers working with a threshing machine, in a case where they were hired by the owner of the thresher and not by the owner of the crop.[1141]

The method of perfecting the farm worker's lien is set out by statute. It is well settled that this or any statutory lien can be preserved only when it has been perfected in the manner prescribed.[1142] Under the provisions of the latter

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1135 TEX. ANN. REV. CIV. STAT. art. 5483 (Vernon, 1941). "Lien prescribed. Whenever any . . . common laborer, farm hand, male or female, may labor or perform any service . . . or any farm hands, under or by virtue of any contract or agreement, written or verbal, with any person, employer, firm or corporation . . . in order to secure the payment of the amount due or owing under such contract or agreement, written or verbal, the hereinbefore mentioned employees shall have a first lien upon all products . . . or thing or things of value of whatever character that may be created in whole or in part by the labor or that may be used or useful by such person or persons or necessarily connected with the performance of such labor or service, which may be owned by or in the possession or under the control of the aforesaid employer, person, firm, corporation . . . provided, that the lien herein given to a farm hand shall be subordinate to the landlord's lien provided by law."
See 13 TEX. JUR. 29 (sec. 28) and 28 TEX. JUR. 42, et seq: (secs. 41-46) on farm laborer's liens.

1136 See Beakley v. Lind, 32 S.W.2d 671, 672 (Tex. Civ. App. 1930) (San Antonio).

1137 See Beakley v. Lind, 32 S.W.2d 671, 672 (Tex. Civ. App. 1930) (San Antonio).

1138 Beakley v. Lind, 32 S.W.2d 671, 672 (Tex. Civ. App. 1930) (San Antonio).

1139 Dunn v. Hankins, 127 S.W.2d 983, 985 (Tex. Civ. App. 1939) (San Antonio).

1140 Farmers' Elevator Co. v. Advance Thresher Co., 189 S.W. 1018, 1021 (Tex. Civ. App. 1916) (Dallas); see generally 2 TEX. JUR. 672 (sec. 2).

1141 Gibson v. Wood, 199 S.W. 893, 894 (Tex. Civ. App. 1917) (Fort Worth).

1142 Farmers' Elevator Co. v. Advance Thresher Co., 189 S.W. 1018, 1021 (Tex. Civ. App. 1916) (Dallas).

act, the laborer, to fix and preserve his lien, must upon failure or refusal to pay make duplicate accounts of the amount due, and within 30 days after the wages accrue, present one copy to his employer and file the other copy with the county clerk.[1143]

If labor or service is by agreement by the day or week, wages shall be due and payable weekly, or if by the month, wages shall be due and payable monthly.[1144] A laborer's lien ceases to exist six months after it is fixed, unless suit is brought within that time to enforce it.[1145]

The word "accrued" as used in the statute on fixing the lien, means the original maturity date of the amount owing as same is fixed in the original contract, and has reference to the first vestiture of the right to demand and enforce payment, and not to any date of extension beyond the statutory period in which the lien must be fixed.[1146] In other words, an agreement between the employer and laborer for an extension of time for payment of the wages accrued does not extend the time for perfecting the laborer's lien; and, if the agreement for extension carried the debt beyond the period in which the lien could be fixed, the right to fix the lien is lost.[1147]

Although the act limits the time for presenting a wage claim to perfect the lien to 30 days after the account has

1143 TEX. ANN. REV. CIV. STAT. art. 5486 (Vernon, 1941). "Liens, how fixed. Whenever any person, employer, firm, corporation . . . shall fail or refuse to make payments as hereinafter prescribed in this law, the said . . . employee, farm hand, . . . or laborer, who shall have performed service of any character, shall make or have made duplicate accounts of such service, with amount due him or her for the same, and present, or have presented, to aforesaid employer, person, firm or corporation . . . one of the aforesaid duplicate accounts within thirty (30) days after the said indebtedness shall have accrued. The other of the said duplicate accounts shall, within the time hereinbefore prescribed, be filed with the county clerk of the county in which said service was rendered . . . The party or parties presenting the aforesaid account shall make affidavit as to the correctness of the same. A compliance with the foregoing requirements in this Article shall be necessary to fix and preserve the lien given under this law; and the liens of different persons shall take precedence in the order in which they are filed; provided, that all persons claiming the benefit of this law shall have six months within which to bring suit to foreclose the aforesaid lien; and provided, further, that a substantial compliance with the provisions of this Article shall be deemed sufficient diligence to fix and secure the lien hereinbefore given; provided, that any purchaser of such products from the owner thereof shall acquire a good title thereto, unless he has at the time of the purchase actual or constructive notice of the claim of such lienholder upon such products, said constructive notice to be given by record of such claim, as provided for in this law, or by suit filed."

1144 TEX. ANN. REV. CIV. STAT. art. 5485 (Vernon, 1941). "Payment of wages. Under the operation of this law, all wages, if service is by agreement performed by the day or week, shall be due and payable weekly, or if by the month, shall be due and payable monthly; all payments to be made in lawful money of the United States."

1145 TEX. ANN. REV. CIV. STAT. art. 5488 (Vernon, 1941). "Duration of lien. The lien created by this chapter shall cease to be operative after six months after the same is fixed, unless suit is brought within said time to enforce said lien."

1146 Security Trust Co. of Houston v. Roberts, 208 S.W. 892, 894 (Tex. Comm. App. 1919), reversing 166 S.W. 12 (Tex. Civ. App. 1914) (urban); see Lunsford v. Pearce, 19 S.W.2d 71, 74 (Tex. Civ. App. 1929) (Waco).

1147 Security Trust Co. of Houston v. Roberts, 208 S.W. 892, 894 (Tex. Comm. App. 1919), reversing 166 S.W. 12 (Tex. Civ. App. 1914) (urban).

accrued, there is nothing in the terms of the statute fixing the due date for the wages of daily and weekly laborers which forbids the right to contract as to a due date. If by contract wages are to be paid at the end of each day, then for the purpose of fixing the lien the time shall be computed from the end of the week. If the payment is contracted to be paid at the end of each week, the time is computed from the contract due date. So of employment by the month.[1148] When a farm hand employed to assist in making a crop was not hired for a fixed or definite time, but his compensation was to be at the rate of $1 per day for the time he labored, ". . . and the entire amount of his hire was to be paid when the cotton, or the first portion of the same . . . was sold," the account, totaling about $39, earned over a period of four months, and filed within 30 days after the first sale (some three months later) was not filed too late to fix his lien.[1149] Another court said that, under a contract to work as a farm hand for one year at $30 per month, the same to be due when the first cotton was sold, the laborer's wages did not accrue until such sale, and, in fact, he could not prior to such time have taken any steps to fix and preserve his lien.[1150]

A farm laborer under contract to work at $20 per month, from January to September, when the whole sum was to be payable, was held not required to file a claim after each month but, instead, within 30 days after September 1, could file a lien claim for the entire sum due for the eight-month period.[1151] In like manner, a laborer hired for a year to grow a crop of tobacco, wages payable monthly, was held not required by the statute to fix a separate lien for wages falling due each month. The court said to hold otherwise would do "violence to the spirit and evident purpose of the statute."[1152]

In one decision where the parties mutually rescinded a prior cropping contract and then entered into a new agreement under which the former cropper worked and put in the crop as a farm laborer, he was held not entitled to a statutory laborer's lien on the crop produced because of his failure to comply with the statute in regard to fixing his lien.[1153]

1148 Neblett v. Barron, 104 Tex. 111, 134 S.W. 208, 209 (1911), answering certified question, 160 S.W. 1167 (Tex. Civ. App. 1917) and citing Sparks v. Crescent Lumber Co., 40 Tex. Civ. App. 222, 89 S.W. 423, 424 (1905).
1149 Neblett v. Barron, 104 Tex. 111, 134 S.W. 208, 209 (1911), answering certified question, 160 S.W. 1167, 1170 (Tex. Civ. App. 1917).
1150 Lunsford v. Pearce, 19 S.W.2d 71, 74 (Tex. Civ. App. 1929) (Waco).
1151 Cash v. First Nat. Bank of McGregor, 26 Tex. Civ. App. 109, 61 S.W. 723, 724 (1901).
1152 Mudgett v. Texas Tobacco Growing and Mfg. Co., 61 S.W. 149, 152 (Tex. Civ. App. 1901).
1153 Monroe v. Hall, 290 S.W. 289, 291 (Tex. Civ. App. 1927) (El Paso).

In another interesting decision, a laborer, employed by the month, who had worked for several months in growing a rice crop and thereafter for three months on another farm operated by the same employer, before he presented and filed his wage claim, was held not to have a statutory laborer's lien on the rice for either period of employment. The lien did not exist for the latter three-month period because his services during that period were not rendered in connection with the production, harvesting or preservation of the rice; and was denied for the previous period, because of his failure to present and file duplicate accounts showing the amount due within 30 days after the wages for services on the rice crop accrued.[1154]

Where a laborer intervened in a suit to foreclose a mortgage on a cotton crop, and thereby sought recovery of the amount due him, and foreclosure of his lien on the crops, since the intervention occurred within the time allowed by statute to fix his lien, it was held, relying upon the concluding clause of this statute, that "it was not necessary for him to take other steps to fix and preserve his lien."[1155]

The statute does not require the laborer's account or affidavit to state or describe the crops raised on the farm in whole or in part by his labor.[1156] Moreover, the act does not give a lien for "expenses" incurred by the laborer in raising the crop; nor does it authorize a lien to cover the amount of damages caused by a breach of a contract of hire.[1157]

The lien of a landlord for rent and for advances to a tenant to enable him to make and gather the crop on the rented premises, is superior to a laborer's lien on the crop.[1158] However, a laborer's lien which existed beginning some four months before and at the time of execution of a chattel mortgage on the crop, was held superior to the lien of the mortgage.[1159] In the latter decision the court said that a laborer's lien on a crop arose when he began his year's work under his employment contract, and continued and was in full force and effect through the time allowed by statute for him to fix and preserve his lien.[1160] Moreover, the court stated that

1154 Carlile v. Taub, 283 S.W. 570, 571 (Tex. Civ. App. 1926) (Texarkana).
1155 Lunsford v. Pearce, 19 S.W.2d 71, 75 (Tex. Civ. App. 1929) (Waco).
1156 Allen v. Glover, 27 Tex. Civ. App. 483, 65 S.W. 379, 380 (1901).
1157 Mudgett v. Texas Tobacco Growing & Mfg. Co., 61 S.W. 149, 152 (Tex. Civ. App. 1901).
1158 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947); Paine v. Dorough, 132 S.W. 369, 370 (Tex. Civ. App. 1910).
1159 Lunsford v. Pearce, 19 S.W.2d 71, 75 (Tex. Civ. App. 1929) (Waco); see generally 28 TEX. JUR. 48 (sec. 45).
1160 Lunsford v. Pearce, 19 S.W.2d 71, 75 (Tex. Civ. App. 1929) (Waco).

where a laborer was engaged, as was true in this case, in preparing land for planting, in planting and in cultivating a crop, these facts were sufficient to put a chattel mortgagor upon inquiry as to that laborer's rights in the crops his labor was producing, and that such mortgagor was chargeable with actual notice of such facts as an inquiry would have revealed.[1161]

A different conclusion was reached under a different set of facts in regard to the lien of parties who picked or assisted in picking cotton. Their lien for their work, which was all performed after a chattel mortgage on the crop was recorded, was held inferior to the lien of the prior duly registered chattel mortgage on the crop.[1162]

A laborer entitled to a lien for unpaid wages may sell his rights thereto.[1163]

Priority between landlord's liens and other miscellaneous liens or claims. Under most circumstances, it can be said that a lien for unpaid taxes is a first lien upon all property.[1164]

Save for the tax lien, the irrigation lien and other exceptions discussed above,[1165] the landlord is given a preference lien for rent and advances on the crop raised by the tenant on the rented premises during the current contract year, whether rent is to be paid in money or agricultural products.[1166] The landlord's lien for unpaid rent or advances is superior, for example, to the attachment liens of the tenant's creditors;[1167] and again his lien on the crop has priority over that of an execution creditor.[1168] Since a landlord has a lien on the entire crop, an attaching creditor cannot subject some part of the crop to the payment of his debt by showing that the remainder of the crop is sufficient to pay the debt to the landlord. He must show that the landlord's debt has been paid in full.[1169] In fact, a judgement creditor who levied an execution on a part of a tenant's crop on which the landlord

1161 Lunsford v. Pearce, 19 S.W.2d 71, 75 (Tex. Civ. App. 1929) (Waco).
1162 Westbrook v. Clinton Grocery Co., 9 S.W.2d 1044, 1046 (Tex. Civ. App. 1928) (Waco).
1163 TEX. ANN. REV. CIV. STAT. art. 5487 (Vernon, 1941). "Right of assignment. Any party entitled to such lien may transfer or assign his rights hereunder, and his assignee or assignees shall have the same rights and privileges as are conferred upon him." See 5 TEX. JUR. 14 (sec. 11).
1164 TEX. ANN. REV. CIV. STAT. art. 7269 (Vernon, 1939). See subtitle "Payment of Taxes—Tax Sales," infra p. 160, for discussion of certain property, including crops which are exempt from taxation. Livestock and farm implements, however, are taxable.
1165 See discussion under subtitle "Other Liens on Crops—Priorities," supra p. 149.
1166 Citizens State Bank of Alvarado v. Schmauder, 139 S.W.2d 619, 620 (Tex. Civ. App. 1940) (Waco).
1167 Sullivan & Co. v. Cleaveland, 62 Tex. 677, 681 (1884) (urban); see generally 27 TEX. JUR. 161 et seq. (secs. 82-83).
1168 Jones v. Avant, 41 Tex. 650, 654 (1874).
1169 Evans v. Groesbeck, 42 Tex. Civ. App. 43, 93 S.W. 1005, 1007 (1906); previous opinions, 40 Tex. Civ. App. 216; 88 S.W. 889 (1905), 83 S.W. 430 (1904).

had a lien for rent and advances, and seized it and removed it from the farm, was held liable in conversion to the landlord for so much of the converted crop as might be necessary to satisfy the landlord's claim in full. Liability was not limited to the *pro rata* part of the landlord's claim that the crop converted bore to the whole crop raised by the tenant.[1170]

On the other hand, when a landlord without qualification waives his lien on the tenant's crop, he thereafter has no greater rights in the proceeds of the crop than general unsecured creditors have.[1171] Similarly, when a landlord's statutory lien on mules and horses, sold to his tenant to make a crop, was lost because the stock was neither used to make a crop nor kept on the leased premises, as the tenant lived on other property a short distance from the leased land and kept the stock there and this was known to the landlord, a chattel mortgage on the stock, later given by the tenant, was held to take priority over the claim of the landlord.[1172] Likewise, where a landlord charged a rental in excess of the percentage of the value of the crop allowed under the statute,[1173] he was held not to have a preference statutory lien on his tenant's crops.[1174]

A purchaser of a crop from the tenant or his renters has been held charged with notice of a recorded lease reserving a prior lien on the crops for rent, though he bought for a valuable consideration and in good faith.[1175] Also, he is charged with notice of the landlord's preference statutory lien.[1176]

A landlord's lien for rent and supplies furnished is both prior and superior to the tenant's homestead exemption claim, and the crops, though unsevered from the soil and exempt as to other creditors, are not exempt as to the landlord's lien.[1177] Another decision held a landlord's lien on the crop grown on leased premises, and on animals and tools furnished the tenant to make the crop, was superior not only to the claim

1170 Fields v. Fields, 216 S.W. 195 (Tex. Civ. App. 1919) (Fort Worth); see Crider v. McIntyre, 20 S.W.2d 242, 243 (Tex. Civ. App. 1929) (Waco).
1171 Curtis v. Hart, 26 S.W.2d 420, 422 (Tex. Civ. App. 1930) (Dallas).
1172 Watkins v. Citizens Nat. Bank of Rockwall, 53 Tex. Civ. App. 437, 115 S.W. 304 (1909).
1173 TEX. ANN. REV. CIV. STAT. art. 5222 (Vernon, 1947); see discussion under subtitle "Statutory regulation of rent," supra p. 58.
1174 Citizens State Bank of Alvarado v. Schmauder, 139 S.W.2d 619, 620 (Tex. Civ. App. 1940) (Waco).
1175 Land v. Roby, 56 Tex. Civ. App. 333, 120 S.W. 1057, 1058 (1909).
1176 Caswell v. Lensing & Bennett, 183 S.W. 75, 77 (Tex. Civ. App. 1916) (Austin); see Mathews v. Burke, 32 Tex. 419, 434 (1870); Lehman v. Stone, 4 Willson Civ. Cas. Ct. App. sec. 121 (1890); Lehman v. Stone, 16 S.W. 784 (Tex. Civ. App. 1891).
1177 Stephens v. Cox, 255 S.W. 241, 242 (Tex. Civ. App. 1923); motion for rehearing overruled, 256 S.W. 643 (Tex. Civ. App. 1923); see discussion under subtitle "Tenant's Homestead Rights in Leased Premises," supra p. 47.

of the deceased tenant's children for exemptions, but to "the allowance in lieu thereof."[1178]

In the administration of a tenant's estate a mortician's claim for funeral expenses which were incurred in 1930, and expenses of administration of the tenant's estate, were held to have preference over the landlord's lien claim against the crop and the items furnished as advances to make the crop.[1179] The court, in the same decision, said that under the law as it exists, after amendment made in 1931, "a secured claimant (such as a landlord), electing to proceed . . . for payment of claim from the specific property securing the indebtedness, instead of provision for payment thereof in due course of administration from entire assets of estate, is entitled to preference over claims against estate for funeral expenses and expenses of administration."[1180]

Right to Conservation Practice Payments

Under the 1947 agricultural conservation program, conservation practice payments may be earned by farmers carrying out "approved" conservation practices. "Farmers," as the term is used in the conservation program regulations, "means any person who as landlord, tenant, or sharecropper, participates in the operation of a farm."[1181] Payments shall be divided between the participating farmers in the following manner: "The payment earned in carrying out practices with conservation materials or services shall be credited to the farmer to whom the materials or services are furnished. Payment for practices performed with conservation materials and services shall have priority over payment for other practices. The payment earned in carrying out other practices shall be paid to the farmer who carried out the practices. If more than one farmer contributed to the carrying-out of such practices, the payment shall be divided in the proportion that the county committee determines the farmers contributed to the carrying-out of the practices. In making this determination, the county committee shall take into consideration the value of the labor, equipment, or material contributed by each farmer toward the carrying-out of each practice on a particular acreage, assuming that each contributed equally, unless it is established to the satisfaction of the

1178 Champion v. Shumate, 90 Tex. 597, 40 S.W. 394, 395 (1897).
1179 Guest v. Wilson, 130 Tex. 272, 109 S.W.2d 468, 469 (Tex. Comm. App. 1937), reversing 81 S.W.2d 812 (Tex. Civ. App. 1935).
1180 See Guest v. Wilson, 130 Tex. 272, 109 S.W.2d 468, 469 (Tex. Comm. App. 1937), reversing 81 S.W.2d 812 (Tex. Civ. App. 1935), citing Wyatt v. Morse, 129 Tex. 199, 102 S.W.2d 396, 399 (1937).
1181 1947 Agricultural Conservation Program Handbook For Texas, 1, 25 (1946).

county committee that their respective contributions thereto were not in equal proportion. The furnishing of land will not be considered as a contribution to the carrying-out of any practice."[1182]

Any person entitled to conservation payments may assign his payment in whole or in part as security for cash loaned or advances made for the purpose of financing the making of the current crop. Such assignment will be recognized if made in writing in accordance with conservation program instructions.[1183]

Payments will be computed and made without regard to questions of title under State law; without deduction of claims for advances, unless made as provided in the regulations; "and without regard to any claim or lien against any crop, or proceeds thereof, in favor of the owner or any other creditor."[1184] Payment may be withheld in whole or in part or required to be refunded if any person otherwise entitled thereto has employed or participated in any scheme or device (including coercion, fraud or misrepresentation), the effect of which would be or has been to deprive any other person of any payment under the program.[1185]

Only a few disputes involving AAA (now PMA) payments have reached Texas appellate courts. In one such case, an amount paid a tenant by the Federal Government, under the Agricultural Adjustment Act,[1186] as a subsidy or bonus for idle land, was held not a "crop grown upon the premises" within the meaning of the landlord lien statute, so as to entitle the landlord to a lien on the amount paid.[1187] The court also said that amounts paid by the Federal Government to a "half-tenant" as subsidy or bonus for idle land should be divided equally between the parties, and if the tenant converted the landlord's half, the landlord was entitled to judgment therefor.[1188]

A more recent decision in which a tenancy was involved is of interest. A water company entered into two types of contracts with rice farmers. Under the first type of contract the company furnished only water, and the farmer agreed to pay a cash water rental equal to one-fourth of the gross proceeds derived from the sale of all rice grown upon lands

1182 1947 Agricultural Conservation Program Handbook For Texas, 22 (1946).
1183 Id., p. 23.
1184 Id., p. 23.
1185 1947 Agricultural Conservation Program Handbook For Texas, 23 (1946).
1186 7 U.S.C.A. sec. 601 et seq. (1939).
1187 Noska v. Mills, 141 S.W.2d 429, 431 (Tex. Civ. App. 1940) (Dallas).
1188 Noska v. Mills, 141 S.W.2d 429, 431 (Tex. Civ. App. 1940) (Dallas).

farmed. Under the second type of contract the company furnished land, seed and water, and the farmer agreed to pay one-half of the gross proceeds derived from the sale of all the rice grown upon land farmed. Both types of contracts were executed after passage of the Agricultural Adjustment Act and provided that "gross proceeds" derived from sale of rice should include allotment or benefit payments for which the rice farmers should be eligible under the regulations of Agricultural Adjustment Administration.[1189] Under a rule of the 1935 Southern Rice Production Program, promulgated by the Agricultural Adjustment Administration, and authorized by the Act, but issued after execution of the contract, adjustment or benefit payments might not be assigned by the farmers under any condition, except as a pledge to obtain funds or credit for carrying on current farming operations. The court held the provision by which the water company claimed a fractional part of the benefit payments under both types of contracts void, because it violated the administrative rule against assignment of benefit payments; void as running counter to a declared policy of the Federal Government to restore the purchasing power of the farmers; and void for want of consideration. The court characterized the clause as an "attempt to engraft upon the written contract such benefit payments as a gratuity."[1190]

Payment of Taxes—Tax Sales

All property, real, personal or mixed, except such as is expressly exempted, is subject to taxation.[1191] Real property, for the purpose of taxation, includes the land itself and all buildings, structures and improvements.[1192] Personal property includes all goods, chattels and effects, moneys, etc.[1193] Each parcel of real property shall be valued for taxation at its true money value, "excluding the value of crops growing or ungathered thereon."[1194]

"The general rule is that the owner of real estate leased, is taxed upon the entire value of the property."[1195]

"Doubtless, the Legislature may subject leasehold interest in land to taxation . . ." but it has not acted.[1196] There is

1189 7 U.S.C.A. sec. 601, et seq. (1939).
1190 Gulf Coast Water Co. v. Cartwright, 160 S.W.2d 269, 273 (Tex. Civ. App. 1942) (Galveston).
1191 TEX. ANN. REV. CIV. STAT. art. 7145 (Vernon, 1939); TEX. CONST. Art. VIII, sec. 1.
1192 TEX. ANN. REV. CIV. STAT. art. 7146 (Vernon, 1939).
1193 Id., art. 7147.
1194 Id., art. 7174; see 13 TEX. JUR. 6 (sec. 4).
1195 Daugherty v. Thompson, 71 Tex. 192, 9 S.W. 99, 101 (1888).
1196 40 TEX. JUR. 98 (sec. 66).

an important exception: "Property held under lease from the State for a term of 3 years or more, or held under a contract of purchase thereof, belonging to this State, or that is exempt from taxation in the hands of the owner thereof . . .," for the purpose of taxation shall be considered the property of the tenant.[1197] Such taxable leasehold estates shall be valued for taxation at such a price as they would bring at a fair voluntary sale for cash.[1198] A tax imposed upon a tenant holding a taxable leasehold should be based on the value of the leasehold estate only, and not on the full value of the real estate leased.[1199]

Certain property is exempt from taxation. Thus, on residential homesteads[1200] to $3,000 of the assessed taxable valuation is exempt from all taxation for all State purposes.[1201] "The exemption does not extend to other than state taxes."[1202] Although, generally, in this State, all property, real or personal, owned by any person is liable for all State and county taxes owed by the owner, and may be levied on to satisfy any delinquent taxes,[1203] no homestead may be sold for taxes other than the taxes due thereon.[1204]

"Farm products in the hands of the producer, and family supplies for home and farm use, are exempt from all taxation until otherwise directed by a two-third vote of all the members elect to both houses of the Legislature."[1205] Also exempt is household and kitchen furniture of each family to the value of $250.[1206]

A tenant may buy land he is leasing at tax sale, and set up the title so acquired against his landlord, without coming within the rule prohibiting a tenant from denying his landlord's title. He owes no duty to protect the land from such sale or the landlord from the sale of such land. "It was open for him to bid at the sale, as well as any one else." Moreover, the rule prohibiting a tenant from denying his landlord's title has no application in a suit between the tenant-purchaser and the landlord under such circum-

1197 TEX. ANN. REV. CIV. STAT. art. 7173 (Vernon, 1939).

1198 Id., art. 7174.

1199 Daugherty v. Thompson, 71 Tex. 192, 9 S.W. 99, 101 (1888); State v. Taylor, 72 Tex. 297, 12 S.W. 176, 177 (1888).

1200 See discussion under subtitle "Cropper Cannot Assert Homestead Rights," supra p. 49.

1201 TEX. CONST. Art. VIII, sec. 1-a.

1202 40 TEX. JUR. 119 (sec. 82).

1203 TEX. ANN. REV. CIV. STAT. art. 7272 (Vernon, 1939).

1204 TEX. ANN. REV. CIV. STAT. art. 7279 (Vernon, 1939); see TEX. ANN. REV. CIV. STAT. art. 3839 (Vernon, 1945).

1205 TEX. CONST. Art. VIII, sec. 19; see 13 TEX. JUR. 6 (sec. 4).

1206 TEX. ANN. REV. CIV. STAT. art. 7150-11 (Vernon, 1939); TEX. CONST. Art. VIII, sec. 1.

stances.[1207] However, where a tenant in the lease contract agreed to pay all taxes, but during the term purchased the leased premises at tax sale, the court held for the landlord.[1208] Unlike the first case, where the tax sale itself conveyed a good title, and was not merely relied upon to support a title by limitation,[1209] it was here held necessary for the tenant, in order to set the statute of limitations running in his favor, after the tax sale, so as to base his claim on adverse possession, to repudiate the tenancy and give notice thereof to the landlord.[1210]

Rights and Duties in Regard to Third Persons

The obligations of owners and tenants to the public to keep premises from becoming a nuisance, and to use the premises in a lawful manner, has been discussed above.[1211] Also discussed were the rights of tenants whose possession has been interfered with by third persons.[1212] In the following two sections, rights and duties in regard to third persons coming upon leased premises are considered.[1213]

Trespassers, Licensees, Invitees

A trespasser on land is one who, having no title thereto, enters thereon without consent of the owner.[1214]

"A licensee is a person who goes on the premises of another with the consent of the occupier, but for his own interest or convenience and not for any purpose in which the occupier is concerned."[1215] Licensees "are not trespassers, but are upon the premises of another merely by his permission, express or implied, and not by any express or implied invitation."[1216] It is held that "a license implies permission or authority, and is therefore more than mere sufferance, but does not imply an invitation."[1217]

"An invitee or business guest is a person who goes upon the premises of another for the benefit, real or supposed, of

1207 Crosby v. Bonnowsky, 29 Tex. Civ. App. 455, 69 S.W. 212, 213 (1902), certified question answered, 95 Tex. 449, 68 S.W. 47 (1902); see 40 TEX. JUR. 263 (sec. 192); see generally 27 TEX. JUR. 71, et seq. (secs. 20-25) on contestation by tenant of landlord's title.
1208 Bryson & Hartgrove v. Boyce, 92 S.W. 820 (Tex. Civ. App. 1906).
1209 See Werts' Heirs v. Vick, 203 S.W. 63, 64 (Tex. Civ. App. 1918) (Amarillo).
1210 Bryson & Hartgrove v. Boyce, 92 S.W. 820, 823 (Tex. Civ. App. 1906).
1211 See discussion under subtitle "Nuisances and unlawful uses," supra p. 52.
1212 See discussion under subtitle "Interference with tenant's possession by third persons," supra p. 40.
1213 See discussion under subtitles "Trespassers, Licensees, Invitees," p. 162; and "Hunters, Fishers, Trappers," infra p. 166.
1214 McDaniel Bros. v. Wilson, 70 S.W.2d 618, 621 (Tex. Civ. App. 1934) (Beaumont).
1215 17 TEX. L. REV. 226 (1939); see 30 TEX. JUR. 860, et seq. (secs. 177-178).
1216 Mack v. Houston E. & W. T. Ry. Co., 134 S.W. 846, 847 (Tex. Civ. App. 1911) (urban).
1217 Missouri K. & T. Ry. Co. of Texas v. Kinslow, 172 S.W. 1124, 1126 (Tex. Civ. App. 1915) (Dallas, urban).

the owner or occupant, his presence there being apparently desired."[1218] "Where buildings or grounds are devoted to business purposes, there is an implied invitation to members of the public having business with the owner or occupant to come upon his premises for that purpose."[1219]

In determining whether a person on the premises of another is an invitee or merely a licensee, the general test is whether he "had present business relations with the owner (operator) of the premises which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner (operator) of the premises. In the absence of some relation which inures to the mutual benefit of the two, or to that of the owner (operator), no invitation can be implied, and the . . . person must be regarded as a mere licensee."[1220]

The general rule is that "The owner or occupant of real property is under no obligation to make it safe for the benefit of trespassers, intruders, or mere licensees coming upon it without his invitation, expressed or implied. If, however, such owner or occupant invites the public or particular members of it to come upon his premises, he owes to such persons the duty to have same in a reasonably safe condition and to give warning of latent or concealed perils."[1221] In another decision, it was said that the occupant of premises owes an invitee the "duty of exercising reasonable or ordinary care for his safety."[1222]

Under the general rule, the tenant, and not the landlord, is *prima facie* liable to third persons for damages resulting to them from defects in the leased premises.[1223] However, "the owner of leased premises is liable to the public or to third persons for injuries resulting from a defective structure on the premises, when the defect existed at the time the lease was made, or when he had covenanted to repair, and keep in

1218 17 TEX. L. REV. 226 (1939); see 30 TEX. JUR. 860 et seq. (secs. 177-178).
1219 Bustillos v. Southwestern Portland Cement Co., 211 S.W. 929, 931 (Tex. Comm. App. 1919), reversing 169 S.W. 638 (Tex. Civ. App. 1914), on rehearing, 216 S.W. 268 (Tex. Civ. App. 1919).
1220 Cowart v. Meeks, 131 Tex. 36, 111 S.W.2d 1105, 1107 (Tex. Comm. App. 1938), affirming 84 S.W.2d 845 (Tex. Civ. App. 1935) (urban). Quotation from Kruse v. Houston Railway Company, 253 S.W. 623, 625 (Tex. Civ. App. 1923).
1221 Bustillos v. Southwestern Portland Cement Co., 211 S.W. 929, 931; reversing 169 S.W. 638 (Tex. Civ. App. 1914); on rehearing, 216 S.W. 268 (Tex. Civ. App. 1919) (urban); see Galveston-Houston Electric Co. v. Reinle, 113 Tex. 456, 258 S.W. 803, 804 (1924); answered certified question, 264 S.W. 783 (Tex. Civ. App. 1924) (urban). See generally 30 TEX. JUR. 857 (sec. 175).
1222 El Paso Laundry Co. v. Gonzales, 36 S.W.2d 793, 794 (Tex. Civ. App. 1931) (El Paso, urban).
1223 Marshall v. Heard, 59 Tex. 266, 267 (1883) (urban); see generally 11 TEX. L. REV. 253, and 27 TEX. JUR. 346 (sec. 205).

repair."[1224] An early court stated "the owner cannot create a nuisance on his premises, and relieve himself of liability to a third person injured thereby, by leasing," and, where the landlord has not contracted to repair the nuisance, both the landlord and the tenant are liable to third persons.[1225]

Since the duty to keep leased premises in repair, in the absence of a covenant to the contrary, rests upon the tenant, he must see that the premises are safe for those coming there by his invitation, express or implied, and if he permits the premises to be in an unsafe condition, he is liable for any injuries occasioned thereby to his invitees.[1226] Further, it has been held that a landlord who leased premises to another, in good and safe condition, "is not liable for any injury which may result by reason of the negligence of the tenant to make use of the means furnished him by which the premises may be maintained in safety for all persons using them."[1227]

When a defective structure causing the injury was on the premises when leased, and there is no contract for the landlord to repair, and no fraud, the landlord is not liable therefor to the tenant, or his servants[1228] or to the tenant's invitees or guests.[1229]

Under an exception to the general rule denying recovery for injuries to trespassers or mere licensees, such recovery may be allowed when the injury is inflicted by an illegal contrivance, or "when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises."[1230]

While a person may protect his property by such reasonable means as may be necessary, "yet considerations of humanity preclude him from setting out . . . traps and devices dangerous to life and limb of those whose appearance and presence may be reasonably anticipated, even though they may be trespassers."[1231] Under this rule, a lessee has been held liable for injuries caused to a trespassing child by

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1224 **Perez v. Raybaud, 76 Tex. 105, 13 S.W. 177 (1890) (urban); Texas Co. v. Freer, 151 S.W.2d 907, 812 (Tex. Civ. App. 1941) (Waco, urban).**
1225 Perez v. Raybaud, 76 Tex. 105, 13 S.W. 177, 178 (1890); **see additional discussion under subtitle "Nuisances and unlawful uses," supra p. 52.**
1226 Goldstein Hat Mfg. Co. v. Cowen, 136 S.W.2d 867, 873 (Tex. Civ. App. 1939) (Dallas, urban).
1227 Texas Loan Agency v. Fleming, 92 Tex. 458, 49 S.W. 1039, 1042 (1899) reversing 18 Tex. Civ. App. 668, 46 S.W. 63 (1898) (urban).
1228 Perez v. Raybaud, 76 Tex. 105, 13 S.W. 177, 178 (1890).
1229 **Marshall v. Heard, 59 Tex. 267 (1883).**
1230 Galveston Oil Co. v. Morton, 70 Tex. 400, 7 S.W. 756, 758 (1888) (urban); **see generally 30 TEX. JUR. 857, et seq. (secs. 175-176).**
1231 Phelps v. Hamlett, 207 S.W. 425, 426 (Tex. Civ. App. 1918) (Fort Worth); **see generally 30 TEX. JUR. 868 (sec. 183).**

explosion of a bomb set off by electric contact upon opening a door.[1232] In another case, an owner-occupant who had protected his melon patch with a spring gun was held liable for injuries to a trespasser.[1233] In this latter decision the court said: "When the owner employs upon his premises and sets in motion dangerous agencies such as spring guns, mantraps, etc., of a nature calculated to cause death or inflict serious bodily injury, with the intention of inflicting injury upon a trespasser, and injury results, he is liable, unless facts and circumstances exist which in law would amount to an excuse or justification."[1234]

The usual rule defining a trespassing adult is not to be applied to children of tender years.[1235] Children "are not trespassers or intruders within the meaning of the law, until they are old enough or intelligent enough to know and appreciate the right of the proprietor to exclude them from his premises by a simple command. They understand that they are required to keep out only when they cannot get in."[1236] In fact, an invitation for children to come upon the premises can be implied from the presence there of something "unusually attractive to children, placed and kept there by the owner (or proprietor) with full knowledge that it is so attractive and does attract children of immature years."[1237] This attractive thing or instrumentality, known in legal parlance as an "attractive nuisance,"[1238] is "a thing which may naturally be expected to allure young children upon private premises, or a thing which has an especial or unusual attraction for young children . . . ." In other words, it "must be such that on account of its nature, location, and surroundings it is especially and unusually calculated to attract and does attract young children."[1239]

Moreover, it has been said that "The exercise of that care requisite to the discharge of legal duty toward an adult person of intelligence, and not wanting in physical ability to take care of himself, if exercised towards a child of tender years, wanting in intelligence and ability to take care of

1232 Phelps v. Hamlett, 207 S.W. 425, 426 (Tex. Civ. App. 1918) (Fort Worth).
1233 Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342, 344 (1903).
1234 Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342, 344 (1903).
1235 McCoy v. Texas Power & Light Co., 239 S.W. 1105, 1108 (Tex. Comm. App. 1922), reversing 229 S.W. 623 (Tex. Civ. App. 1921) (urban); see generally on injuries to children, 30 TEX. JUR. 877, et seq. (secs. 190-197).
1236 Dublin Cotton Oil Co. v. Jarrard, 40 S.W. 531, 535 (Tex. Civ. App. 1897) (urban), affirmed, 91 Tex. 289, 42 S.W. 959 (1897).
1237 McCoy v. Texas Power & Light Co., 239 S.W. 1105, 1108 (Tex. Comm. App. 1922), reversing 229 S.W. 623 (Tex. Civ. App. 1921) (urban).
1238 See generally, on attractive nuisances, 30 TEX. JUR. 887, et seq. (secs. 198-209); 7 TEX. L. REV. 173 (1928); 8 TEX. L. REV. 612 (1930); 9 TEX. L. REV. 106 (1930).
1239 Texas-Louisiana Power Co. v. Bihl, 66 S.W.2d 672, 674 (Tex. Comm. App. 1933), reversing 43 S.W.2d 294 (Tex. Civ. App. 1931).

itself, would often amount to what is usually termed gross negligence."[1240] And where an attractive nuisance is involved, the law places upon the owner (or proprietor) the duty of exercising "ordinary care" to keep it in a "reasonably safe condition" for the protection of children, if the owner knew, or in the exercise of ordinary care, ought to have known, that children were likely or probably would be attracted by machinery, and thus be drawn to the premises.[1241]

" 'Ponds, pools, lakes, streams, and other waters embody perils that are deemed to be obvious to children of the tenderest years; and as a general proposition no liability attaches to the proprietor by reason of death resulting therefrom to children who have come upon the land to bathe, skate, or play.' " The proprietor is not under obligation as a general rule to erect fences or take other measures to prevent children being injured thereby.[1242] "The size of the lake . . . is not material. The dangers of a small lake, where deep enough to drown a child, are the same as those of a large one, and the same lure to the child is present . . . ."[1243] No greater degree of care for the protection of children is required of one who maintains an artificial pool for a useful purpose than is required of one through whose land flows a natural stream, unless there is in the pool some peculiar danger, in the nature of a hidden peril or trap for the unwary, of which he has or ought to have knowledge.[1244]

Hunters, Fishers, Trappers

It is unlawful to enter upon "the enclosed land of another without the consent of the owner, proprietor or agent in charge . . ." and therein hunt with firearms or catch or attempt to catch fish from any pond, lake, tank or stream, and whoever does so, on conviction may be fined and, in addition, his hunting license and the right to hunt in the State for a year or more may be forfeited. Any person found upon another's enclosed land, without consent, is subject to arrest without warrant by any peace officer.[1245]

1240 Galveston City Ry. Co. v. Hewitt, 67 Tex. 473, 3 S.W. 705, 707 (1887) (urban).
1241 Duron v. Beaumont Iron Works, 7 S.W.2d 867, 869; supplementing opinion, 9 S.W.2d 1104 (Tex. Comm. App. 1928); reversing 297 S.W. 1075 (Tex. Civ. App. 1927) (urban).
1242 Maruska v. Missouri, K. & T. R. Co. of Texas, 10 S.W.2d 211, 212 (Tex. Civ. App. 1928) (Austin), quoting from 20 R. C. L. sec. 83, p. 97. See 30 TEX. JUR. 903 (sec. 210).
1243 Maruska v. Missouri, K. & T. R. Co. of Texas, 10 S.W.2d 211, 212 (Tex. Civ. App. 1928) (Austin).
1244 Maruska v. Missouri, K. & T. R. Co. of Texas, 10 S.W.2d 211, 212 (Tex. Civ. App 1928) (Austin).
1245 TEX. ANN. PEN. CODE art. 1377 (Vernon, 1925, Supp. 1949). See generally 19 TEX. JUR. 701 (sec. 13); 20 TEX. JUR. 585 et seq. (secs. 1-11); and 41 TEX. JUR. 444 et seq. (secs. 28, 29).

By "enclosed lands" is meant lands used for agriculture, grazing or for any other purposes, enclosed by any structure for fencing, either of wood or iron, or a combination thereof, or wood and wire, or "partly by water or stream, canyon, brush, rock or rocks, bluffs or islands . . . ."[1246] The fact that the fence happened to be down or disconnected at any particular place has been held not to constitute a defense.[1247] Moreover, the term "the enclosed lands of another," has been construed as referring to the possessory right, and not necessarily to the title.[1248] At this point, it may be observed that the landowner, should he so desire, may reserve to himself the exclusive right to hunt, fish or trap on leased premises.

Evidence that the accused, while hunting on an adjoining farm, flushed a covey of birds and, without the owner's consent, followed them onto adjoining enclosed premises, where he fired two shots, as he explained, to call his dog, was held to warrant conviction of hunting with firearms on the enclosed lands of another.[1249] But another court held that a farmer was not "hunting" within the meaning of the statute, who, while driving cattle along a public road, flushed a covey of quail from the road and followed them, killing three with one shot, in an adjoining pasture which belonged to the prosecuting witness, but which he thought belonged to his friend.[1250]

Game wardens in the performance of their duties have at all times the right to enter upon private lands or waters where wild game or fish are known to be.[1251]

Both rivers navigable in fact and streams navigable by statute[1252] in Texas are public streams, and "their beds and waters are owned by the state in trust for the benefit and best interest of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes . . . ."[1253] The boundary line between public and private ownership along streams declared by statute to be navigable is a gradient of the flowing water in the stream. It is located midway

1246 TEX. ANN. PEN. CODE art. 1377 (Vernon, 1925, Supp. 1949).
1247 Haynie v. State, 45 Tex. Cr. R. 204, 75 S.W. 24, 25 (1903), construing Tex. Laws 1897, c. 55, sec. 1, now TEX. ANN. PEN. CODE art. 1384 (Vernon, 1925), prohibiting gathering pecans on another's land; see generally 41 TEX. JUR. 444 (sec. 28).
1248 Daley v. State, 40 Tex. Cr. R. 101, 48 S.W. 515, 516 (1898), construing a fencing statute, Penal Code 1895, art. 794, now TEX. ANN. PEN. CODE art. 1352 (Vernon, 1925); see 41 TEX. JUR. 446 (sec. 29).
1249 Hughes v. State, 103 Tex. Cr. R. 38, 279 S.W. 846, 847 (1926).
1250 Sims v. State, 70 Tex. Cr. R. 586, 157 S.W. 1194, 1195 (1913).
1251 TEX. ANN. PEN. CODE, art. 919 (Vernon, 1936).
1252 Streams of an average width of 30 feet from the mouth up. See TEX. ANN. REV. CIV. STAT. art. 5302 (Vernon, 1947).
1253 Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 445 (1935), affirming 58 S.W.2d 566 (Tex. Civ. App. 1933).

between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank. Because of the State's ownership, such stream beds and banks, up to the line above defined, may be used by the public for fishing. Beyond that line they have no right to go without the consent of the riparian landowner.[1254] But, "the right to fish in public waters does not carry with it a right to cross or trespass upon privately owned land in order to reach the water."[1255]

"Every inland lake or pond that has the capacity to float a boat is not necessarily navigable." To be navigable it must be of such size and so situated, either alone or in connection with other bodies of water, as to be generally and commonly useful to transport goods or passengers between points connected thereby.[1256] A fresh-water inland lake 1.5 miles long, 700 feet wide, averaging 15 feet deep at points 10 feet from its banks, and which was valuable chiefly for fishing or pleasure boats of small size, was held not navigable.[1257] The bed of a nonnavigable lake may be privately owned; and one who holds title to a specific portion of the bed of such a lake has "a right to control that part of the surface of the lake above his land, including the right to fish in or boat upon the water . . . ."[1258] Where public river waters were confined for irrigation purposes by a dam, and resulted in the formation of a navigable artificial lake, the public was held to retain the right to fish not only in the water above the original river bed, but also in that part of the water of the lake bed above land owned by riparian owners.[1259]

It is unlawful to trap muskrat upon the posted or enclosed lands of another without the consent of the owner or tenant.[1260] However, no trapper's license is required of owners, tenants and their children who are residents when trapping fur-bearing animals on the premises they own or rent.[1261] "Tenants," as here used, means any person who has a lease for agricultural or grazing purposes, and has resided con-

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1254 Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 447 (1935), affirming 58 S.W.2d 566 (Tex. Civ. App. 1933); see State of Oklahoma v. State of Texas, 261 U.S. 340, 342 (1923).

1255 Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 445 (1935), affirming 58 S.W.2d 566 (Tex. Civ. App. 1933).

1256 Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 129 (Tex. Civ. App. 1935) (Waco).

1257 Taylor Fishing Club v. Hammett, 88 S.W.2d 130 (Tex. Civ. App. 1935) (Waco).

1258 Taylor Fishing Club v. Hammett, 88 S.W.2d 130 (Tex. Civ. App. 1935) (Waco).

1259 Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 446 (1935), affirming 58 S.W.2d 566 (Tex. Civ. App. 1933); but see Fisher v. Barber, 21 S.W.2d 569, 570 (Tex. Civ. App. 1929) (Beaumont).

1260 TEX. ANN. PEN. CODE, art. 923 r.r. (Vernon, 1936, Supp. 1947).

1261 TEX. ANN. PEN. CODE, art. 923 o.o. (Vernon, 1936).

tinuously on the land he occupies for a period in excess of 12 months.[1262]

Lands may be "posted" by placing signs reading "posted" in a conspicuous place at the gate or gates and at any streams entering the enclosure.[1263]

Whenever wild birds or animals are destroying crops or domestic animals, the game commissioner is authorized to permit the killing of such wild birds or animals "without regard to open or closed season, bag limits, or night shooting."[1264] It is necessary, however, before killing such depredating animals, to obtain a permit as provided in the act.[1265]

1262 TEX. ANN. PEN. CODE, art. 923 (Vernon, 1936).
1263 Id., art. 923 t.t.
1264 Id., art. 888.
1265 Dobie v. State, 120 Tex. Cr. R. 72, 48 S.W.2d 289, 290 (1932).

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PART III. TRANSFER, CONTROVERSY AND TERMINATION

Transfer of Leasehold or of Premises Under Lease or Contract

In the following sections the rights and obligations of landlords, tenants and croppers on transfer of "leased" premises are discussed.

Sale, Foreclosure or Devolution of Landlord's Reversion

On sale of leased premises, the tenant thereon becomes the tenant of the new owner, unless the lease provides otherwise.[1] Such sale does not terminate the tenancy or deprive the tenant of any rights under the lease.[2] And, when the tenant is in possession at the time of the sale, the purchaser is charged with notice of his rights.[3]

Of course, the lease contract may provide for termination of the lease, upon sale of the premises, and in one decision it was held that "when the contingency happened all rights under the lease contract, including the right of occupancy, terminated."[4] Such a stipulation—that a contract of lease may be terminated by the sale of the land—is valid and has been upheld by the courts.[5] This was true in one case where a year's rent had been paid in advance, but the landlord offered to return and tendered to the tenant the unearned rent.[6] Similarly, an executory contract for conveyance of a farm was held to void a lease, under a lease provision that "sale" of the farm before a stated date would have that effect, where no technical distinction between an executory contract of sale and an executed deed was intended.[7]

Further, an option to cancel a lease upon sale becomes a covenant running with the land, which right inures to the purchaser from the landlord.[8] However, where a sale of leased premises is fraudulently made for the sole purpose of term-

1 Davidson v. Wallingford, 88 Tex. 619, 32 S.W. 1030, 1032 (1895), reversing 30 S.W. 286 and 30 S.W. 827 (Tex. Civ. App. 1895); see generally 27 TEX. JUR. 67 (sec. 18).
2 Wilson v. Beck, 286 S.W. 315, 321 (Tex. Civ. App. 1926).
3 O'Neil v. Davis, 1 White & W. Civ. Cas. Ct. App. sec. 416 (1883).
4 Johnson v. Phelps, 215 S.W. 446, 447 (Tex. Comm. App. 1919), reversing 181 S.W. 862 (Tex. Civ. App. 1915); see generally 27 TEX. JUR. 297 (sec. 171) and 69 (sec. 18).
5 Jordan v. Dinwiddie, 205 S.W. 862, 864 (Tex. Civ. App. 1918) (Amarillo), reversed on other grounds, 228 S.W. 126 (Tex. Comm. App. 1921).
6 Thomason v. Oates, 46 Tex. Civ. App. 383, 103 S.W. 1114 (1907) (urban).
7 Travelers Ins. Co. v. Gibson, 133 Tex. 534, 130 S.W.2d 1026, 1028 (Tex. Comm. App. 1939), modifying 110 S.W.2d 241 (Tex. Civ. App. 1937).
8 Frankfurt Finance Co. v. Treadaway, 159 S.W.2d 514, 516 (Tex. Civ. App. 1942) (Dallas, urban).

inating a lease, one court said the tenant, if he saw fit, could set it aside.[9]

A tenant who leases land with actual or constructive notice of a mortgage lien thereon "takes the lease subject to the lien, and with the knowledge that his tenure terminates with the foreclosure of the lien and sale thereunder to another, at the option of the purchaser."[10] In fact, where the lease was executed after the mortgage, it has been held that "sale under foreclosure gave the right to the purchaser to either terminate the lease or to continue it in force with the tenant's consent."[11] Moreover, "If a purchaser, under foreclosure of a prior mortgage, is not bound by the rental contract, it would seem that the tenant would likewise be free . . . unless the tenant attorns to him after the sale."[12]

In contrast, if the lease is anterior to, (created before), the mortgage, "the possession of the tenant being notice of his rights thereunder . . . and his right thereto are not affected by a foreclosure of the mortgage. A change of landlords is only effected. Instead of being the tenant of the mortgagor, he becomes the tenant of the mortgagee, or of him who by the foreclosure has acquired the reversion. He has every right against his new landlord that he had under the lease against the original lessor, and he who acquired the reversion at the foreclosure has every right against him that the lessor had under the lease."[13]

"As a general rule a person cannot create a larger estate in lands than he has in himself."[14] Consequently, where the landlord bought a farm, giving the seller a mortgage lien to secure the balance of the purchase price, and thereafter leased it, foreclosure of the vendor's lien, where both the landlord and tenant were made parties, terminated the lease. But if the tenant had not been made a party to the foreclosure proceedings, the lease would not have been terminated.[15]

Leasehold interests held by a bankrupt as lessor do not terminate on adjudication of bankruptcy, but pass to the trus-

9 Rogers v. Rogers, 230 S.W. 489, 490 (Tex. Civ. App. 1921); reversed on other grounds, 240 S.W. 1104 (Tex. Comm. App. 1922).
10 See Millingar v. Foster, 293 S.W. 249, 250 (Tex. Civ. App. 1927) (San Antonio). On second appeal, 8 S.W.2d 514 (Tex. Civ. App. 1928), affirmed, 17 S.W.2d 768 (Tex. Comm. App. 1929), it was held that where the landlord assigned his rent claim to his tenant as collateral security for his indebtedness to the tenant before the mortgage foreclosure sale, the rent claim did not pass with the land at foreclosure sale. See generally 27 TEX. JUR. 100 (sec. 37) and 298 (sec. 172); and 29 TEX. JUR. 1002, et seq. (secs. 157-159).
11 Peck & Hills Furniture Co. of Texas v. Long, 68 S.W.2d 288, 289 (Tex. Civ. App. 1934) (Fort Worth, urban).
12 See Wootton v. Bishop, 257 S.W. 930, 931 (Tex. Civ. App. 1924) (Amarillo).
13 Groos & Co. v. Chittim, 100 S.W. 1006, 1010 (Tex. Civ. App. 1907).
14 Jones v. Hutchinson, 21 Tex. 370, 377 (1858); see generally 27 TEX. JUR. 298 (sec. 172).
15 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).

tee. "The lessor's adjudication as bankrupt does not sever the relation of landlord and tenant."[16]

The death of the landlord ordinarily does not terminate the lease contract.[17] The landlord's legal representatives are bound by the lease, and so long as the tenant observes its terms he cannot be deprived of its benefits.[18]

Under certain circumstances the tenant, on termination of the lease, is entitled to "emblement," or the right to enter upon the leased premises to cultivate, harvest and remove his crop.[19] The right to receive rent after sale or foreclosure of leased premises is discussed in a previous chapter.[20]

Transfer of Leasehold Interest of Tenant

A leasehold under some circumstances may be transferred by the tenant, in whole or in part, by assignment or subletting, or its transfer may result from foreclosure of a mortgage on the leased premises, or by devolution following death of the tenant.

Assignment or subletting of leasehold. A tenant may not rent leased premises to another without first obtaining the consent of the landlord.[21]

An "assignee" is one who leases from the tenant all of his rented premises for his whole term, or who leases part of the tenant's premises for the whole of the tenant's lease term; a "subtenant" is one who leases all or part of rented premises from the original tenant for a term less than that held by the latter.[22]

Assignment and subletting, without consent of the landlord, are equally prohibited by the statute.[23] Moreover, "A leasehold cannot be sold without the consent of the land-

16 See Grant Co. v. Utitz, 102 S.W.2d 436, 438 (Tex. Civ. App. 1937) (Beaumont, urban).
17 Hazlewood v. Pennybacker, 50 S.W. 199, 201 (Tex. Civ. App. 1899), second appeal, 26 Tex. Civ. App. 183; 61 S.W. 153 (1901).
18 Hazlewood v. Pennybacker, 50 S.W. 199, 201 (Tex. Civ. App. 1899), second appeal, 26 Tex. Civ. App. 183; 61 S.W. 153 (1901).
19 See discussion under subtitle "Harvesting crops after termination of lease or after end of rental period—'Emblements'" and subtitles thereunder, supra p. 100 et seq.
20 See discussion under subtitle "Parties Entitled to Rental Payment when Leased Premises are Sold or Foreclosed," supra p. 66.
21 TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1947). "Tenants shall not sub-let. A person renting said lands or tenements shall not rent or lease the same during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney." See generally 27 TEX. JUR. 359 et seq. (secs. 214-220).
22 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 482 (1894); see 27 TEX. JUR. 359 (sec. 214); also see discussion under subtitle "Rent Liability when Tenant Assigns or Sublets Premises," supra p. 63, et seq., for additional definitions of assignment and subletting.
23 Gulf, C. & S. F. Ry. Co. v. Settegast, 79 Tex. 256, 15 S.W. 228, 230 (1891) (urban), construing art. 3122 REV. CIV. STAT. 1879, now TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1947); see Texas Nat. Guard Armory Board v. McGraw, 132 Tex. 613, 126 S.W.2d 627, 638; see generally 27 TEX. JUR. 363 (sec. 216).

lord."[24] This statute, which has application to assignments as well as sublettings by the tenant, "was doubtless enacted to secure to the owners of the lands the selection of persons to occupy and care for them . . ."[25]

However, "If the landlord consents expressly or impliedly to the occupation of his land by an assignee or under-tenant, the relation of landlord necessarily exists between him and such persons."[26] And, where the lease terms permitted subletting, refusal of the landlord to allow a subtenant to go into possession was held to relieve the tenant of the obligation to pay rent.[27] Further, if under the lease terms the tenant has the right to assign or sublease, the landlord is bound by an assignment or sublease even though he may not have had the particular assignee or subtenant in mind.[28] Where the original lease authorizes assignment or subletting, it is not necessary for the landlord to endorse his consent to an assignment upon the latter contract.[29]

A lease to the tenant, "his heirs and assigns," has been held to expressly authorize assignment by the tenant, and also authorizes a subletting.[30] But in one case, under a rice lease involving special trust and confidence in the tenant by the landlord, consent to sublet was held not to include consent to assign.[31]

The landlord, though assenting to the assignment of a lease, may refuse to release the original tenant from his obligation to pay the rent.[32]

If the landlord, by later acts and conduct, recognizes an assignee as his tenant, he cannot thereafter question the right of the original tenant to assign the lease.[33] Thus, a landlord who claimed part of the subtenant's crop as rent ratified the unauthorized subletting.[34] Moreover, acquiescence of the landlord for periods of 15 and 20 years in assignments of two

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24 Steger v. Barrett, 58 Tex. Civ. App. 231, 124 S.W. 174, 176 (1909).
25 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 482 (1894), construing art. 3122 REV. CIV. STAT. 1879, now TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1947).
26 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894); see generally 27 TEX. JUR. 371 (sec. 221).
27 Penick v. Eddleman, 291 S.W. 194, 195 (Tex. Comm. App. 1927), reversing 283 S.W. 300 (Tex. Civ. App. 1926).
28 Russell v. Old River Co., 210 S.W. 705, 709 (Tex. Civ. App. 1919) (Beaumont).
29 Coffin v. Schulz, 260 S.W. 612, 613 (Tex. Civ. App. 1924) (Waco, urban).
30 Dillingham v. Williams, 165 S.W.2d 524, 526 (Tex. Civ. App. 1942) (El Paso, urban).
31 Morrow v. Camp, 101 Tex. 260, 106 S.W. 315 (1908); reversing on other grounds 101 S.W. 819, 820 (1907).
32 Davis v. First Nat. Bank of El Paso, 258 S.W. 241, 242 (Tex. Civ. App. 1924) (El Paso, urban); see discussion under subtitle "Rent Liability when Tenant Assigns or Sublets Premises," supra p. 63.
33 Irwin v. Jackson, 230 S.W. 522, 524 (Tex. Civ. App. 1921) (Amarillo, urban); see generally 27 TEX. JUR. 370 (sec. 220).
34 Moore v. Graham, 29 Tex. Civ. App. 235, 69 S.W. 200, 203 (1902).

leases was held indicative of assent and ratification and to constitute a waiver of his right to object.[35]

Although a sublease made without consent of the landlord may be forfeited by the landlord, it is not nullified *ipso facto*. It may, as one court stated it, become valid and binding by agreement, acquiescence or ratification by the landlord.[36] A waiver by the landlord of a stipulation in the lease against subletting has been held also to waive the statutory prohibition.[37]

The exact legal status of the tenant, or his subtenants and assignees, and the rights of the landlord, when premises are re-let without consent of the landlord has been a question before several courts. An early decision held that an assignment of a lease, without consent of the landlord, conferred no right upon the assignee to enter upon and occupy the leased premises. "He was a mere trespasser upon said premises."[38] A similar conclusion was reached in a more recent decision regarding a subletting in which it was said that the person holding the premises without the landlord's consent was "a trespasser and occupies the attitude of a stranger to the landlord."[39] The Supreme Court said that, "If the consent of the landlord be not given, such assignees or sub-tenants, in so far as the landlord and his rights are concerned, must be treated simply as employees of the lessee."[40]

Since the landlord may ratify an unauthorized subletting,[41] "The assignment of a lease by a tenant without the assent of the landlord is not void, but voidable at the option of the landlord. He may claim a forfeiture, or waive it."[42] In another decision in the same vein involving a sublease made without consent of the landlord, the court said the subtenant "had no rights as a tenant on the premises;" and, further, the relation of landlord and tenant was forfeited by the original tenant when he sublet the premises.[43]

In fact, if a tenant subleases land without the landlord's consent, the landlord may treat the tenant's lease as no longer in force,[44] recover possession from the tenant and subtenant[45]

35 Wildey Lodge v. City of Paris, 31 Tex. Civ. App. 632, 73 S.W. 69, 70 (1903) (urban).
36 Edwards v. Worthington, 118 S.W.2d 328, 333 (Tex. Civ. App. 1938) (Amarillo).
37 Fred v. Moseley, 146 S.W. 343, 344 (Tex. Civ. App. 1912) (Dallas, urban).
38 Rose v. Riddle, 3 Willson Civ. Cas. Ct. App. sec. 299 (1887); see generally 27 TEX. JUR. 368 (sec. 219).
39 Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543, 545 (Tex. Comm. App. 1929).
40 Forrest v. Durnell, 86 Tex. 647, 26 S.W. 481, 483 (1894).
41 Edwards v. Worthington, 118 S.W.2d 328, 333 (Tex. Civ. App. 1938) (Amarillo).
42 Scott v. Slaughter, 35 Tex. Civ. App. 524, 80 S.W. 643, 645 (1904); Elliott v. Dodson, 297 S.W. 520, 522 (Tex. Civ. App. 1927) (Fort Worth).
43 Brown v. Pope, 27 Tex. Civ. App. 225, 65 S.W. 42, 43 (1901).
44 See Waggoner v. Snody, 36 Tex. Civ. App. 514, 82 S.W. 355, 358 (1904), reversed on other grounds, 98 Tex. 512, 85 S.W. 1134 (1905).
45 Shoemake v. Gillespie, 28 S.W.2d 1114, 1115 (Tex. Civ. App. 1930) (Austin).

and thereafter lease the land to others.[46] And where a lease does not contain a stipulation against subletting, "the omission is supplied by the statute, which forbids subletting without the landlord's consent; and, if the covenant has been violated, the right to forfeit the lease therefore accrued to the landlord by force of the statute."[47]

Certain contractual relationships between tenants and third persons have been said not to violate the statute forbidding re-leasing without consent of the landlord. For example, "Letting lodging is not a breach of a contract not to underlet the premises or any part thereof."[48] But the renting by the tenant of two rooms in an eight-room residence has been held such a subletting as is prohibited without consent of the landlord.[49] A contract between a tenant of an opera house and a person he employed as manager, whereby the latter was to receive a certain salary and a portion of the profits at the end of the season, was held not to be a subletting or an assignment of the lease but, rather, a contract of employment.[50] It was also said in this case that a tenant may take into the business conducted on the rented premises a partner, while retaining absolute ownership of the lease himself, without violating any rights of the landlord.[51]

Although a sublease of a pasture without the landlord's consent has been held void,[52] merely permitting a third party to pasture his stock on the leased premises together with the tenant's stock, there being no surrender of the tenant's control and management of the premises, was held not a subletting.[53]

When one of two sharetenants who rented a farm together, in prospect of being drafted into the Army, arranged with his brothers to look after the land in his absence, such arrangement was held not to constitute a subletting. Under the arrangement, the remaining sharetenant was to act as

46 See Waggoner v. Snody, 36 Tex. Civ. App. 514, 82 S.W. 355, 358 (1904), reversed on other grounds, 98 Tex. 512, 85 S.W. 1134 (1905).
47 See Markowitz v. Greenwall Theatrical Circuit Corp., 75 S.W. 74, 76 (1903), reversed on other grounds, 97 Tex. 479, 79 S.W. 1069 (1904) (urban), construing art. 3250 REV. CIV. STAT. 1895, now TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1925).
48 Ross v. Haner, 244 S.W. 231, 234 (Tex. Civ. App. 1922) (Beaumont), affirmed, 258 S.W. 1036 (Tex. Comm. App. 1924) (Beaumont, urban).
49 Hudgins v. Bowes, 110 S.W. 178, 179 (Tex. Civ. App. 1908) (urban), construing art. 3250 REV. CIV. STAT. 1895, now TEX. ANN. REV. CIV. STAT. art. 5237 (Vernon, 1925).
50 Markowitz v. Greenwall Theatrical Circuit Corp., 75 S.W. 74, 76 (1903), reversed on other grounds, 97 Tex. 479, 79 S.W. 1069 (1904) (urban).
51 Markowitz v. Greenwall Theatrical Circuit Corp., 75 S.W. 74, 76 (1903), reversed on other grounds, 97 Tex. 479, 79 S.W. 1069 (1904) (urban).
52 Waggoner v. Snody, 36 Tex. Civ. App. 514, 82 S.W. 355, 358 (1904), reversed on other grounds, 98 Tex. 512, 85 S.W. 1134 (1905).
53 Wade v. Madison, 206 S.W. 118, 119 (Tex. Civ. App. 1918) (Dallas).

overseer, while one of the draftee's brothers agreed to look after the land and the other brother agreed to work it.[54]

Although a contract between a tenant and a "cropper on the halves" giving the latter exclusive occupancy and use of the house on the premises, and exclusive possession and use of part of the fields, has been held a subletting, it was intimated in one decision that an agreement between a tenant and cropper giving the latter merely "the right of ingress and egress to the premises for the purpose of working the fields," the status of an employee, would not constitute a subletting.[55] Similarly, it appears that the consent of the landlord to the occupancy by a cropper of a part of premises leased to a tenant is not required, where the tenant retains the right to exclusive possession and control of all the premises, and the tenant, in fact, is that cropper's employer.[56]

" 'Restrictions against assignment or subleases, whether imposed by statute or by terms of the lease, are intended for the benefit of the lessor and his assigns, and, if neither of these object to a breach of the restriction, no one else may do so. One to whom the term has been assigned in breach of the restriction cannot set up the breach in defense of an action brought against him by the lessor on the lease, or in defense of an action brought against him by the lessee on obligations incident to the assignment.' "[57]

In other words, the prohibition of the statute against sub-renting is solely for the benefit of the landlord, and he alone can complain of the wrong done by an unauthorized subletting. Moreover, the original tenant who, during the lease term, bought the land, cannot take advantage of his own wrong by complaining that the subletting made by him without the landlord's consent was void.[58] Similarly, a creditor levying upon crops growing upon the debtor's homestead cannot raise the issue whether the debtor, who is a sublessee, is occupying the premises with the owner's consent.[59]

An assignee, who leases premises from the tenant without the landlord's consent, has been held not entitled to sue the landlord for damages for breach of the lease terms.[60] Nor does the provision in the main lease against subleasing without consent of the landlord give the subtenant a right to aban-

54 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo).
55 Shoemake v. Gillespie, 28 S.W.2d 1114, 1115 (Tex. Civ. App. 1930) (Austin); see 27 TEX. JUR. 366 (sec. 217).
56 See Brown v. Johnson, 118 Tex. 143, 12 S.W.2d 543, 545 (Tex. Comm. App. 1929).
57 Huffstutler & Howell v. McKenzie, 163 S.W. 652, 653 (Tex. Civ. App. 1914) (Austin), quoting 24 Cyc. 968. See generally 27 TEX. JUR. 367 (sec. 218).
58 Ewing v. Moran, 166 S.W.2d 760, 763 (Tex. Civ. App. 1942) (Galveston).
59 Moore v. Graham, 29 Tex. Civ. App. 235, 69 S.W. 200, 203 (1902).
60 Harris & Co. v. Campbell, 187 S.W. 365, 366 (Tex. Civ. App. 1916) (Dallas, urban).

don his contract, or offer him a defense to a suit by the tenant for rent.[61] Nor is the illegality of the sublease a defense, for the sub-tenant, in a suit brought by the tenant for damages sustained in connection with the sublease.[62]

Foreclosure or devolution of leasehold. "No property or interest in property is subject to sale under execution or like process unless the debtor, if sui juris (of his own right), has power to pass title to such property or interest in property by his own act."[63] In other words, a leasehold which the tenant cannot sublet without consent of the landlord is not subject to levy and sale under an attachment by the tenant's creditors.[64] However, a tenant holding under a lease that authorizes him to sublet any part of the leased premises has the right to mortgage his leasehold estate, and the purchaser of that estate, on sale under the mortgage, would take the lease with the privilege of extending it for the full term, under the same limitations and obligations as the tenant held it. The right of such purchaser was held not to include the privilege, conferred on the tenant under the lease, of buying the premises from the landlord, partly on credit, at a price named, at any time during the term. This privilege to purchase was held personal, and involved a relation of personal confidence in the tenant. The court indicated its decision might have been different if the terms of purchase prescribed were for cash or no terms of purchase were fixed beforehand. In that latter event the landlord could demand cash, if he did not choose to grant a credit, and thus the terms would be a matter of agreement.[65]

A receivership of an estate of a tenant does not necessarily terminate the lease. Where the lease is not personal to the tenant, the receiver may elect to accept the lease, thereby becoming an assignee and liable for rentals.[66] On the other hand, if a trustee in bankruptcy rejects the lease, the bankrupt estate is released of all burdens thereunder except for rents or other obligations which may have already accrued.[67]

"It is a general rule that the death of a party to a con-

61 Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., 252 S.W. 1048, 1053 (Tex. Comm. App. 1923); reforming and affirming 241 S.W. 267 (Tex. Civ. App. 1922) (urban).
62 Huffstutler & Howell v. McKenzie, 163 S.W. 652, 654 (Tex. Civ. App. 1914) (Austin).
63 Moser v. Tucker, 87 Tex. 94, 26 S.W. 1044, 1045 (1894) (urban).
64 Boone v. First Nat. Bank of Waxahachie, 17 Tex. Civ. App. 365, 43 S.W. 594, 596 (1897) (urban); Moser v. Tucker, 87 Tex. 94, 26 S.W. 1044, 1046; see 27 TEX. JUR. 361 (sec. 215).
65 Menger v. Ward, 87 Tex. 622, 30 S.W. 853, 854 (1895), reversing in part 28 S.W. 821 (Tex. Civ. App. 1894) (urban).
66 Alexander v. Alexander, 99 S.W.2d 1062, 1065 (Tex. Civ. App. 1937) (Austin); Keton v. Silbert, 250 S.W. 316, 319 (Tex. Civ. App. 1923) (Austin, urban). See generally 27 TEX. JUR. 300 (sec. 173).
67 In re Grand River, 50 F.2d 264, 265 (S. D. Tex. 1930) (urban); see Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban).

tract does not extinguish the contract if it is capable of being fulfilled by his representatives, and is not of a personal nature."[68] And it has been held that "An ordinary contract of lease will not, under the rule, be such a personal contract as would be annulled by the death of the lessee."[69] Moreover, upon the death of the tenant, the lease becomes a part of the assets of the estate, and it is up to the administrator to perform it, or be liable for its breach.[70] Also, in one case where the children of the deceased tenant remained upon the leased premises, giving full recognition to the tenancy of their father, the court said they continued to hold under that lease.[71]

Transfer of Contract Interest of Cropper

Depending on the terms of the agreement and the intent of the parties, a cropping contract may create a tenancy relationship with title to the crop in the tenant, or a tenancy in common in the crop, or an employer-employee relationship with title to the crop in employer-landowner.[72]

The same statutory prohibitions that apply in an ordinary tenancy against assigning or subletting without consent of the landlord apply to cropping contracts creating a tenancy, although rent is payable in a share of the crop. These same rules apply, though the cropping agreement creates a tenancy in common in the crop, if by the parties' agreement a landlord-tenant relationship in the land is in fact also created, with the sharetenant having dominion over the land. However, where a tenancy in common in the crop is created by the share agreement but dominion over the land is retained by the landowner, the sharecropper is an employee and has no interest in the land which he can assign or sublet. Such cropper-employee has a mere personal contractual engagement with his employer, giving him the right to ingress and egress to the land to perform his duties under the contract.[73] Further, a sharecropper with the status of a mere employee, wages to be paid in a share of the crop but with title to the crop, until division, retained by the landowner, like other farm hands has a lien on the crop for his labor. Such employee may assign his contractural right to unpaid crop-share wages.[74] A sharecropper may mortgage his in-

68 Wilcox v. Alexander, 32 S.W. 561 (Tex. Civ. App. 1895).
69 Wilcox v. Alexander, 32 S.W. 561 (Tex. Civ. App. 1895); see generally 27 TEX. JUR. 301 (sec. 174).
70 Wilcox v. Alexander, 32 S.W. 561 (Tex. Civ. App. 1895).
71 Carter & Bro. v. Collins, 192 S.W. 316, 322 (Tex. Civ. App. 1916) (Beaumont).
72 See discussion under subtitles "Tenants Pay Rent—Croppers Receive Wages," supra p. 55; "Nature of tenant's interest in crops," supra p. 97; and "Nature of cropper's interest in crops," supra p. 107.
73 See discussion under subtitle "Assignment or subletting of leasehold,," supra p. 173.
74 See discussion under subtitle "Laborer's or farm hand's lien on crops," supra p. 151.

terest in the crop, whether title thereto is in the cropper-tenant[75] or is held in common.[76]

On sale by the landowner of premises under cropping contract, title to the crops growing thereon may or may not pass to the land purchaser, depending on a number of factors discussed in a previous section.[77]

In one early case the court stated: "It has been held that a contract to do ordinary farm work for a year is not terminated by the death of the employer before the expiration of the year, and where the employee continues to do the work without objection by the legal representatives of the deceased he may recover of them the full contract price for the year's work when he has performed it."[78]

Miscellaneous Disputes Between Landlords and Tenants or Croppers

Generally, breach of lease or contract terms by either of the contracting parties gives the injured party legal grounds for bringing an action in the courts for damages only, unless the parties agree to other remedies.[79] Depending on the monetary value involved and on the nature of the dispute, jurisdiction may be in the justice court, the county court or the district court.[80] Costly litigation sometimes may be avoided by an agreement to arbitrate the dispute.[81]

Breach of Contract by Landlord

The landlord is liable to the tenant for whatever damages may be sustained from the landlord's failure to comply with his part of the contract. To secure such damages the tenant has a lien on all the landlord's unexempt property in the tenant's possession and on rents that are due.[82] This act has been held also to apply to a purchaser of the premises from

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75 See discussion under subtitle "Tenants may mortgage or sell growing crops," supra p. 99.
76 See discussion under subtitle "Cropper's right to mortgage or sell interest in crop," supra p. 108.
77 See discussion under subtitle "Cropper's rights in crop on sale of farm," supra p. 109.
78 Hazlewood v. Pennybacker, 50 S.W. 199, 201 (Tex. Civ. App. 1899), second appeal, 26 Tex. Civ. App. 183, 61 S.W. 153 (1901).
79 See discussion under subtitle "Termination of Lease or Cropping Contract," and subtitles thereunder, infra p. 196, et seq.
80 See discussion under subtitle "Suit to Recover Rent," supra p. 77.
81 See discussion under subtitle "Arbitration and award," infra p. 189.
82 TEX. ANN. REV. CIV. STAT. art. 5236 (Vernon, 1947). "Rights of tenant. Should the landlord, without default on the part of the tenant or lessee, fail to comply in any respect with his part of the contract, he shall be responsible to said tenant or lessee for whatever damages may be sustained thereby; and to secure such damages to such tenant or lessee, he shall have a lien on all the property of the landlord in his possession not exempt from forced sale, as well as upon all rents due to said landlord under said contract."

the landlord. Such purchaser is charged with notice of the rights, under an existing lease, of a tenant in possession.[83]

Recovery of damages may be had by a tenant who relied on the landlord's false representations that the leased lands are free from poisonous or obnoxious grasses;[84] but if the tenant at the time of leasing knew the landlord was falsely representing the land as free from Johnson grass, the tenant waived any right to recover damages occasioned by the alleged misrepresentation.[85]

One court said the proper measure of damages in such cases was the difference between the value of the crop, rice in this case, which the tenant would have raised upon the land had it been as represented, minus the additional expense necessary to have grown, harvested, and marketed the same, and the value of the crop that was raised. It was contended that the proper measure was the difference between the rental value of the land if free from obnoxious grasses and its actual rental value, but the court rejected that measure.[86]

Recovery of damages has also been allowed for failure by the landlord to furnish irrigation water as agreed;[87] and for failure by the landlord to pay water charges promptly as he had contracted to do.[88] The measure of damages recoverable in one case, under a "half-and-half" land and water rice lease, was held to be the reasonable market value of the tenant's share of the crop which was not made, but could have been made but for the water shortage, minus the additional expense of raising and marketing a full crop (both shares) over and above the expense of raising and marketing the crop raised.[89] Liability for such damage cannot be avoided by the landlord's claim that the land rented did not belong to him.[90]

But an irrigation company which agreed to, but did not, provide the landlord with water, was held not a necessary or proper party in a suit by a tenant against his landlord for failure to furnish water to irrigate leased rice lands as agreed, since there was no privity of contract between the tenant and the irrigation company.[91] The landlord, of course, may in the lease contract limit the amount of damages the tenant

83 Rumbold v. Adcock, 193 S.W. 415, 416 (Tex. Civ. App. 1917) (Amarillo).
84 Poutra v. Sapp, 181 S.W. 792 (Tex. Civ. App. 1916) (Galveston).
85 Klyce v. Gundlach, 193 S.W. 1092, 1093 (Tex. Civ. App. 1917) (Austin).
86 Poutra v. Sapp, 181 S.W. 792, 794, 797 (Tex. Civ. App. 1916) (Galveston); see Klyce v. Gundlach, 193 S.W. 1092, 1093 (Tex. Civ. App. 1917) (Austin).
87 Dunlap v. Raywood Rice Canal & Milling Co., 43 Tex. Civ. App. 269,, 95 S.W. 43 (1906).
88 Miller v. Keyes, 206 S.W.2d 120, 207 S.W.2d 257 (Tex. Civ. App. 1947) (Austin).
89 Dunlap v. Raywood Rice Canal & Milling Co., 43 Tex. Civ. App. 269, 95 S.W. 43, 44 (1906).
90 Kincheloe Irrigating Co. v. Hahn Bros. & Co., 132 S.W. 78, 80 (Tex. Civ. App. 1910), affirmed, 105 Tex. 231, 146 S.W. 1187 (1912).
91 Stockton v. Brown, 106 S.W. 423, 425 (Tex. Civ. App. 1907).

can recover as a result of the landlord's failure to furnish irrigation water.[92]

A tenant seeking damages for the landlord's breach of the rental contract can recover only upon proof of the contract alleged;[93] and, where part of the work to produce the crop is to be done by others, he must prove the cost of raising and harvesting the crop, to afford a basis for calculating his net interest therein.[94] The tenant's right to damages, however, for breach by the landlord of a six-year farm lease, rent to be paid by clearing and improving, was held not to be affected by proof that the rental value of the farm for the two years the tenant occupied it was worth as much as the improvements agreed upon.[95] Nor does cancellation of a lease contract by mutual agreement as a matter of law abrogate the right of either party to recover damages resulting from breaches before the cancellation.[96]

In a counter claim by a share tenant for breach by the landlord of lease terms, damages for mental anguish were held "not recoverable as an element of actual damages, but may be considered in assessing exemplary damages, if the pleading and evidence should warrant the recovery of such character of damages."[97] The landlord cannot be held responsible for conversion of the tenant's property by third parties unless there was a conspiracy involving the landlord.[98]

In a proper case a cropper would be entitled to recover damages for breach by the landowner of his agreement to furnish advances of money to make the crop, buy groceries, tools, implements, etc.[99]

Other sections in this bulletin discuss the rights of tenants or croppers when their landlord or employer fails to put them into possession,[100] interferes with their occupancy,[101] fails to repair as agreed,[102] wrongfully takes possession of the crop[103] or wrongfully evicts.[104]

92 Moore-Cortes Canal Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S.W. 350, 351.
93 Bowman v. Grimes, 155 S.W.2d 420, 421 (Tex. Civ. App. 1941) (Eastland).
94 Walters v. Bates, 65 S.W.2d 1103, 1104 (Tex. Civ. App. 1933) (Amarillo).
95 Madox v. Humphries, 24 Tex. 195, 197 (1859).
96 Garrett v. Danner, 146 S.W. 678, 681 (Tex. Civ. App. 1912) (Amarillo); see additional discussion under subtitle "Termination by surrender, by abandonment and acceptance, and on assignment or subletting," infra p. 198.
97 Haile v. Coker, 258 S.W. 228, 229 (Tex. Civ. App. 1924) (Amarillo).
98 Dees v. Thomason, 71 S.W.2d 591, 592 (Tex. Civ. App. 1934) (Waco).
99 See Matthews v. Foster, 238 S.W. 317, 318 (Tex. Civ. App. 1922) (San Antonio).
100 See discussion under subtitle "Damages recoverable for failure to put into possession," supra p. 35.
101 See discussions under subtitles "Interference by landlord or by others under paramount title," supra p. 37; and "Interference with occupancy of a farmer on shares," supra p. 41.
102 See discussion under subtitle "Express agreement by landlord to repair," supra p. 84.
103 See discussion under subtitles "Cropper's remedies when landowner wrongfully takes possession of crop," supra p. 110; and "Landlord's rights in crops—landlord's liens," supra p. 111 et seq.
104 See discussion under subtitle "Wrongful eviction or ouster—what constitutes," and subtitles thereunder, infra p. 212 et seq.

Breach of Contract by Tenant or Cropper

The landlord, on breach of a mere covenant in a lease by the tenant, has the right to sue for damages only. He has no right of re-entry, unless there is an express clause in the agreement to that effect.[105] Moreover, under the common law of England, which continues in force in Texas insofar as it is not inconsistent with the Constitution and other laws of the State,[106] the "landlord could not forfeit the lease of his tenant for failure to comply with the provisions without first making demand upon the tenant for such performance." This rule of the common law can be disregarded only in cases in which the lease contains an express waiver of demand.[107]

In the landlord's suit against the tenant for breach of the lease terms, if facts exist excusing the tenant from liability, the burden is on him to allege and prove them.[108]

In other sections of this bulletin the rights of the parties are discussed when the tenant assigns or sublets;[109] abandons the premises or crop;[110] fails to pay rent,[111] or to repair as agreed;[112] or, without consent, removes a lien crop from the leased premises.[113] Also discussed elsewhere are the rights of the landowner-employer when the employee-cropper abandons the crop or fails to cultivate properly.[114]

Settling Disputes out of Court.[115]

"The reputation of Texans as litigous is deserved. A comparison of the published reports as being issued of Texas appellate decisions with those of any other jurisdiction amply confirms it. A tabulation of the civil judicial statistics of England and Wales for 1923 shows, if we disregard the civil cases disposed of in the county courts of which 94 percent involved claims of less than twenty pounds, that only 4606 cases were

105 Johnson v. Gurley, 52 Tex. 222, 226 (1879); Bagby v. Hodge, 297 S.W. 882, 883 (Tex. Civ. App. 1927) (Austin, urban).

106 TEX. ANN. REV. CIV. STAT. art. 1 (Vernon, 1947). "Common law. The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decisions, and shall continue in force until altered or repealed by the Legislature."

107 Gray v. Vogelsang, 236 S.W. 122, 126, 127 (Tex. Civ. App. 1921) (Galveston, urban), citing REV. CIV. STAT. 1911, art. 5492, now TEX. ANN. REV. CIV. STAT. art. 1 (Vernon, 1947).

108 Smith v. Irwin, 289 S.W. 113 (Tex. Civ. App. 1926) (El Paso, urban).

109 See discussions under subtitles "Assignment or subletting of leasehold," supra p. 173; and "Rent Liability when Tenant Assigns or Sublets Premises," supra p. 63.

110 See discussions under subtitles "Abandonment of crop by tenant," supra p. 104; and "Rent Liability on Abandonment of Premises or Crops—Harvesting," supra p. 69.

111 See discussion under subtitle "Nonpayment of Rent," supra p. 76.

112 See discussion under subtitle "Express agreement by tenant to repair," supra p. 87.

113 See discussion under subtitle "Landlord's remedies if unauthorized removal—distress warrant," supra p. 135.

114 See discussion under subtitle "Improper cultivation—abandonment of crop by cropper," supra p. 109.

115 See discussions under subtitles "Compromise and settlement—accord and satisfaction," infra p. 184; and "Arbitration and Award, infra p. 189 et seq.

disposed of in the year. There were more civil cases filed (4,623) in the district courts of a single Texas county (Dallas) in that year."[116]

Compromise and settlement[117]—accord and satisfaction.[118] " 'It is the policy of the law to discourage litigation, and to enforce voluntary settlements effected without the interposition of the law' . . ."[119] In other words, "the law favors an amicable adjustment of the differences between litigants,"[120] whether such adjustment of differences occurs after court action has commenced[121] or prior thereto.[122] And, when the parties in good faith have settled a controversy as to the construction of their contract, the courts will uphold the settlement agreement.[123]

A "compromise" has been defined as "an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree on. It is essential to a compromise that there be mutual concessions or yielding of opposing claims."[124] "Settle" has been held to have a double meaning, denoting an adjustment and a paying.[125] Moreover, a "full settlement" between parties having a contractual relationship implies "an adjustment of all pending matters, the mutual release of all prior obligations existing between the parties."[126]

" 'An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is, or considers himself, entitled to; and a "satisfaction" is the execution, or performance, of such an agreement'."[127]

It has been said that an accord and satisfaction ". . . is distinguishable from compromise in that the latter is based on a disputed claim, while an accord and satisfaction may ex-

116 Carrington, Commercial Arbitration in Texas, 4 TEX. L. REV. 450 (1926).
117 See generally on compromise and settlement, 9 TEX. JUR. 333 et seq. (secs. 1-18).
118 See generally on accord and satisfaction, 1 TEX. JUR. 243 et seq. (secs. 1-45).
119 Bartlett Oil Mill Co. v. Cappes, 54 Tex. Civ. App. 354, 117 S.W. 485, 486 (1909) (urban); quoting from 6 Am. & Eng. Ency. Law 711 (2d ed.); see also 9 TEX. JUR. 335 (sec. 3).
120 Elliott v. Shaffer, 41 S.W.2d 686 (Tex. Civ. App. 1931) (Waco).
121 See Elliott v. Shaffer, 41 S.W.2d 686 (Tex. Civ. App. 1931) (Waco).
122 See Bedford v. Simono, 79 S.W. 97, 98 (Tex. Civ. App. 1904) (urban).
123 Von Hatzfeld v. Haubert, 224 S.W. 220, 222 (Tex. Civ. App. 1920) (Fort Worth, oil lease).
124 Alexander v. Handley, 123 S.W.2d 379, 381 (Tex. Civ. App. 1939) (Dallas), quoting 12 C. J. 314, sec. 1; affirmed, 136 Tex. 110, 146 S.W.2d 740 (Tex. Comm. App. 1941) (urban). For other definitions, see 9 TEX. JUR. 335 (sec. 2).
125 City of Longview v. Capps, 123 S.W. 160, 162 (Tex. Civ. App. 1909) (urban).
126 Hickox v. Hickox, 151 S.W.2d 913, 918 (Tex. Civ. App. 1941) (El Paso, urban).
127 Texas & P. Ry. Co. v. Poe, 131 Tex. 337, 115 S.W.2d 591, 592 (1938), quoting 1 C. J. S. 462, sec. 1, reversing 95 S.W.2d 505 (Tex. Civ. App. 1936) (tort case). For other definitions, see 1 TEX. JUR. 245 (sec. 2).

tinguish an undisputed, liquidated claim."[128] In one decision, the Supreme Court, without so holding, referred to the application of a contestant which conceded "that distinctions between 'compromise and settlement' and 'accord and satisfaction' are shadowy and usually of little practical importance, and that they have found no Texas case making a distinction between the two terms."[129]

The compromise of a cause of action, real or supposed, made in good faith, is binding.[130] In other words, it is not essential that there should have been in fact a good cause of action, if one of the parties believed, in good faith, that he had cause of action.[131] Very essential elements to a compromise, however, are the existence of a *bona fide* dispute between the parties, both parties acting in good faith, without concealment, misrepresentation or fraud.[132]

As one court said: "When a right is doubtful, or is controverted, or where the object is to avoid or settle litigation, a compromise duly executed will not be set aside by the courts if the parties acted in good faith, and there is no fraud or misrepresentation." Further, ". . . no investigation into the character or value of respective claims will be made; it being sufficient that the parties thought there was a question between them."[133] In fact, an agreement entered into upon a supposition of right or of a doubtful right will be binding though it comes out that the right was on the other side. Nor is it sufficient ground for opening and rescinding such an agreement that it is harsh or unequal in its operation.[134] In other words, " 'The binding quality of a compromise of a disputed claim does not rest upon the validity of the claim in fact, but upon the belief, in good faith, of the claimant of its validity.' "[135] And, in cases of contest of a claim, the test is whether the contestant in good faith urged or asserted a defense which he really believed was substantial, and not whether he was correct in his contention.[136] In other words, as was said in one case where an accord and satisfaction was under consideration, "the test applied is whether the one who is

128 1 TEX. JUR. 246 (sec. 2).
129 Alexander v. Handley, 136 Tex. 110, 146 S.W.2d 740, 742 (Tex. Comm. App. 1941) (urban).
130 Bartlett Oil Mill Co. v. Cappes, 54 Tex. Civ. App. 354, 117 S.W. 485 (1909) (urban); see generally 9 TEX. JUR. 341 (sec. 8).
131 Bartlett Oil Mill Co. v. Cappes, 54 Tex. Civ. App. 354, 117 S.W. 485 (1909) (urban).
132 Ford v. Glaze, 60 S.W.2d 898, 899 (Tex. Civ. App. 1933) (El Paso, urban).
133 O'Fiel v. Janes, 269 S.W. 1074, 1082 (Tex. Civ. App. 1925), affirmed, 280 S.W. 163 (Tex. Comm. App. 1926), motion dismissed, 299 S.W. 640 (Tex. Civ. App. 1927) (urban).
134 Camoron v. Thurmond, 56 Tex. 22, 34, 35 (1881) (urban).
135 Walker-Smith Co. v. Pouns, 256 S.W. 613, 615 (Tex. Civ. App. 1923) (Austin, urban), quoting 3 R. C. L. 941.
136 See Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S.W. 1014, 1016 (1901) (urban).

sought to be held liable urges a defense which he believes to be valid, and not whether such defense is, as a matter of fact or law, a valid one."[137]

"There may be a binding settlement by a compromise without a complete closing out of all pending matters."[138] A compromise of a dispute over an illegal transaction or gambling contract is without consideration and unenforceable.[139] Moreover, the court may set aside a compromise agreement for fraud.[140] And, similarly, a supposed settlement with an employee who was coerced by the employer through use of gross fraud, imposition, undue advantage and oppression will not be upheld.[141]

To claim the benefit of an offer of compromise, it must be shown that it was accepted without condition.[142] Moreover, "the acceptance of an amount less than due as a full settlement of the disputed claim is a bar to recovery of the balance."[143] The rule is thus stated by the Commission of Appeals: "It is the settled law of this state that, when an account is made the subject of a bona fide dispute between the parties as to its correctness, and the debtor tenders his check to the creditor upon condition that it be accepted in full payment (check marked as 'payment in full'), the creditor must either refuse to receive the check or accept the same burdened by its attached condition. If he accepts the check and cashes the same, he impliedly agrees to the condition, although he may expressly notify the debtor that he is not accepting the same with the condition, but is only applying the same as a partial payment on the account.[144]

On the other hand, the general rule is that an agreement to accept a smaller payment in satisfaction of an undisputed liquidated debt, that is, for the whole of an admittedly due indebtedness, would be unenforceable for want of consideration.[145] Necessarily, in the absence of a *bona fide* dispute as to the amount owed, a payment of a less sum than the liquidated amount due, as a general rule, does not bar recovery

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137 See Murray Tool Co. v. Root & Fehl, 16 S.W.2d 316 (Tex. Civ. App. 1929) (Eastland, urban). Decision reversed in 26 S.W.2d 189 but this rule not affected.
138 Applewhite v. Sessions, 131 S.W.2d 301, 304 (Tex. Civ. App. 1939) (El Paso, urban).
139 Kennedy Mercantile Co. v. Ainsworth, 258 S.W. 205, 206 (Tex. Civ. App. 1924) (San Antonio, urban); see generally 9 TEX. JUR. 344 (sec. 10).
140 Ross v. Seip, 154 S.W.2d 958, 960 (Tex. Civ. App. 1941) (Texarkana, urban).
141 Obert v. Landa, 59 Tex. 475, 480 (1883) (urban).
142 White v. Shepperd, 16 Tex. 163, 172 (1856) (urban).
143 Bergman Produce Co. v. Brown, 172 S.W. 554, 556 (Tex. Civ. App. 1915) (Amarillo, urban).
144 Root & Fehl v. Murray Tool Co., 26 S.W.2d 189, 191 (Tex. Comm. App. 1930), reversing 16 S.W.2d 316 (Tex. Civ. App. 1929) (urban).
145 National Surety Co. v. American Finance Co. of Galveston, 41 S.W.2d 66, 69 (Tex. Civ. App. 1931) (Galveston, urban).

of the balance.[146] This rule holds true even though such payment was made in full satisfaction of the indebtedness.[147] Under an exception to this general rule, a sufficient consideration to support an agreement by the debtor to accept less than a liquidated sum due may be found if there exists some new benefit to the creditor or detriment to the debtor; "but manifestly such benefit or detriment must be something more than the receiving by the creditor and the payment by the debtor of a part of the indebtedness."[148]

It has been held that upon breach of an executory agreement to compromise, the injured party has an election either to enforce the compromise contract, or to sue upon the original cause of action.[149] But it appears that there is no election on breach of an executed compromise agreement. The remedy for breach thereof is by action on the compromise agreement and not on the original right of action.[150]

"All parties capable of making contracts may enter into an accord and satisfaction of a claim, disputed or undisputed."[151]

An accord and satisfaction, like a compromise and settlement, operates as a bar to the recovery of the old debt.[152] However, "to constitute a bar to an action on the original claim or demand, the accord must be fully executed (performed), unless the agreement or promise instead of the performance thereof, is accepted in satisfaction."[153] In one decision where the performance of the new agreement was to be accepted as satisfaction, the accord before satisfaction was held to be revocable at the pleasure of either party. Until fully executed as agreed, it was held not a bar to suit on the original demand.[154] Moreover, in a later decision the Commission of Appeals held that if performance of the accord is to be the satisfaction of the claim, the creditor may, on de-

146 Cox. v. Banker's Guaranty Life Co., 45 S.W.2d 390, 392 (Tex. Civ. App. 1931) (Austin, urban).
147 Silvers Box Corporation v. Boynton Lumber Co., 297 S.W. 1059, 1061 (Tex. Civ. App. 1927) (Eastland, urban).
148 National Surety Co. v. American Finance Co. of Galveston, 41 S.W.2d 66, 69 (Tex. Civ. App. 1931) (Galveston, urban); but see Tomson v. Heidenheimer, 16 Tex. Civ. App. 114, 40 S.W. 425 (1897).
149 Scott v. Lott, 247 S.W. 685, 687 (Tex. Civ. App. 1923) (San Antonio, urban); see generally 9 TEX. JUR. 350 (sec. 18).
150 Bost v. Barringer, 202 S.W. 791, 792 (Tex. Civ. App. 1918) (Texarkana, urban); see generally 9 TEX. JUR. 351 (sec. 18).
151 Texas & P. Ry. Co. v. Poe, 131 Tex. 337, 115 S.W.2d 591, 592 (1938), reversing 95 S.W.2d 505 (Tex. Civ. App. 1936).
152 Ferguson-McKinney Dry Goods Co. v. Garrett, 235 S.W. 245, 246 (Tex. Civ. App. 1921), reversed on other grounds, 252 S.W. 738 (Tex. Comm. App. 1923) (urban); Bergman Produce Co. v. Brown, 172 S.W. 554, 556 (Tex. Civ. App. 1915) (Amarillo, urban); see 1 TEX. JUR. 255 (sec. 9).
153 Ferguson-McKinney Dry Goods Co. v. Garrett, 235 S.W. 245, 246 (Tex. Civ. App. 1921), reversed on other grounds, 252 S.W. 738, 743 (Tex. Comm. App. 1923) (urban), quoting 1 C. J. 530.
154 Ashbrook v. Neal, 103 S.W.2d 1101, 1103 (Tex. Civ. App. 1937) (Amarillo, urban).

fault in performance of the accord by the debtor, sue either on the accord or on the original cause of action.[155] On the other hand, in those cases where some new promise is accepted as satisfaction of the prior debt or duty, if that promise is not performed, the only remedy is by action for its breach, as no right exists to sue on the original demand.[156]

As in compromise and settlement, so in cases involving an accord and satisfaction, where a *bona fide* dispute as to the amount due exists, if money is accepted on the condition that acceptance is a full satisfaction, the claim is canceled and no protest, declaration, or denial can vary that result so long as the condition is insisted upon.[157] But, as a general rule, if there is no *bona fide* dispute as to the liquidated amount owed, payment of a less sum than the amount owing, even though made in full satisfaction of the indebtedness, does not constitute an accord and satisfaction.[158]

An accord may be satisfied by the delivery of goods such as cotton, as per the agreement, and the indebtedness thereby discharged.[159] Further, where the new agreement is not within the operation of the statutes of fraud, it is valid though not in writing.[160]

A few examples of use of contracts of compromise and settlement or of accord and satisfaction in settling landlord-tenant disputes or miscellaneous rural controversies may be of interest. In one case a compromise as to the amount of a debt protected by a water lien on rice was upheld,[161] as was a dispute between a landlord and tenant arising out of a lease contract in another case.[162] The question as to whether an injured ranch hand had accepted an offer to compromise was held for the jury to decide.[163] However, an overpayment of accrued rent made under protest was, under the facts of the particular case, held not a compromise of the disputed claim.[164]

155 Alexander v. Handley, 136 Tex. 110, 146 S.W.2d 740, 743 (Tex. Comm. App. 1941), affirming 123 S.W.2d 379, 381 (Tex. Civ. App. 1938) (urban).

156 Ferguson-McKinney Dry Goods Co. v. Garrett, 235 S.W. 245, 246 (Tex. Civ. App. 1921) (San Antonio), reversed on other grounds, 252 S.W. 738, 743 (Tex. Comm. App. 1923).

157 Early-Foster Co. v. W. F. Klump & Co., 229 S.W. 1015, 1018 (Tex. Civ. App. 1921) (Austin, urban); Bergman Produce Co. v. Brown, 172 S.W. 554, 557 (Tex. Civ. App. 1915) (Amarillo, urban).

158 Silvers Box Corporation v. Boynton Lumber Co., 297 S.W. 1059, 1061 (Tex. Civ. App. 1927) (Eastland, urban).

159 Bradshaw v. Davis, 12 Tex. 336, 354 (1854).

160 TEX. ANN. REV. CIV. STAT. arts. 3995 et seq. (Vernon, 1945).

161 Tyrrell Rice Milling Co. v. McFaddin-Wiess-Kyle Land Co., 32 S.W.2d 393, 395 (Tex. Civ. App. 1930) (Beaumont).

162 Champlin Refining Co. v. Street, 57 S.W.2d 903, 906 (Tex. Civ. App. 1933) (Amarillo, urban).

163 Babicora Development Co. Inc. v. Edelman, 54 S.W.2d 552, 554 (Tex. Civ. App. 1932) (El Paso).

164 Shannon v. Todd, 287 S.W. 517, 518 (Tex. Civ. App. 1926) (Austin, urban).

Arbitration and Award[165]

"Arbitration is the voluntary submission of a controversy or dispute to persons selected by parties to investigate and determine the matter and render a decision concerning it. The persons so selected are arbitrators, and their decision is the award. The award is a kind of substitute for the judgment of established tribunals of justice, and the proceedings of arbitrators are intended to avoid the formalities, delay, expense and vexation of ordinary litigation."[166]

"Arbitration is a proceeding so favored by Texas law that both our constitution and statutes provide for the submission of difference to arbitration."[167] "It is the policy of the law to encourage settlements by arbitration. . . ."[168]

Two types of arbitration are recognized under Texas law:[169] common law arbitration[170] and statutory arbitration.[171] However, neither type is frequently used for settling disputes. In fact, "Statutory arbitration in Texas has practically ceased to exist . . . even common law arbitrations have been rare."[172]

Common Law Arbitration

"At common law, any person competent to contract may submit a controversy to arbitration and will be bound by an award made in pursuance thereof."[173] The provisions of the Texas arbitration statute do not repeal the common law in relation thereto.[174] In fact, a statute expressly provides: "Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they may select."[175] Agreements for common law arbitration are subject to the general law governing contracts.[176]

It is not necessary that the dispute submitted to arbitration constitutes a legal cause of action to bind the parties by the award. "A difference of opinion between the parties upon the whole case including the defendant's legal liability as well

165 See generally 4 TEX. JUR. 660, et seq. (secs. 1-37).
166 4 TEX. JUR. 661 (sec. 2), citing Temple v. Riverland Co., 228 S.W. 605, 609 (Tex. Civ. App. 1921) (Amarillo, oil).
167 Brazoria County v. Knutson, 142 Tex. 172, 176 S.W.2d 740, 743 (1943), affirming 170 S.W.2d 843 (Tex. Civ. App. 1943) (urban).
168 Smith v. Gladney, 70 S.W.2d 342, 348 (Tex. Civ. App. 1934) (Fort Worth), reversed on other grounds, 128 Tex. 354, 98 S.W.2d 351 (1936) (urban); see 4 TEX. JUR. 662 (sec. 3).
169 See 4 TEX. JUR. 662 (sec. 4).
170 See discussion under subtitle "Common Law Arbitration," p. 189.
171 See discussion under subtitle "Statutory Arbitration," infra p. 194.
172 Carrington, Commercial Arbitration in Texas, 4 TEX. L. REV. 457 (1926).
173 4 TEX. JUR. 664 (sec. 6), citing 2 R. C. L. 354.
174 Faggard v. Williamson, 4 Tex. Civ. App. 337, 23 S.W. 557, 558 (1893); Hurst v. Funston, 91 S.W. 319, 320 (Tex. Civ. App. 1905).
175 TEX. ANN. REV. CIV. STAT. art. 238 (Vernon, 1947).
176 Callaway v. Albin, 114 Tex. 5, 261 S.W. 372, 374 (Tex. Comm. App. 1924).

as the amount of damages might have been submitted to, and determined by the arbitrators . . ."[177] The general rule is that matter in dispute between the parties is all that is necessary as the subject matter of the arbitration.[178] And, where several matters are in controversy, the parties may submit one of them to arbitration without submitting the others.[179] Moreover, the parties may agree to arbitrate their differences although a lawsuit is pending.[180] One exception to the general rule should be noted. Claims arising out of illegal contracts are not matters that are subject to arbitration.[181] Under this exception it has been held that a claim arising out of an illegal transaction, such as speculation in futures, is not a legitimate subject of arbitration, and that an award based thereon is void and unenforceable, the court saying: "The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality."[182]

Among controversies of rural interest which have been submitted to common law arbitration in Texas are the following: "a dispute arising from an alleged failure of a landlord to repair;[183] a boundary dispute (and the agreement to arbitrate a division line between adjacent owners, need not be in writing);[184] a disagreement over cattle;[185] a misunderstanding arising from a cropping agreement;[186] a quarrel over a contract for the hire of a slave;[187] a difference between a landlord and tenant over settlement[188] and a dispute arising over a trade of sheep for cows.[189]

At common law, the agreement to arbitrate may be oral, or it may be in writing.[190] In an early decision it was held "That an oral submission to arbitration, when not in conflict with the statute of frauds, is binding at common law cannot be controverted."[191]

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177 Houston Saengerbund v. Dunn, 41 Tex. Civ. App. 376, 92 S.W. 429, 431 (1906) (urban). See 4 TEX. JUR. 669 (sec. 8).
178 Hill v. Walker, 140 S.W. 1159, 1162 (Tex. Civ. App. 1911) (Austin).
179 Dockery v. Randolph, 30 S.W. 270, 272 (Tex. Civ. App. 1895).
180 Faggard v. Williamson, 4 Tex. Civ. App. 337, 23 S.W. 557, 558 (1893); Dockery v. Randolph, 30 S.W. 270, 272 (Tex. Civ. App. 1895).
181 Wise v. Citizens Nat. Bank of Brownwood, 107 S.W.2d 715, 719 (Tex. Civ. App. 1937) (Austin).
182 Smith v. Gladney, 128 Tex. 354, 98 S.W.2d 351, 352 (Tex. Comm. App. 1936), reversing 70 S.W.2d 342 (Tex. Civ. App. 1934).
183 Houston Saengerbund v. Dunn, 41 Tex. Civ. App. 376, 92 S.W. 429, 430 (1906) (urban).
184 Hill v. Walker, 140 S.W. 1159, 1162 (Tex. Civ. App. 1911) (Austin); see Myers v. Easterwood, 60 Tex. 107 (1883) (where an award determining title to land was upheld).
185 Dockery v. Randolph, 30 S.W. 270, 271 (Tex. Civ. App. 1895); Eubank v. Bostick, 194 S.W. 214 (Tex. Civ. App. 1917) (El Paso).
186 Faggard v. Williamson, 4 Tex. Civ. App. 337, 23 S.W. 557, 558 (1893).
187 Hooper v. Brinson, 2 Tex. 185 (1847).
188 Hurst v. Funston, 91 S.W. 319 (Tex. Civ. App. 1905).
189 Callaway v. Albin, 114 Tex. 5, 261 S.W. 372 (Tex. Comm. App. 1924).
190 Owens v. Withee, 3 Tex. 161, 166 (1848) (urban); see 4 TEX. JUR. 666 (sec. 7).
191 Faggard v. Williamson, 4 Tex. Civ. App. 337, 23 S.W. 557, 558 (1893).

Requisites for a common law oral arbitration are not technical. One court in upholding such an award stated that "All that is necessary is that the question to be arbitrated be a matter in dispute between the parties, that the arbitrators be selected, terms for the arbitration be agreed upon, that the arbitrators act in accordance with said agreement, and that their award be published; that is, be made known to the parties."[192]

Should the parties decide to express their common-law arbitration agreement in writing, the following form is suggested:

> **"Whereas, certain controversies (state subject matter of controversy) now exist between the undersigned A. B., of ....., and C. D., of .....;**
>
> **"Now, therefore, it is hereby agreed that the said controversies, and all of them, be and they are hereby submitted to E. F., of ....., and G. H., of ....., as arbitrators, the said arbitrators to hear and determine the same and make their award in writing on or before the..... day of....., 19.....**
>
> **"Witness our hands, this.....day of....., 19.....**
>
> **"In presence of: ....."[193]

A common law arbitration agreement may be made with or without bonds or sureties obligating each party to abide by the award.[194]

"The general or common law rule is that any competent person may be an arbitrator, no matter what his legal status; but if qualifications are stipulated in the agreement, then only those who fulfill them are eligible."[195] Further, the fact that neither arbitrators nor witnesses were sworn does not necessarily vitiate a common law arbitration, since such irregularities may be waived.[196]

"In common-law arbitration if the agreement does not name a day for the trial it would seem to be the duty of the arbitrators to hold a meeting within a reasonable time after their appointment."[197] But notice to the parties of the time and place of the meeting of the arbitrators should be given, unless waived.[198]

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192 Hill v. Walker, 140 S.W. 1159, 1162 (Tex. Civ. App. 1911) (Austin).
193 4 TEX. JUR. 667 (sec. 7). See same section for additional, more detailed forms.
194 See 4 TEX. JUR. 670 (sec. 9) for bond form.
195 4 TEX. JUR. 674 (sec. 13), citing 2 R. C. L. 372.
196 Hurst v. Funston, 91 S.W. 319, 320 (Tex. Civ. App. 1905); see 4 TEX. JUR. 674 (sec. 14).
197 4 TEX. JUR. 675 (sec. 15), citing 2 R.C. L. 377.
198 Hooper v. Brinson, 2 Tex. 185, 187 (1847).

"A common-law award may be rendered orally[199] unless a writing is required by the statute of frauds."[200] Of course if the arbitration agreement specifies a written award, the award must be in writing. A common-law award may be in the following form:

> "(Caption)
>
> "The undersigned arbitrators selected by the above-named parties in their agreement dated the.....day of....., 19....., . . . having on the.....day of....., 19....., being the day assigned for trial of said controversy, been duly sworn according to law, and finding that all the parties were duly and legally notified to present their respective sides of the controversy on this date, and having heard the evidence and arguments of the parties upon the matters submitted, do render the following award: (Set forth the decision plainly.)
>
> "(Attestation Clause)"[201]

The right to revoke a submission to arbitration at common law had to be exercised before the making and publication of the award.[202] And, if one party after agreeing to arbitrate refused to submit the matter in controversy and revoked the authority of the arbitrators or filed suit in the matter, there was no remedy at common law other than by suit for breach of the agreement to arbitrate.[203]

"After an award is made, neither party can revoke it without the consent of the other."[204] Moreover, it is not necessary that the parties should accept the award as a final settlement of all the matters in dispute in order to make it binding.[205] The award, when rendered, "In the absence of fraud, mistake or misconduct, . . . will be held final and conclusive as to all matters which were embraced in the arbitration agreement."[206]

It has been held that "Nothing will be presumed against an award; on the contrary, every presumption not contradic-

199 4 TEX. JUR. 683 (sec. 20), citing Hurst v. Funston, 91 S.W. 319, 320 (Tex. Civ. App. 1905).
200 4 TEX. JUR. 683 (sec. 20), citing 2 R. C. L. 382.
201 4 TEX. JUR. 684 (sec. 20).
202 Houston & T. C. Ry. Co. v. Newman, 2 Willson Civ. Cas. Ct. App. sec. 349 (1884).
203 Owens v. Withee, 3 Tex. 161, 166 (1848); see 4 TEX. JUR. 673 (sec. 12); see also statements by Carrington, Commercial Arbitration in Texas, 4 TEX. L. REV. 451, 457 (1926) that the chief objection to common-law arbitration is that it remains voluntary even after submission. Either party may revoke the arbitrator's authority, in violation of the agreement, and thereby render further proceedings ineffective, up to the time the submission has proceeded to an award.
See 7 TEX. L. REV. 160 (1928) for a discussion of the enforceability of agreement to submit disputes to arbitration.
204 Houston & T. C. Ry. Co. v. Newman, 2 Willson Civ. Cas. Ct. App. sec. 349 (1884).
205 See Aspley v. Thomas, 17 Tex. 221, 226 (1856); and 4 TEX. JUR. 685 (sec. 22).
206 Houston & T. C. Ry. Co. v. Newman, 2 Willson Civ. Cas. Ct. App. sec. 349 (1884).

ted by proof will be admitted to support it."[207] An honest mistake in judgment on the part of the arbitrators was held in another case as furnishing no reason for disturbing the award.[208] And such honest mistake, "which does not exceed the bounds of the submission, is not, as a general rule, ground of impeachment of the award, whether the alleged mistake is one of fact or law, or of both."[209] In fact, one court held that "where arbitrators, knowing what the law is, or leaving it entirely out of their consideration, make what they conceive under the circumstances of the case to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law."[210]

Bias of one of the arbitrators, however, or undue influence and intimidation of the board will avoid the award.[211] Moreover, where it was agreed to submit to arbitrators the question of liability for alleged injury to a horse, but not to inform them who were the parties interested, and one of the parties, in violation of the arbitration agreement, revealed to the arbitrators the ownership of the horse, and the purpose of the examination and decision, such act invalidated the arbitration.[212]

In a recent decision, a common-law award was said to have the effect of a contract, and is "conclusive upon the parties as to all matters of fact and law, in the absence of partiality, fraud, mistake or gross error," duly pleaded and proved, such as would warrant the setting aside of a contract.[213] Similarly, in an earlier decision, a common-law award based on evidence as to the ownership of an animal was held conclusive in the absence of a showing of fraud, gross mistake or unfair conduct.[214] Moreover, one court said that "The agreement for survey is in the nature of an arbitration agreement. Such an agreement is valid and the award subject to impeachment only as in other cases."[215]

After an award has been rendered in a common-law arbitration proceeding, if one of the parties refuses or fails to abide by it, the award may be enforced by court action.[216] A suit may be brought "on the award to establish it and secure

207 Robbs v. Woolfolk, 224 S.W. 232, 234 (Tex. Civ. App. 1920) (Amarillo).
208 Sanders v. Newton, 57 Tex. Civ. App. 319, 124 S.W. 482 (1909).
209 Smith & Lawson v. Taylor, 249 S.W. 519, 520 (Tex. Civ. App. 1923) (Austin), citing 5 C. J. 179.
210 Panhandle Grain & Elevator Co. v. Dorsey, 242 S.W. 255, 257 (Tex. Civ. App. 1922) (San Antonio), quoting Edrington v. League, 1 Tex. 64, 68 (1846).
211 Anderson Bros. v. Parker Const. Co., 222 S.W. 677, 678 (Tex. Civ. App. 1920) (Beaumont, urban).
212 Wiley v. Heard, 1 White & W. Civ. Cas. Ct. App. sec. 1205 (1881).
213 Ferguson v. Ferguson, 93 S.W.2d 513, 516 (Tex. Civ. App. 1936) (Eastland).
214 Ridgill Bros. v. Dupree, 85 S.W. 1166, 1167 (Tex. Civ. App. 1905).
215 Robbs v. Woolfolk, 224 S.W. 232, 234 (Tex. Civ. App. 1920) (Amarillo).
216 Swift v. Faris, 11 Tex. 18, 19 (1853); see 4 TEX. JUR. 688 (sec. 24).

a judgment, in a regular proceeding for that purpose."[217] Moreover, a common-law award, under some circumstances, may be enforced by a decree of specific performance.[218] Further, awards intended to be statutory, but not fully complying therewith, have been enforced by the courts as common-law awards in many instances, though not always.[219]

Statutory Arbitration[220]

Arbitration may also be conducted under the provisions of the Texas arbitration statutes.[221] Procedures under the statutes, however, are more formal than those required under the common law.

Under the statutes, "all persons desiring to submit any dispute, controversy, or right of action supposed to have accrued to either party, to arbitration, shall have the right so to do in accordance with the provisions" of the Texas arbitration statutes.[222] This right applies to corporations as well as to natural persons. Further, executors, administrators and guardians, with consent of the appropriate court, may agree to arbitrate.[223]

The arbitration statutes are to be liberally construed.[224] But, for a statutory award to be enforceable as such, the parties must have "substantially" complied with the provisions of the act.[225] However, awards not sufficient under the statute are sometimes upheld as common-law awards.[226]

The arbitration agreement must be in writing.[227] It must be filed in some court. If the amount in dispute is less than $200, filing must be with some justice of the peace, either in the county of the defendant's residence or where the dispute arose; if over $200, filing must be with the clerk of the district or county court according to the amount involved, or the matter in dispute may come within the jurisdiction of one court or the other.[228]

After an agreement to arbitrate is filed, the parties thereto shall be bound to that mode of trial to this extent.

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217 Temple v. Riverland Co., 228 S.W. 605, 607 (Tex. Civ. App. 1921) (Amarillo, oil).
218 Myers v. Easterwood, 60 Tex. 107, 110 (1883); see 4 TEX. JUR. 689 (sec. 25).
219 Hurst v. Funston, 91 S.W. 319, 320 (Tex. Civ. App. 1905); Dockery v. Randolph, 30 S.W. 270, 272 (Tex. Civ. App. 1895). But see Myers v. Easterwood, 60 Tex. 107, 110 (1883); see generally 4 TEX. JUR. 690 (sec. 26).
220 See generally 4 TEX. JUR. 659, et seq. (secs. 1-37).
221 TEX. ANN. REV. CIV. STAT. arts. 224-238 (Vernon, 1947).
222 TEX. ANN. REV. CIV. STAT. art. 224 (Vernon, 1947).
223 TEX. ANN. REV. CIV. STAT. art. 237 (Vernon, 1947).
224 Temple v. Riverland Co., 228 S.W. 605, 607 (Tex. Civ. App. 1921) (Amarillo).
225 Alexander v. Witherspoon, 30 Tex. 291, 295 (1867).
226 See Ferguson v. Ferguson, 93 S.W.2d 513, 516 (Tex. Civ. App. 1936) (Eastland).
227 TEX. ANN. REV. CIV. STAT. art. 225 (Vernon, 1947).
228 Id., art. 226; see Temple v. Riverland Co., 228 S.W. 605, 607 (Tex. Civ. App. 1921) (Amarillo) (holding that the requirement of filing may be waived).

Thereafter, should the party who signed the arbitration agreement as plaintiff refuse to arbitrate, the agreement may be pleaded as a bar to a suit by him on the same cause of action; and should the party who signed the arbitration agreement as defendant so refuse, the agreement may be pleaded as a bar to any right or defense set up by him in the agreement.[229] "In statutory arbitrations a bond is not required."[230]

The parties submitting a dispute to statutory arbitration shall, in the written arbitration agreement, each name one arbitrator, who must be of age, not related to either party, have the qualifications of a juror and who shall not be interested in the result of the cause submitted for decision.[231] The justice of the peace or the clerk of the court with whom the agreement is filed shall set the day for the trial, and shall issue process for witnesses;[232] and at the assembling for the trial, he shall administer an oath to each arbitrator.[233] Witnesses shall be sworn by the arbitrators.[234]

"The trial of the cause shall proceed in like manner with trials in the courts of this State . . ."[235] For good cause, an arbitration hearing may be continued or postponed.[236]

If the two arbitrators cannot agree on an award, they shall select an umpire with like qualifications as themselves. If the arbitrators cannot agree on an umpire, the justice or clerk shall select one. The cause may then be tried again.[237] When an umpire has been selected, a majority of the arbitrators is sufficient to form an award.[238]

The award must be reduced to writing, and filed with the appropriate justice or clerk.[239] Cost of the proceeding may be taxed against either party, but if the award is silent as to costs, each party shall contribute equally.[240] Unless the right of appeal has been expressly reserved in the original arbitration agreement, the decision of the arbitrators is final. Ap-

229 TEX. ANN. REV. CIV. STAT. art. 236 (Vernon, 1947).
230 4 TEX. JUR. 670 (sec. 9).
231 TEX. ANN. REV. CIV. STAT. art. 225 (Vernon, 1947).
232 Id., art. 227.
233 Id., art. 228.
234 Id., art. 230.
235 Id., art. 230; see Carrington, Commercial Arbitration in Texas, 4 TEX. L. REV. 456, 457 (1926), where the guess is hazarded that the chief reason for the disuse of Texas statutory arbitration is the requirement that "the trial of the cause shall proceed in like manner with trials in the courts." Continuing, he observes: "Under this provision arbitrators are not expected to make investigations on their own initiative. They are expected to pass on evidence properly presented to them in accord with the principles of evidence on which our courts act . . . Arbitrators generally . . . . were honest neighbors unhampered by knowledge of rules of evidence; to require such arbitrators to act in consonance with rules of evidence . . . was to place before them a standard which could only lead to uncertainty and confusion."
236 TEX. ANN. REV. CIV. STAT. art. 229 (Vernon, 1947).
237 Id., art. 232.
238 King & Co. v. Grey, 31 Tex. 22, 27 (1868).
239 TEX. ANN. REV. CIV. STAT. art. 231 (Vernon, 1947).
240 Id., art. 235.

plication for appeal must be in writing and filed with the court on or before the return day of the next term.[241] At the next term of the justice or other court, if no appeal has been applied for, the "award shall be entered and recorded as the judgment of the court, with like effect as other judgments of said court."[242] Such statutory arbitration awards have been held to be "conclusive upon the parties as to all matters of fact and law, in the absence of partiality, fraud, mistake, or gross error, duly pleaded and proved such as would warrant the setting aside of a judgment . . ."[243] However, even though no right of appeal is reserved in the agreement, an award tainted by partiality, fraud, misconduct or gross error can be attacked. Similarly, "an award of the arbitrators in excess of the authority given them by the agreement is void," unless the excess may be disregarded without disturbing the remainder.[244]

Termination of Lease or Cropping Contract

The landlord-tenant or employer-cropper relationships may be ended in a number of ways, the most usual being by expiration of the lease or contract term,[245] by mutual assent, by abandonment and acceptance,[246] and by eviction.[247]

Causes of Termination of Lease

Termination on expiration of lease term, or on notice. A tenancy for a definite term is terminable at the expiration of that term, and the landlord is entitled to possession at that time without giving the tenant notice to vacate.[248] However, there are other instances where a demand is absolutely necessary, such as in a tenancy at will or one from year to year.[249]

A tenancy at will may be terminated at any time by either the landlord or tenant upon notice given to the other party.[250] Moreover, a lease to run until the premises are sold is a tenancy at will, and here it has been said that "such a lease is

241 TEX. ANN. REV. CIV. STAT. art. 233 (Vernon, 1947).
242 Id., art. 231.
243 Ferguson v. Ferguson, 93 S.W.2d 513, 516 (Tex. Civ. App. 1936) (Eastland).
244 Evans v. De Spain, 37 S.W.2d 231, 232 (Tex. Civ. App. 1930) (Austin).
245 See discussion under subtitle "Termination on expiration of lease term, or on notice," p. 196.
246 See discussion under subtitle "Termination by surrender, by abandonment and acceptance, and on assignment or subletting," infra p. 198; also see discussion under subtitle "Grounds for Eviction of Tenants and Croppers," infra p. 209, et seq.
247 See discussion under subtitle "Termination on forfeiture of lease, and on eviction," infra p. 201.
248 Shipman v. Mitchell, 64 Tex. 174, 176 (1885) (urban); see similar holding under an old act in Hendrick v. Cannon, 5 Tex. 248, 250 (1849); also see 27 TEX. JUR. 319 (sec. 186) and 295 (sec. 169).
249 Hendrick v. Cannon, 5 Tex. 248, 250 (1849). See generally discussions under subtitles "Tenancies at Sufferance and Tenancies at Will", supra p. 22; and "Common Law Tenancy from Year to Year," supra p. 26.
250 Buford v. Wasson, 49 Tex. Civ. App. 454, 109 S.W. 275, 278 (1908).

terminable at any time by either party, upon reasonable notice to the other."[251] A lease of farm land for as long as the tenant wanted the premises was also held a tenancy at will. The court in this decision said such a lease is terminable by the tenant "at his own will or convenience," and "at the will of the landlord at the end of any crop year." Notice to the tenant given September 1, or 60 days preceding the end of the crop year on November 1, was held sufficient notice to terminate the lease on the latter date.[252] The death of either the landlord or the tenant terminates a tenancy at will.[253]

Periodic monthly tenancies are terminable, unless the parties contract otherwise, at the expiration of the monthly period and not at any intervening period in the month.[254] Such tenancies unless otherwise agreed are subject to termination by either party upon "reasonable" notice to the other, and in one decision, although three days' notice was not deemed "reasonable," a month's notice, as under the common law rule, was held a "reasonable" time.[255]

A tenancy for another year created by holding over,[256] in the absence of an agreement to the contrary, is a tenancy on the same terms as the former year, and is terminable only at the end of the lease year and not at any intervening date.[257] One court has indicated that a hold-over tenancy from year to year is terminable at the pleasure of either party at the end of any year upon giving requisite notice. The court, in a decision involving a farm lease, without discussing whether "requisite" notice had been given the tenant, gave possession to the landlord on the first of January, as requested, following notice to vacate given the tenant by the landlord on the preceding October 17.[258]

A common law tenancy from year to year can be terminated by either party giving six months' notice.[259]

The terms of a lease contract, of course, may require either party to give the other a definite period of notice to terminate the lease. One such lease agreement provided that

251 Willis v. Thomas, 9 S.W.2d 423, 424 (Tex. Civ. App. 1928) (San Antonio, urban).
252 Wildscheutz v. Lee, 281 S.W. 1105 (Tex. Civ. App. 1926) (San Antonio).
253 First Nat. Bank of Paris v. Wallace, 13 S.W.2d 176, 183 (Tex. Civ. App. 1929) (Texarkana), reversed on other grounds, 120 Tex. 92, 35 S.W.2d 1036 (1931) (urban).
254 See McKibbin v. Pierce, 190 S.W. 1149, 1150 (Tex. Civ. App. 1917) (Amarillo, urban).
255 Sellers v. Spiller, 64 S.W.2d 1049, 1051 (Tex. Civ. App. 1933) (Austin, urban).
256 See generally discussion under subtitle "Periodic Tenancies—Tenancies for Another Year," supra p. 24.
257 See Bateman v. Maddox, 86 Tex. 546, 26 S.W. 51, 54 (1894) (urban); also see Rice, Periodic Tenancy at Common Law—Developments and Substitutes in the United States and Texas, 19 TEX. L. REV. 194 (1941).
258 Hill v. Hunter, 157 S.W. 247, 253 (Tex. Civ. App. 1913) (Austin); see Rice, Periodic Tenancy at Common Law—Developments and Substitutes in the United States and Texas, 19 TEX. L. REV. 193 (1941).
259 See discussion under subtitle "Common Law Tenancy from Year to Year," supra p. 26.

the lease term should be extended one year unless either party gave notice of cancellation 90 days before the end of the original term. Under this contract, notice given less than 90 days preceding the end of the original term was held to terminate the lease one year after the original termination date.[260] A provision in another written lease authorizing the landlord to terminate the lease on giving the tenant six months' written notice to vacate was held for the landlord's exclusive benefit, and the tenant, having omitted to insert a like provision in his own interest, could not take advantage of the stipulation to terminate the lease.[261] Further, a tenant on receiving notice, as per agreement, to vacate leased premises "by" ("by" meaning "not later than; as early as") a certain date, is not relieved of liability for rent to the day fixed, on his removing earlier.[262]

Termination by surrender, by abandonment and acceptance, and on assignment or subletting. A lease may be terminated by "surrender" of the leased premises by the tenant and acceptance of such by the landlord.[263] "A surrender, as the term is used in the law of landlord and tenant, is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties."[264] As stated by other courts, to constitute a surrender "it is essential to the termination of the term of a lease that both the lessor and the lessee agree to the surrender;"[265] and there must "be a mutual agreement between the lessor and the lessee."[266] "Such agreement of surrender and release may be express, or it may be implied where the parties, without express surrender, do some act or acts from which it is necessarily implied that they have both agreed to consider the surrender as made."[267]

An acceptance of an offer by the landlord to terminate the lease, if the tenant, "the sooner the better," would vacate the premises, in order "to bind the offer must be unequivocal and unconditional, and, if it vary the terms offered, it is a

260 Medical Professional Bldg. Corpn. v. Ferrell, 131 S.W.2d 683, 685 (Tex. Civ. App. 1939) (San Antonio, urban).
261 Martin Weiss Co. v. Schwartz, 295 S.W. 197, 198 (Tex. Civ. App. 1927) (Eastland, urban).
262 Goldman v. Broyles, 141 S.W. 283, 285 (Tex. Civ. App. 1911) (El Paso, urban).
263 See additional discussion under subtitle "Oral agreements to modify, extend, assign, or surrender a lease, supra p. 12; see generally 27 TEX. JUR. 310 et seq. (secs. 181-185).
264 Cannon v. Freyermuth, 4 S.W.2d 84, 85 (Tex. Civ. App. 1928) (Dallas, urban), quoting 35 C. J. 1084, sec. 265.
265 Goldman v. Broyles, 141 S.W. 283, 286 (Tex. Civ. App. 1911) (El Paso, urban); Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban).
266 Early v. Isaacson, 31 S.W.2d 515, 517 (Tex. Civ. App. 1930) (Amarillo, urban); for a discussion of surrender by operation of law, see Note 9, TEX. L. REV. 578 (1931).
267 Drollinger v. Holliday, 117 S.W.2d 562, 564 (Tex. Civ. App. 1938) (Waco, urban); Cannon v. Freyermuth, 4 S.W.2d 84, 85 (Tex. Civ. App. 1928) (Dallas, urban).

rejection, and puts an end to the proposed agreement."[268] Moving six months later was held not an acceptance of this landlord's proposition to vacate the premises.[269] But where a tenant on being "ordered to vacate the leased premises, chose to do so, paying the rent to that date, this the court held amounted to a termination of the lease."[270]

Surrender results by operation of law where circumstances and acts of the parties are equivalent to an agreement on the part of the tenant to abandon the leased premises and on the part of the landlord to resume possession.[271] However, in one decision, the fact that the landlord, after the tenant abandoned the leased premises, made protective repairs and also collected rent from a subtenant and credited them on the tenant's account (the lease authorized subletting), was held not inconsistent with continuance of the lease between the landlord and tenant.[272] Neither did "acceptance of the key, and an attempt to rent the premises, accompanied with no other acts or words evidencing an acceptance of surrender," terminate another lease.[273] Nor does the taking possession by the landlord of abandoned premises and reletting them for the unexpired term for the tenant's account, the lease permitting this, constitute a mutual surrender.[274] It is the settled law of this State that the landlord may relet abandoned premises without terminating the lease contract by taking proper precautions not to create a surrender by operation of law.[275] But the act of the landlord in directing the sheriff to seize, hold and sell equipment furnished the tenant with the leased premises, under their contract, was held to constitute an acceptance of the surrender tendered by the tenant, an eviction and a termination of the lease.[276] In conclusion, it should be emphasized that "to terminate a lease contract or to constitute a surrender, the minds of the parties must meet; the termination or surrender must be by mutual agreement."[277]

A lease may be terminated by abandonment of the leased premises by the tenant and by assent to the abandonment by

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268 Martin Weiss Co. v. Schwartz, 295 S.W. 197, 198 (Tex. Civ. App. 1927) (Eastland, urban).

269 Martin Weiss Co. v. Schwartz, 295 S.W. 197, 198 (Tex. Civ. App. 1927) (Eastland, urban).

270 Davidson v. Harris, 154 S.W. 689, 690 (Tex. Civ. App. 1913) (Galveston, urban).

271 Cannon v. Freyermuth, 4 S.W.2d 84, 85 (Tex. Civ. App. 1928) (Dallas, urban).

272 Texas Loan Agency v. Fleming, 92 Tex. 458, 49 S.W. 1039, 1041 (1899); reversing 18 Tex. Civ. App. 668, 46 S.W. 63 (1898) (urban).

273 Peticolas v. Thomas, 9 Tex. Civ. App. 442, 29 S.W. 166, 167 (1895) (urban).

274 Robinson Seed & Plant Co. v. Hexter & Kramer, 167 S.W. 749, 751 (Tex. Civ. App. 1914) (Dallas, urban).

275 Barrett v. Heartfield, 140 S.W.2d 942, 944 (Tex. Civ. App. 1940) (Beaumont, urban).

276 Barrett v. Heartfield, 140 S.W.2d 942, 945 (Tex. Civ. App. 1940) (Beaumont, urban).

277 Barrett v. Heartfield, 140 S.W.2d 942, 944 (Tex. Civ. App. 1940) (Beaumont, urban).

the landlord.[278] A tenant cannot defeat the right of the landlord under the terms of a lease contract by a simply declared intention not to further occupy the leased premises, or by his own voluntary abandonment of the premises.[279] In other words, a lease cannot be terminated by the tenant's acts alone, [280] since it is essential to the termination of the lease that the landlord and tenant agree to the surrender.[281] Of course, the landlord may take possession of premises on abandonment thereof by the tenant,[282] but the mere taking possession of premises abandoned by the tenant would not amount to an acceptance by the landlord of the surrender so as to terminate the lease or end the tenant's liability for rent.[283] And where, in case of abandonment, the landlord under the provisions of the lease contract was authorized to resume possession and relet the leased premises for the unexpired term for the tenant's benefit, the act of the landlord in retaking possession and reletting the premises was held not an acceptance of the surrender.[284]

The landlord at his option may terminate a lease if, without consent of the landlord, the tenant assigns[285] or sublets the leased premises.[286] Also, it should be recalled that in the absence of an express release, a tenant is not released from his express covenant to pay rent by a subletting[287] or an assignment of the leased premises.[288]

Termination on happening of event or from destruction of premises. The lease contract may provide for termination of the lease on sale of the premises. Also, on foreclosure of a mortgage on the leased premises created prior to the lease contract, the purchaser at his option may terminate the

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278 Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban); see generally on abandonment, discussions under subtitles "Rent Liability on Abandonment of Premises or Crops—Harvesting," supra p. 69; "Abandonment of crop by tenant," supra p. 104; and "Improper cultivation—abandonment of crop by cropper," supra p. 109.

279 Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban).

280 Faseler v. Kothman, 70 S.W. 321, 322 (Tex. Civ. App. 1902).

281 Sellers v. Radford, 265 S.W. 413, 415 (Tex. Civ. App. 1924) (El Paso, urban).

282 Alsbury v. Linville, 214 S.W. 492, 495 (Tex. Civ. App. 1919) (San Antonio, urban).

283 Walton v. Steffens, 170 S.W.2d 534, 537 (Tex. Civ. App. 1942) (El Paso, urban).

284 Robinson Seed & Plant Co. v. Hexter & Kramer, 167 S.W. 749, 751 (Tex. Civ. App. 1914) (Dallas, urban).

285 Scott v. Slaughter, 35 Tex. Civ. App. 524, 80 S.W. 643, 645 (1904).

286 Shoemake v. Gillespie, 28 S.W.2d 1114, 1115 (Tex. Civ. App. 1930) (Austin); Elliott v. Dodson, 297 S.W. 520, 522 (Tex. Civ. App. 1927) (Fort Worth); see generally discussion under subtitle "Assignment or subletting of leasehold," supra p. 173.

287 27 TEX. JUR. 385 (sec. 231); see Pressler v. Barreda, 157 S.W. 435, 436 (Tex. Civ. App. 1913) (San Antonio, urban).

288 Cauble v. Hanson, 249 S.W. 175, 179; affirming 224 S.W. 922, 923 (Tex. Civ. App. 1920); see generally discussion under subtitle "Rent Liability when Tenant Assigns or Sublets Premises," supra p. 63.

lease.[289] But it appears that the destruction of buildings on leased premises ordinarily will not terminate the lease.[290]

Termination on forfeiture of lease and on eviction. The landlord has no right of reentry for breach of a mere covenant in a lease, unless there is an express agreement to that effect. He has a right to sue for damages only.[291] The same rule applies in a breach by the tenant of a covenant to pay rent.[292] However, leases frequently provide that on breach of certain covenants by the tenant, usually the covenant to pay rent, the landlord may forfeit the lease and resume possession.[293] But, as was said by the Supreme Court: "Forfeitures are harsh and punitive in their operation. They are not favored by the law. . . . The authority to forfeit a vested right . . . should be found only in language which is plain and clear, whose unequivocal character may render its exercise fair and rightful."[294]

"When a landlord evicts his tenant, whether rightfully or not, and resumes possession of the premises, the rental contract is at an end . . ."[295] On termination of a lease by the landlord, by cancellation and retaking of possession of the premises, the landlord is not entitled to recover from the original tenant, nor any of his assignees, rents accruing after the termination of the contract of leasing or renting by cancellation of the lease, unless the contract provides otherwise.[296] This general rule of course does not apply if the lease expressly stipulates that reentry by the landlord will not affect the obligation of the tenant for the unexpired term of the lease.[297]

Eviction of Tenants and Croppers

"The law in its effort to prevent violence and to maintain peace has prepared adequate remedies to restore possession (of premises) to the party rightfully entitled thereto." In no circumstances, even assuming that the lease term has

289 See discussion under subtitle "Sale, Foreclosure, or Devolution of Landlord's Reversion," supra p. 171; also see discussion under subtitle "Harvesting crops after termination of lease or after end of rental period—'Emblements' " supra p. 100 et seq.

290 See discussion under subtitle "Reduction or Release from Rent Liability," supra p. 72; see also 27 TEX. JUR. 329 et seq. (secs. 194-196).

291 Johnson v. Gurley, 52 Tex. 222, 226 (1879); Wade v. Madison, 206 S.W. 118, 119 (Tex. Civ. App. 1918) (Dallas). See generally discussion under subtitle "Breach of Contract by Tenant or Cropper," supra p. 183.

292 See discussion under subtitle "Nonpayment of Rent," supra p. 76.

293 Apex Co. v. Grant, 276 S.W. 445, 447 (Tex. Civ. App. 1925) (Dallas, urban).

294 Nelson v. Downtain, 265 S.W. 135, 140 (Tex. Comm. App. 1924), quoting Decker v. Kirlicks, 110 Tex. 90, 216 S.W. 385, 386 (1919) and reversing 249 S.W. 241 (Tex. Civ. App. 1923), modified on rehearing, 268 S.W. 731 (Tex. Comm. App. 1925).

295 Nolan v. Stauffacher, 3 Willson Civ. Cas. Ct. App. sec. 372; see 27 TEX. JUR. 90 (sec. 31) and 280 (sec. 159). See, on rent liability after eviction, discussions under subtitles "Reduction or Release from Rent Liability," supra p. 72, and "Nonpayment of Rent," supra p. 76.

296 Waggoner v. Edwards, 83 S.W.2d 386, 388 (Tex. Civ. App. 1935) (Amarillo, urban).

297 See Walling v. Christie & Hobby, Inc., 54 S.W.2d 186, 188 (Tex. Civ. App. 1932) (Galveston, urban).

expired and that the landlord has a better right to possession of the premises, can he "resort to the strong hand of force, violence or terror to dispossess one having peaceable possession."[298] As was said in an early decision, "If one holding title to the land was permitted, by himself or his agent, with force and arms, to dispossess one in the peaceable possession, the consequence would be breaches of the peace, oppression and bloodshed, and trial by the use of the bowie knife and the revolver would be resorted to instead of the quiet and peaceable remedy afforded by the due course of law in the judicial tribunals of the country."[299]

Likewise, forcibly evicting persons other than tenants in peaceful possession of premises is unwarranted. Damages for such unlawful eviction have been allowed a discharged laborer who continued occupying the house, claiming a right to hold possession until he was paid,[300] to an employee or servant of a tenant who was holding over after termination of the lease,[301] and to the tenant of an adverse claimant.[302] Even a person in peaceful possession in the "attitude of a trespasser" on the land cannot lawfully be forcibly evicted therefrom by the owner entitled to possession thereof.[303]

Repossession Without Court Order

Under Texas statutes a legal action may be brought against any person who in taking possession of premises makes entry thereon by force.[304] "Force," as used in this connection, has been defined as including "such a display of physical power as is reasonably calculated to inspire fear of physical harm to those who seek to oppose the possession of the premises by the trespasser. Actual physical combat it not necessary."[305]

A legal action also lies if any person makes entry into real property "except where entry is given by law."[306] Moreover, a "forcible entry" where entry is not given by law has been defined by another article as meaning "an entry without the consent of the person having the actual possession."[307]

298 Kuhn v. Palo Duro Corporation, 151 S.W.2d 894, 897 (Tex. Civ. App. 1941) (Texarkana), reversed on other grounds, 139 Tex. 125, 161 S.W.2d 778 (Tex. Comm. App. 1942).
299 Warren v. Kelly, 17 Tex. 544, 551 (1856).
300 Ray v. Dyer, 20 S.W.2d 328, 329, 331 (Tex. Civ. App. 1929) (Amarillo).
301 Chrone v. Gonzales, 215 S.W. 368 (Tex. Civ. App. 1919) (San Antonio, urban).
302 Sinclair v. Stanley, 69 Tex. 718, 7 S.W. 511, 513 (1888) (urban).
303 See Little Sandy Hunting & Fishing Club v. Berry, 194 S.W. 1161, 1162 (Tex. Civ. App. 1917) (Texarkana).
304 TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945). "When action lies. If any person (1) shall make entry into any lands, tenements or other real property, except in cases where entry is given by law, or (2) shall make such entry by force . . . such person shall be adjudged guilty of forcible entry and detainer, or of forcible detainer, as the case may be . . . . "
305 Smith v. Sinclair Refining Co., 77 S.W.2d 894, 895 (Tex. Civ. App. 1934) (Fort Worth, urban).
306 TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945).

It is not lawful for a person to move in during the casual absence of the person in possession, and "it is not necessary . . ." that one ". . . should actually live upon the land to constitute actual possession."[308] For example, a tenant living off the premises, but pasturing cattle on a 3,000-acre fenced pasture and storing corn in the crib and salt in a building thereon, was held to be in possession thereof. Another person, who in the tenant's absence, against his will, and without his consent, took possession of the property, was held to have made a forcible entry in contemplation of the statute.[309] In like vein, another court concluded that a tenant had actual possession of a 240-acre tract, enclosed by a fence which was completed except for gates, and that the tenant could maintain an action of forcible entry and detainer against another who disturbed his possession.[310] Similarly, where a person in actual possession of property locked it and remained temporarily absent, his possession was "regarded as continuing," and he could maintain such legal action against anyone wrongfully taking possession during his absence.[311]

It is not necessary that a person hazard his life in attempting to regain possession of premises occupied by another during his absence. "He is none the less expelled by force, because his prudence kept him from immediate personal contact with it, when he approached near enough to see the danger."[312]

An interesting dispute arose between a tenant and another farmer who took possession of an adjoining farm without permission from anyone and who, the court said "was in fact a trespasser." This farm of 400 acres was under two enclosures. The "trespasser" farmer cropped 100 acres under one fence; she apparently did not have actual possession of the other enclosure consisting of a pasture. Later a tenant leased this farm from the rightful owner and placed his cattle in the pasture. Some of the cattle broke into the trespasser's crops, causing damage. The court in discussing the rules of law which apply in this case, among other things said that if a trespasser "is allowed to continue on the land, and the land-

307 Zuercher v. Startz, 53 Tex. Civ. App. 442, 115 S.W. 1175, 1176 (1909), citing ANN. CIV. STAT. art. 2520 (Sayles, 1897), now TEX. ANN. REV. CIV. STAT. art. 3974 (Vernon, 1945), reading as follows:

"Forcible entry

"A 'forcible entry,' or an entry where entry is not given by law is:

1. An entry without the consent of the person having the actual possession.
2. As to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent."

308 Zuercher v. Startz, 53 Tex. Civ. App. 442, 115 S.W. 1175, 1176 (1909).

309 Zuercher v. Startz, 53 Tex. Civ. App. 442, 115 S.W. 1175, 1176 (1909).

310 Winn v. McKinnon, 39 S.W. 965, 966 (Tex. Civ. App. 1897).

311 Lewis v. Yoakum, 32 S.W. 237 (Tex. Civ. App. 1895); see also Benevides v. Lucio, 13 S.W.2d 71, 72 (Tex. Comm. App. 1929), reversing 297 S.W. 476 (Tex. Civ. App. 1927).

312 Holmes v. Hollway, 21 Tex. 658, 659 (1858).

lord sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful though it may be, and cannot be forcibly ejected . . ." Moreover, the court continued under the facts in this controversy, "If we regard the entry upon the pasture lands as peaceable, still the appellee (trespasser) held possession of the field in which her crops were planted, and could not be lawfully ejected by force, and her crops destroyed by the invasion of cattle." However, like other adjoining property owners, this court held she was obliged, after receiving notice of the cattle being placed in the pasture, to protect her own crops by putting the fence in repair so as to make it a lawful fence.[313]

However, in another part of the same opinion the court, in discussing the right of an owner to take peaceable possession, said that ". . . we know of no case which has gone to the extent of holding that the rightful owner, when he can gain peaceable possession of his property, must obtain the consent of the person not in the *actual* possession before he can enter . . ." (italics supplied). "But if one lawfully entitled to possession can make peaceable entry, even while another is in occupation, the entry, in contemplation of law, restores him to complete possession; and it is not unlawful for him to resort to such means, short of the employment of force, as will render further occupation by the other impracticable."[314]

Eviction by Court Proceedings

Forcible entry and detainer actions.[315] "The action of forcible entry and detainer . . . provides an efficient and speedy remedy at law which has for its purpose the determination of the right of possession of real property."[316] The parties, however, are not confined to this remedy,[317] but may resort to any other form of action in which the property in controversy can be recovered.[318] In other words, this type of action is "not exclusive, but cumulative, of any other remedy that a party may have in the courts of this state."[319] Nor do the proceedings under the forcible detainer statutes bar an action for trespass, damages, waste, rent or *mesne* profits.[320]

313 Heironimus v. Duncan, 11 Tex. Civ. App. 110, 33 S.W. 287, 288, 290 (1895).
314 Heironimus v. Duncan, 11 Tex. Civ. App. 110, 33 S.W. 287, 289 (1895), last statement quoted from COOLEY on Torts, 323.
315 See Forcible entry and detainer statutes, TEX. ANN. REV. CIV. STAT. arts. 3973-3994 (Vernon, 1945); and procedural rules in FRANKI, Vernon's Tex. Rules of Civ. Proc., Rules 738-755 (1948); see generally 19 TEX. JUR. 757 et seq. (secs. 1-27).
316 Story v. Story, 142 Tex. 212, 176 S.W.2d 925, 927 (1944), reversing 172 S.W.2d 753 (Tex. Civ. App. 1943) (urban).
317 See discussion under subtitle "Other legal actions for eviction," infra p. 209.
318 McDannell & Co. v. Cherry, 64 Tex. 177, 179 (1885).
319 Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 309 (1935) (urban).
320 TEX. ANN. REV. CIV. STAT. art. 3994 (Vernon, 1945).

In a forcible entry and detainer proceeding the only issue at the trial shall be the right to possession of the premises; "the merits of the title shall not be inquired into."[321] However, "proof of title may be received, not to determine title, but in connection with possession."[322]

The courts early stated that the forcible entry and detainer statutes embrace two classes of cases for the exercise of the summary remedy for possession of realty. The first, where there is no subsisting relation of landlord and tenant between the parties; and the other, when that relation does exist.[323] There is omitted from this discussion any reference to the law relating to the first class of cases, known as actions of forcible entry and detainer. The second class of cases is known as actions of forcible detainer. The law pertaining thereto is presented briefly below.

Pertinent parts of the law in regard to forcible detainer provide as follows: If any person shall willfully and without force, after demand in writing for possession thereof, hold over premises after expiration of the term for which such real property was let to him, "or to the person under whom he claims," such person shall be guilty of forcible detainer.[324] Moreover, tenants at will or by sufferance, who refuse to give possession to the landlord after demand in writing, are guilty of forcible detainer. The same applies to tenants of persons who have made forcible entry, and to certain other persons.[325]

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321 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 746 (1948).

322 Orange Laundry Co. v. Stark, 179 S.W.2d 841, 842 (Tex. Civ. App. 1944) (Amarillo, urban).

323 Warren v. Kelly, 17 Tex. 544, 550 (1856).

324 TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945). "When action lies.

"If any person (1) shall make an entry into any lands, tenements or other real property, except in cases where entry is given by law, or (2) shall make any such entry by force or (3) shall willfully and without force hold over any lands, tenements or other real property after the termination of the time for which such lands, tenements or other real property were let to him, or to the person under whom he claims, after demand made in writing for the possession thereof by the person or persons entitled to such possession, such person shall be adjudged guilty of forcible entry and detainer, or of forcible detainer, as the case may be. Any justice of the peace of the precinct where the property is situated shall have jurisdiction of any case arising under this title."

325 TEX. ANN. REV. CIV. STAT. art. 3975 (Vernon, 1945). Other cases.

"A person shall be adjudged guilty of forcible detainer also in the following cases:

1. Where a tenant at will or by sufferance refuses, after demand made in writing as aforesaid, to give possession to the landlord after the termination of his will.

2. Where the tenant of a person who has made a forcible entry refuses to give possession, after demand as aforesaid, to the person upon whose possession the forcible entry was made.

3. Where a person who has made a forcible entry upon the possession of one who acquired it by forcible entry refuses to give possession on demand, as aforesaid, to him upon whose possession the first entry was made.

4. Where a person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord upon demand as aforesaid, after the term expires; and, if the term expire whilst a writ of forcible entry sued out by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant. It is not material whether the tenant shall have received possession from his landlord or have become his tenant after obtaining possession."

The language of the forcible entry and detainer statute has been construed to mean that legal action for possession may be brought if the tenant holds over after his right to possession under the lease has ceased, either by the expiration of the time fixed in the lease, or by the termination of the lease as a result of breach of the lease terms, which expressly give the landlord the right to terminate the lease and he has so terminated it.[326] To determine the right to possession in case of holding over, it is the duty of the court to construe the lease in order to determine whether it has terminated.[327]

Actions for forcible entry and forcible detainer must be "commenced and prosecuted . . . within two years after the cause of action shall have accrued, and not thereafter . . ."[328]

A prerequisite to the bringing of an action of forcible detainer is a demand in writing by the landlord on the tenant for possession of the leased premises. This demand is required if a tenant who has been placed in possession by the landlord willfully holds over.[329] The statute does not prescribe the length of time the demand to quit the premises must precede the forcible detainer action. A written demand for possession made the day before complaint was filed has been held sufficient.[330] The giving of the notice to quit required to terminate a tenancy in any case where such notice is required,[331] does not dispense with the notice required as a prerequisite to bringing the action of forcible detainer.[332]

Jurisdiction of forcible detainer cases is in any justice of the peace court of the precinct where the property is situated.[333] Suits for rent may be joined with the action of forcible detainer, whenever the amount involved in the rent suit is within the jurisdiction of the justice court, and in such a case the justice of the peace may render judgment on both matters.[334]

Unless the relationship of landlord and tenant exists, the action of forcible detainer cannot be maintained.[335] However,

326 Young Women's Christian Ass'n of Austin, Tex. v. Hair, 165 S.W.2d 238, 242 (Tex. Civ. App. 1942) (Austin, urban).
327 See Beauchamp v. Runnels, 35 Tex. Civ. App. 212, 79 S.W. 1105, 1106 (1904) (urban); also see 19 TEX. JUR. 760 (sec. 3).
328 TEX. ANN. REV. CIV. STAT. art. 5526 (8) (Vernon, 1941).
329 TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945); see generally 19 TEX. JUR. 772 (sec. 12).
330 Beauchamp v. Runnels, 35 Tex. Civ. App. 212, 79 S.W. 1105, 1106 (1904) (urban).
331 See discussion under subtitle "Termination on expiration of lease term, or on notice," supra p. 196.
332 Null & Co. v. Garlington & Co., 242 S.W. 507, 511 (Tex. Civ. App. 1922) (Amarillo, urban).
333 TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945) " . . . Any justice of the precinct where the property is situated shall have jurisdiction of any case arising under this title."
334 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 738 (1948); see 19 TEX. JUR. 761 (sec. 4).
335 Johnson v. Hampton, 266 S.W. 561, 562 (Tex. Civ. App. 1924) (Texarkana); Francis v. Holmes, 54 Tex. Civ. App. 608, 118 S.W. 881, 883 (1909).

a person "who is in possession of leased premises through or under the lessee is liable to be dispossessed in this form of action."[336] The term "let"' as used in the statute[337] in one decision was defined to contemplate the existence of landlord and tenant and to mean "To give leave to; to permit. To grant the use of realty for a compensation; correlative to hire. . . . To lease, or hire out a thing for compensation."[338]

Since a requisite to maintaining the action of forcible detainer is the existence of the relationship of landlord and tenant, that type of possessory action, in proper factual situations, may be brought to evict share-farmers who were share-tenants, and share-farmers who are "tenants in common in the crop," if in the latter situation a tenancy in the land existed, rather than an employer-employee relationship. It appears that the forcible detainer action is not the proper action for ousting share-farmers who are mere cropper-employees and receive a share of the crop as wages, or "tenants in common in the crop," who are mere employees, if such employees reside off the farm. However, if a house on the farm has been rented to such employee, then it would appear that unlawful detainer would be an appropriate action to oust him from that house when his rightful possession terminated under the terms of the contract.

Eviction procedure under the "detainer" statutes is as follows: A complaint must be prepared identifying the disputed premises, and stating the facts which entitle the complainant to possession and authorize the action under the statutes.[339] The complaint must show that the relation of landlord and tenant existed between the parties.[340] In other words, as stated in an early case, "the complainant must state the fact of the lease, the time of its determination, and the facts which entitle him to the possession of the premises, and to the remedy of the statute."[341]

This written, sworn complaint must then be filed with the justic of the peace by the aggrieved party or his agent. When so filed, the justice shall issue a citation commanding the defendant to appear before him at some designated time

336 Cadwallader v. Lovece, 10 Tex. Civ. App. 1, 29 S.W. 666, 667 (1895) rehearing denied, 29 S.W. 917 (1895).
337 Construing ANN. CIV. STAT. art. 2519 (Sayles, 1897 [1895]) now appearing unchanged as TEX. ANN. REV. CIV. STAT. art. 3973 (Vernon, 1945).
338 Francis v. Holmes, 54 Tex. Civ. App. 608, 118 S.W. 881, 883 (1909).
339 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 741 (1948); see 19 TEX. JUR. 776 (sec. 14).
340 Yarbrough v. Chamberlin, 1 White & W. Civ. Cas. Ct. App. sec. 1122 (1881); Gulledge v. White, 73 Tex. 498, 11 S.W. 527 (1889) (urban); see generally 19 TEX. JUR. 774 (sec. 13).
341 Gulledge v. White, 73 Tex. 498, 11 S.W. 527 (1889) (urban), quoting from Cooper v. Marchbanks, 22 Tex. 1 (1858).

not less than six nor more than 10 days thereafter.[342] The citation shall be served by reading it to the defendant, or by leaving a copy with some person over the age of 16 years, at his usual place of abode, at least six days before the return day thereof.[343]

If the plaintiff (landlord) at the time of filing his complaint, or thereafter prior to final judgment in justice court, shall file a bond approved by the justice in an amount fixed by the justice as likely to be sufficient to cover the suit costs and damages which may result to the defendant in the event the suit has been improperly instituted, he shall be placed in possession of the premises promptly after the end of six days after service of the citation or the end of six days after notice to the defendant of the filing of the bond in cases where the complaint and the bond were not filed together. Should the defendant want to remain in possession of the disputed premises pending trial of the cause, he must post a bond before the expiration of such six days in an amount double the above bond.[344]

Either party may ask for a jury trial;[345] but if no jury is demanded by either party, the justice shall try the case.[346] The justice of the peace has authority to force the attendance of witnesses.[347] Moreover, for good cause shown, supported by affidavit of either party, the trial may be postponed not exceeding six days.[348]

If judgment or verdict at the trial is for the plaintiff, a writ of restitution of the premises shall be issued, but not until two days thereafter. Costs shall be taxed against the losing litigant.[349]

Either party within five days after final judgment in the justice court may appeal to the county court.[350] The trial shall be entitled to precedence in that court.[351] The cause shall be subject to trial in the county court at any time after five full days following the day of the filing of the transcript.[352]

Judgment of the county court insofar as it grants restitution of the premises is final and is not suspended or super-

342 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 739 (1948).
343 Id., Rule 742.
344 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 740 (1948).
345 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 744 (1948).
346 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 747 (1948).
347 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 743 (1948).
348 Id., Rule 745.
349 Id., Rule 748; see 19 TEX. JUR. 783 (sec. 21).
350 Id., Rule 749; see 19 TEX. JUR. 786, et seq. (secs. 23-25).
351 Id., Rule 751.
352 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 753 (1948).

seded by appeal.[353] However, appeal is allowed where judgment for damages exceeds $100.[354] In other words, the judgment of the county court is "a finality in so far as the question of the right of possession of the involved premises is concerned," but the litigants in forcible detainer proceedings have the right to appeal from all judgments for damages exceeding $100.[355]

Other legal action for eviction. Although facts alleged by a party in his pleading may entitle him to repossess premises by an action of forcible entry and detainer, he is not confined to this remedy, "but could resort to any other form of action in which the property in controversy could be recovered."[356] On the other hand, a party may be entitled to possession of lands from one who is holding over after the determination of a lease, and still not be entitled to recover possession by invoking the swift remedy of an action of forcible detainer.[357]

Other actions available to a landlord for recovering possession of premises, in addition to forcible detainer, are: trespass to try title;[358] "a suit to recover possession on the ground that he rented the property to the tenant and that the term expired;"[359] with an ancillary writ of sequestration to recover possession;[360] and a mandatory injunction, where he is without an "adequate and practical remedy at law."[361]

In other words, a forcible detainer proceeding for obtaining possession of premises ". . . . is not exclusive, but cumulative, of any other remedy that a party may have in the courts of this state."[362] Moreover, a forcible detainer action and some other possessory action may be prosecuted concurrently.[363]

Grounds for Eviction of Tenants and Croppers

Ordinarily a breach of a mere covenant in a lease does not give the lessor a right of reentry, unless there is an ex-

353 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 755 (1948).
354 TEX. ANN. REV. CIV. STAT. art. 3992 (Vernon, 1945); see 19 TEX. JUR. 790 (sec. 26).
355 Rose v. Skiles, 245 S.W. 127, 128 (Tex. Civ. App. 1922) (Dallas, urban); see Davis v. Burnett, 179 S.W.2d 1014, 1015 (Tex. Civ. App. 1944) (San Antonio, urban).
356 McDannell & Co. v. Cherry, 64 Tex. 177, 179 (1885).
357 Cooper v. Marchbanks, 22 Tex. 1, 5 (1858) (urban).
358 Thurber & Co. v. Connors, 57 Tex. 96, 97 (1882) (urban); see Hall v. Haywood, 77 Tex. 4, 13 S.W. 612; 41 TEX. JUR. 458 (sec. 5).
359 27 TEX. JUR. 325 (sec. 191), citing Juneman v. Franklin, 67 Tex. 411, 3 S.W. 562 (1887).
360 Hill v. Brown, 237 S.W. 252, 255 (Tex. Comm. App. 1922), reversing 225 S.W. 780 (Tex. Civ. App. 1920).
361 Hudspeth v. Gugenheim, 278 S.W. 952, 953 (Tex. Civ. App. 1926) (San Antonio); see 27 TEX. JUR. 326 (sec. 192); 27 TEX. JUR. 325 (sec. 191), regarding use of writs of sequestration or writs of possession in suits for possession of real estate.
362 Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 309 (1935) (urban).
363 Omohundro v. Nowlin, 142 S.W.2d 399, 400 (Tex. Civ. App. 1940) (Austin, urban).

press clause in the agreement to that effect. The lessor in the absence of such provision has the right to sue for damages only.[364] Under this rule, neither a breach of an express covenant nor a breach of one that arises only by implication forfeits a tenant's right to possession.[365] For example, in one decision it was held that the landlord had no right to oust a cropper-renter, even though it was admitted that he had not cultivated the land in a farmer-like manner, unless the agreement contained covenants of forfeiture or authorized reentry and ouster in such event[366]

Conversely, if, under the terms of the agreement, the landlord is given the right to forfeit the lease and resume possession on breach of a lease covenant, the general rule is that the courts, though sometimes reluctantly, will enforce the parties' contract.[367]

A breach of a covenant to pay rent will not work a forfeiture of the lease or give the landlord the right of reentry unless the lease contract provides for a forfeiture in the event of such failure;[368] but where repossession on nonpayment of rent is authorized, the forfeiture will be enforced though the default is not willful.[369] The landlord, however, cannot work a forfeiture without first making a demand on the tenant at the proper time and place for the overdue rent, unless there are express words in the lease dispensing with a formal demand.[370]

The landlord at his option may recover possession of leased premises if the tenant, without consent of the landlord, sublets (or assigns) the leased premises.[371] Similarly, he may take possession of premises upon abandonment thereof by the tenant;[372] and of necessity, when leased premises are surrendered by the tenant and accepted by the landlord.[373]

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364 Johnson v. Gurley, 52 Tex. 222, 226 (1879).
365 Wade v. Madison, 206 S.W. 118, 119 (Tex. Civ. App. 1918) (Dallas). See discussion under subtitle "Breach of Contract by Tenant or Cropper," supra p. 183.
366 Yarbrough v. Brookins, 294 S.W. 900, 904 (Tex. Civ. App. 1927) (Amarillo). See discussion under subtitle "Improper cultivation—abandonment of crop by cropper," supra p. 109.
367 See discussion under subtitle "Eviction by Court Proceedings," supra p. 204 et seq. for the types of legal action available to a landlord to regain possession, which actions vary somewhat, depending on the facts of each case.
368 Ewing v. Miles 12 Tex. Civ. App. 19, 33 S.W. 235, 238 (1895) (urban). See discussion under subtitle "Nonpayment of Rent," supra p. 76.
369 Randolph v. Mitchell, 51 S.W. 297, 298 (1899).
370 Shepherd v. Sorrells, 182 S.W.2d 1009, 1012 (Tex. Civ. App. 1944) (Eastland).
371 Shoemake v. Gillespie, 28 S.W.2d 1114, 1115 (Tex. Civ. App. 1930) (Austin); see discussion under subtitle "Assignment or subletting of leasehold," supra p. 173.
372 Alsbury v. Linville, 214 S.W. 492, 495 (Tex. Civ. App. 1919) (San Antonio); Dodson v. Moore, 272 S.W. 263, 265 (Tex. Civ. App. 1925) (Amarillo); see discussion under subtitles "Abandonment of crop by tenant," supra p. 104, and "Improper cultivation—abandonment of crop by cropper," supra p. 109.
373 See discussion under subtitle "Termination by surrender, by abandonment and acceptance, and on assignment or subletting," supra p. 198.

"When a tenant disavows his landlord's title and claims the premises for himself or some one else, he thereby forfeits his lease."[374] The owner-landlord thereupon is entitled to bring an action of trespass to try title to recover possession of the premises.[375] In an early case, the court stated that if the assignee of a lease denied the original lessor's title and claimed title in itself, its possession of the property had ceased to be rightful, and the original lessor would be entitled to an action to recover the leased premises.[376] In a later case, another court stated that if a sublessee denied the right of possession of his own landlord, the original lessee, and paid his rent to the landowner, he thereby forfeited his rights under his own lease.[377]

If both the lessor and lessee are parties defendant to a suit foreclosing a mortgage or vendor's lien on leased premises, which was created prior to the lease, the lessee's eviction by the paramount title puts an end to the lease itself, and the purchaser at the foreclosure sale has the right to immediate possession of the property.[378] Similarly, where a lease provides for termination on sale of the premises and the contingency happens, all rights under the lease contract, including the right of occupancy, terminate.[379]

Where a lease term expires, the landlord is entitled to possession without giving the tenant notice to quit;[380] and if the tenant holds over, the landlord may bring his action to eject him and retake the premises.[381] Similarly, if, after expiration of the lease term, the landlord grants the tenant permission to occupy the premises long enough after the end of the original lease to gather the crop, action for possession may be brought at the end of the extended term.[382]

To recapitulate, a possessory action may be brought by the landlord, as one court stated in connection with a forcible detainer suit, ". . . . if the tenant holds over after his right

374 Rice v. Schertz, 187 S.W. 245, 246 (Tex. Civ. App. 1916) (San Antonio), citing Turner v. Smith, 11 Tex. 620, 629 (1854).
375 Hall v. Haywood, 77 Tex. 4, 13 S.W. 612 (1890).
376 Wildey Lodge No. 21, I.O.O.F. v. City of Paris, 31 Tex. Civ. App. 632, 73 S.W. 69, 70 (1903) (urban).
377 Null & Co. v. Garlington & Co., 242 S.W. 507, 510 (Tex. Civ. App. 1922) (Amarillo, urban).
378 Bateman v. Brown, 297 S.W. 773, 775 (Tex. Civ. App. 1927) (Amarillo).
379 Johnson v. Phelps, 215 S.W. 446, 447 (Tex. Comm. App. 1919), reversing 181 S.W. 862 (Tex. Civ. App. 1915); see discussion under subtitle "Sale, Foreclosure or Devolution of Landlord's Reversion," supra p. 171.
380 Null & Co. v. Garlington & Co., 242 S.W. 507, 511 (Tex. Civ. App. 1922) (Amarillo, urban), citing Shipman v. Mitchell, 64 Tex. 174, 176 (1885) (urban); see discussion under subtitles "Termination on expiration of lease term, or on notice," supra p. 196 and "Leases Created by Operation of Law—Effect of Holding Over," supra p. 22 et seq.
381 Puckett v. Scott, 45 Tex. Civ. App. 392, 100 S.W. 969, 970 (1907) (urban); Lamb v. Beaumont Temperance Hall Co., 2 Tex. Civ. App. 289, 21 S.W. 713 (1893), citing Thurber & Co. v. Conners, 57 Tex. 96, 97 (1882).
382 Steele v. Steele, 2 Willson Civ. Cas. Ct. App. sec. 345 (1884).

of possession under a lease has ceased, either by the expiration of the time fixed in the lease, or by the termination of the lease and the tenant's right of possession prior to the time fixed, and as the result of breach of the terms of the lease which expressly give the landlord the right to terminate the lease . . . ."[383]

Wrongful eviction or ouster—what constitutes. An eviction, as the term is popularly used and as used herein, "denotes turning a tenant of land out of possession, either by reentry or by legal proceedings."[384] "To constitute an eviction, it is not necessary that there should be a manual or physical expulsion or exclusion from the demised premises or any part thereof."[385] The tenant "may peaceably yield possession to the person who has the superior title or who has been adjudged to be entitled to the possession, and treat himself as having been evicted."[386] Moveover, when a landlord sues out a writ of sequestration for the purpose of obtaining possession of leased premises to which he has no lawful right, the mere fact that the sheriff does not resort to physical force in ejecting the tenants but permits them to effect the removal themselves makes it nonetheless an ejection by the landlord. It is manifest under such circumstances that the tenants do not voluntarily leave but move under the compulsion of the writ with which the landlord has armed the sheriff.[387]

Another type of wrongful eviction, a constructive eviction, may occur if the landlord materially and permanently interferes with the beneficial use of the leased premises and, as a result thereof, the tenant leaves.[388] However, the general rule is that "there can be no constructive eviction unless the tenant abandons the premises on account of the acts or circumstances claimed to operate as an eviction."[389] So, if the tenant voluntarily leaves the premises or vacates for reasons other than the misconduct of the landlord, or if the conduct of the landlord is not such as to justify an abandonment, there is no eviction.[390] Moreover, the acts or omission complained of must be those of the landlord and not merely of a third person acting without his authority or permission.[391]

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383 Young Women's Christian Ass'n of Austin, Tex. v. Hair, 165 S.W.2d 238, 242 (Tex. Civ. App. 1942) (Austin, urban).
384 BLACK, LAW DICTIONARY 695 (3d ed. 1933).
385 Kennerly v. Avery & Sons Plow Co., 300 S.W. 159, 161 (Tex. Civ. App. 1927), quoting from 36 C. J. 262, reversed on other grounds, 12 S.W.2d 140 (Tex. Comm. App. 1929).
386 Kennerly v. Avery & Sons Plow Co., 300 S.W. 159, 161 (Tex. Civ. App. 1927), reversed on other grounds, 12 S.W.2d 140, 141 (Tex. Comm. App. 1929).
387 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo).
388 Nabors v. Johnson, 51 S.W.2d 1081, 1082 (Tex. Civ. App. 1932) (Waco, urban).
389 Kennerly v. Avery & Sons Plow Co., 300 S.W. 159, 161 (Tex. Civ. App. 1927), reversed on other grounds, 12 S.W.2d 140 (Tex. Comm. App. 1929).
390 Nabors v. Johnson, 51 S.W.2d 1081, 1082 (Tex. Civ. App. 1932) (Waco, urban).
391 Angelo v. Dentser, 30 S.W.2d 707, 710 (Tex. Civ. App. 1930) (Beaumont, urban).

Merely demanding additional rent in violation of the contract is not a constructive eviction, for the reason that the demand does not deprive the tenant of beneficial employment of the leased premises, and need not be complied with.[392] Nor does merely making another lease during the lease term constitute a constructive eviction; but a tenant is evicted if, before expiration of the prior lease, the new tenant takes possession without consent of the existing tenant.[393]

Sale by the landlord of a substantial portion of the leased premises, and the taking of possession by the buyer, under the deed, with the authority and consent of the landlord is an eviction.[394] Such partial eviction from leased premises by act of the landlord will relieve the tenant from liability to pay rent upon any portion of the leasehold during the continuance of the eviction. "The landlord cannot so apportion his wrong as to enforce the lessee to pay anything for the residue."[395] However, taking possession during the remainder of the lease term, and using for its own protection a small part of leased premises abandoned by a tenant, does not amount to an eviction, actual or constructive; but the landlord is liable for the value of its use.[396]

Rightful seizure by the landlord under legal process of a tenant's or subtenant's personal property on the leased premises on which the landlord has a lien does not as a matter of law amount to an eviction. On the other hand, directing the sheriff to seize, hold and sell machinery and equipment installed by the landlord and leased to the tenant, essential to the operation of the leased premises, has been held an eviction and a termination of the lease.[397]

Where leased premises are sold under a decree foreclosing a mortgage given before the lease was negotiated, the tenant may sue the landlord for wrongful eviction after yielding possession on demand of the purchaser. It is not necessary that the tenant be forcibly ejected or dispossessed by process of law.[398] But if the landlord has sold the leased premises under voluntary sale, and the tenant has been wrongfully

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392 Coury v. Porterfield, 299 S.W. 938, 939 (Tex. Civ. App. 1927) (Amarillo, urban).
393 Ellison v. Charbonneau, 101 S.W.2d 310, 314 (Tex. Civ. App. 1936) (Fort Worth, urban).
394 Ellison v. Charbonneau, 101 S.W.2d 310, 314 (Tex. Civ. App. 1936) (Fort Worth, urban).
395 Ellison v. Charbonneau, 101 S.W.2d 310, 316 (Tex. Civ. App. 1936) (Fort Worth, urban).
396 Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., 252 S.W. 1048, 1052 (Tex. Comm. App. 1923), reforming and affirming 241 S.W. 267 (Tex. Civ. App. 1922) (urban).
397 Barrett v. Heartfield, 140 S.W.2d 942, 945 (Tex. Civ. App. 1940) (Beaumont, urban).
398 Avery & Sons Plow Co. v. Kennerly, 12 S.W.2d 140, 141 (Tex. Comm. App. 1929), reversing on other grounds 300 S.W. 159 (Tex. Civ. App. 1927) (urban).

evicted by the buyer, the tenant's cause of action is against the latter.[399]

One purporting to lease land without having either title thereto or a right to possession (lost in this case by reason of expiration of his lease) is liable in damages to another leasing in good faith and to any assignee of such lease, when the land is taken from these latter by the true owner.[400]

Miscellaneous legal remedies if eviction wrongful. Several legal remedies are available to tenants, including cropper-renters, both before and after being wrongfully dispossessed of leased premises. The particular remedy available and the one that is most efficacious will depend on the facts of each case.

A tenant about to be evicted under forcible entry and detainer statutes may post a bond and retain possession of the leased premises pending trial of the cause,[401] or, as was said in one decision, "If they had replevied, they could have retained possession of the land, with the right of occupancy and cultivation thereof under the contract, subject to the final determination . . . by the court."[402] Moreover, under some circumstances the court will enjoin a landlord from ousting the tenant.[403]

A tenant after wrongful ejection from leased premises by the landlord may bring an action of forcible entry and detainer to recover possession;[404] or, under other circumstances, the court will issue an injunction restoring possession.[405]

Where a sharecropper-renter has been wrongfully ejected, he also may bring an action to recover possession of the leased premises.[406]

In addition to the above legal remedies, and most important, a tenant, including the cropper-renter, wrongfully

399 Hodde v. Anderson, 105 S.W.2d 332, 333 (Tex. Civ. App. 1937) (Galveston); see discussion under subtitles "Sale, Foreclosure, or Devolution of Landlord's Reversion," supra p. 171; and "Interference with Tenant's Possession," supra p. 37 et seq.

400 Kolp v. Prewitt, 9 S.W.2d 490, 494 (Tex. Civ. App. 1928) (Fort Worth, urban).

401 FRANKI, Vernon's Tex. Rules of Civ. Proc., Rule 740 (1948); see discussion under subtitle "Forcible entry and detainer actions," supra p. 204 et seq.

402 Lamar v. Hildreth, 209 S.W. 167, 170 (Tex. Civ. App. 1919) (Amarillo).

403 Phoebus v. Connellee, 223 S.W. 1019, 1022 (Tex. Civ. App. 1920) (Fort Worth, urban); see Birchfield v. Bourland, 187 S.W. 422 (Tex. Civ. App. 1916) (Fort Worth); see additional discussion under subtitle "Interference by landlord or by others under paramount title," supra p. 37, et seq.

404 McHenry v. Curtis, 3 Willson Civ. Cas. Ct. App. sec. 269 (1887); see discussion under subtitle "Forcible entry and detainer actions," supra p. 204.

405 Obets & Harris v. Speed, 211 S.W. 316, 318 (Tex. Civ. App. 1919) (El Paso); see discussion under subtitle "Interference by landlord or by others under paramount title," supra p. 37 et seq.

406 See Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S.W. 664, 665 (1904); see discussion under subtitles "Interference with Occupancy of a Farmer on Shares," supra p. 41; and "Croppers remedies when landowner wrongfully takes possession of crop," supra p. 110.

dispossessed, may bring an action against the wrongdoer for damages.

Damages recoverable if eviction wrongful. The purpose of the law in awarding actual damages to a tenant wrongfully evicted is to repair the wrong that has been done or to compensate for the injury inflicted, but not to impose a penalty. The cardinal principle is that the injured person shall receive compensation commensurate with his loss or injury and no more.[407]

If the lessor wrongfully sues to evict and enjoin his lessee from further use of the premises, the tenant's cause of action for breach of the contract and the resulting wrongful eviction accrues at the time of service of the injunction writ upon him, and not at the commencement of the suit by the landlord.[408] The cause of action for damages accrues whether the rent is payable in cash or in crops.[409] Of course, for a tenant to be entitled to damages for wrongful eviction it must first appear that he had a rental contract.[410] If the lease term had expired, repossession by the landlord is not wrongful.[411] Nor may a tenant recover damages for an eviction on his failure to pay rent in advance where the lease provided for termination if it was not so paid.[412]

"A wrongdoer is responsible for the natural and probable consequences of his wrongful act or omission, and this rule applies both in contract and in tort . . . ."[413] The amount of damages incurred by the tenant must be established with reasonable certainty; but absolute certainty is not required.[414] The measure of damages for wrongful eviction of a share-tenant has been stated in one case to be what the tenant would reasonably have made out of the crop but for the breach, this court saying that the rule covered gains prevented and loss sustained; and that under loss sustained came any special damages incurred as a probable result of the breach which were in reasonable contemplation of the parties at the time the contract was entered into.[415] The profit prevented is the reasonable market value of the tenant's share of that crop which the tenant would be reasonably expected to have raised upon the premises during the unexpired term of the lease, minus such amounts as the tenant earned or by use of reason-

407 Reavis v. Taylor, 162 S.W.2d 1030, 1038 (Tex. Civ. App. 1942) (Eastland).
408 Madox v. Humphries, 24 Tex. 195, 196 (1859).
409 Joiner v. Citizens' Nat. Bank, 186 S.W. 390, 391 (Tex. Civ. App. 1916) (El Paso).
410 Sweeney v. Johnson, 103 S.W.2d 431 (Tex. Civ. App. 1937) (Texarkana).
411 Randall v. Rosenthal, 31 S.W. 822 (Tex. Civ. App. 1895) (urban).
412 Wilson v. Moore, 57 Tex. Civ. App. 418, 122 S.W. 577, 579 (1939) (urban).
413 Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).
414 Williams v. Gardner, 215 S.W. 981, 983 (Tex. Civ. App. 1919) (Dallas).
415 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo).

able diligence might have earned in other employment during the unexpired lease term.[416]

In another share-tenancy, the measure of damages for the wrongful eviction was stated to be the reasonable market value of the tenant's share of the crop which it was reasonably probable he would have raised on the farm during the year, minus the expense to him of raising and harvesting it, and minus such sums of money as the tenant and the dependent members of his family could have earned during the same year by engaging in other business. Although expenses of raising and harvesting are deductible, the court said a finding that a crop could be grown with practically no outlay of money was warranted where the tenant, his wife, a grown son and daughter all worked on the farm and the tenant owned two teams, plus the necessary farming equipment.[417]

In another decision involving a wrongful eviction of the tenant from sheep grazing land and where no crops were involved, the court refused to confine the general damages to the difference between the rental value of the premises and the stipulatd rent, saying that this rule rested upon the assumption that the tenant could go at once into the market and obtain like property. Where, as in this case, that was not the fact, the court said that as the reason for the rule did not exist, the rule itself should not apply.[418]

Upon being wrongfully dispossessed, the tenant's cause of action for damages accrues at once. Recovery may be had before the end of the lease term for the profits that would have been derived from the crop had the share-rent contract been continued to the end of the lease period.[419] One who has wrongfully put an end to a leasing contract cannot justly complain if he is immediately sued for compensation in damages. In such action the injured party will be entitled to such damages as would have arisen from the nonperformance at the appointed time, subject to abatement by any means he may have had for mitigating his loss. Even if the injured party "recovers on a basis of costs which might have been increased or diminshed by subsequent events, the party who broke the contract before the time for completing performance cannot complain, for he took the risk involved in such anticipation."[420] Nor will the fact that the landlord actually confer-

416 Brincefield v. Allen, 25 Tex. Civ. App. 258, 60 S.W. 1010, 1012 (1901); expressly approved by the Supreme Court in Rogers v. McGuffey, 96 Tex. 565, 74 S.W. 753 (1903).
417 Rupert v. Swindle, 212 S.W. 671, 672 (Tex. Civ. App. 1919) (Fort Worth).
418 Reavis v. Taylor, 162 S.W.2d 1030, 1036 (Tex. Civ. App. 1942) (Eastland).
419 Lamar v. Hildreth, 209 S.W. 167, 169 (Tex. Civ. App. 1919) (Amarillo).
420 Lamar v. Hildreth, 209 S.W. 167, 171 (Tex. Civ. App. 1919) (Amarillo), quoting Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

red a favor on the tenant by wrongfully evicting him, no crops being made on the rental tract during the lease year due to a drouth, authorize a reversal of the verdict obtained soon after the breach.[421]

As has been stated above, a tenant wrongfuly evicted, in addition to general damages is entitled to any special damages incurred as a probable result of the breach which were in reasonable contemplation of the parties at the time the contract was entered into.[422] Evicted tenants have been allowed as special damages the expenses of removal to a new location.[423] The value of pasturage upon land wrongfully repossessed is a proper element of damages.[424] Then, in addition, where a leased sheep pasture was wrongfully sequestered, the tenant was permitted to recover, as special damages, the reasonable expense of moving his sheep to other pastures, the value of sheep lost by straying or by death as a result of being obliged to move them in hot weather under unfavorable circumstances, and, in addition, the depreciation in the value of the sheep proximately caused by the eviction.[425] In another action arising out of an eviction, testimony concerning a tenant's claim rights to special damages, consisting of medical expenses and loss of his wife's services, was denied admission in the absence of proof that the landlord had notice of her illness at the time of the eviction.[426]

Ordinarily, exemplary or punitive damages are not allowed for a mere breach of contract, but where a landlord "wrongfully and willfully or maliciously uses a writ of sequestration for the purpose of obtaining possession of property to which he has no lawful right such damages may be recovered."[427] Similarly, both actual and exemplary damages may be recovered where the landlord forcibly and wrongfully evicts a tenant and acts of malice are found; as, for example, where, armed with a shotgun and threatening to kill, the landlord maliciously drove the tenant from the premises and refused to permit removal of his household furniture, livestock, farm products and supplies.[428]

It is the duty of a tenant, though wrongfully evicted, to use reasonable means to minimize the damages likely to accrue because of the wrongful act. It is incumbent on him to

421 Lamar v. Hildreth, 209 S.W. 167, 174 (Tex. Civ. App. 1919) (Amarillo).
422 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo).
423 Kennerly v. Avery & Sons Plow Co., 12 S.W.2d 140, 142 (Tex. Comm. App. 1929), reversing on other grounds 300 S.W. 159, 162 (Tex. Civ. App. 1927) (urban).
424 McCauley v. McElroy, 199 S.W. 317, 321 (Tex. Civ. App. 1917) (El Paso).
425 Reavis v. Taylor, 162 S.W.2d 1030, 1034 (Tex. Civ. App. 1942) (Eastland).
426 Furr v. Jones, 264 S.W. 164, 166 (Tex. Civ. App. 1924) (Fort Worth).
427 Lamar v. Hildreth, 209 S.W. 167, 172 (Tex. Civ. App. 1919) (Amarillo).
428 Evans v. Caldwell, 219 S.W. 512, 513 (Tex. Civ. App. 1920) (Dallas).

reduce his losses by making what he can by working himself and using his stock, tools and implements, if he can, for other purposes.[429] However, a tenant evicted from farm land is not required to take any steps to lessen the damage he might sustain by an eviction until actually evicted. For example, he is not required to attempt to lease other premises on first receiving notice from the landlord that he cannot occupy the farm during the lease year.[430] Nor does the law impose upon him a duty to make a replevy bond and retain under the lease contract, subject to final determination of the court, premises about to be wrongfully sequestered by the landlord. He may do so, or, at his option, he may agree that the contract has been put to an end, subject to his right to sue for damages for the wrongful eviction.[431]

The rule requiring a tenant to mitigate damages is applicable on breach of lease contracts the performance of which contemplates the continuous personal service of the tenant in the actual cultivation of the crop. The rule does not apply on breach of contracts to do specific acts in connection with land, as, for example, a contract giving the exclusive right to cut hay from certain acreage. A lease, so called, granting the right or privilege of cutting hay off a tract of land during a specified time was held a contract of the latter type, and to be, in reality, a contract of sale rather than a lease. This contract did not contemplate the exclusive personal service of the purchaser of the hay, or even the use of a great portion of his time. The harvesting of the hay might have been performed by him with his own equipment and labor, or by other means or agencies. It could not be assumed that it was impracticable for the purchaser to engage in other business or in the performance of other similar contracts contemporaneously. He had the right to make as few or as many other like contracts as he saw fit while executing the agreement with the seller; but he was not required to minimize damages by contracting for other hay meadows and harvesting them. His loss, therefore, on wrongful eviction from the premises was the net profit he might otherwise have made. In other words, he was entitled, as damages, to recover the value of the hay he would probably have gathered, minus the expense of cutting, preparing for market, and marketing the same.[432]

The landlord is not liable in damages for the eviction of his tenant by third persons, strangers to the landlord's title.

429 McCauley v. McElroy, 199 S.W. 317, 320, 321 (Tex. Civ. App. 1917) (El Paso).
430 Williams v. Gardner, 215 S.W. 981, 984 (Tex. Civ. App. 1919) (Dallas).
431 Lamar v. Hildreth, 209 S.W. 167, 170 (Tex. Civ. App. 1919) (Amarillo).
432 Bankers' Trust Co. v. Schulze, 220 S.W. 570, 571, 572 (Tex. Civ. App. 1920) (Galveston), affirmed, 236 S.W. 703, 704 (Tex. Comm. App. 1922).

The covenant of quiet enjoyment and possession, implied in every lease in the absence of an express contrary provision, is merely a warranty that the tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of title paramount to his.[433] Even where a landlord-grantor in selling a farm warrants the title against all encumbrances, such fact has been held not to justify the joinder of the grantor as a party defendant in a suit for damages brought by the tenant against the grantee-purchaser for his tortious and wrongful eviction of the tenant if the grantor in no manner participated, and the sale was made with full knowledge of the tenant's rights under the lease.[434] However, damages against a tenant holding under an overlapping lease have been held to be proper where, with knowledge of a prior lease and possession thereunder, he wrongfully drove out and kept the former tenant's cattle out of a leased pasture. The owner of the land, who did not participate in the eviction, was held not liable and, according to this court, the tenant holding the overlapping lease would not have been liable either, if he had been ignorant of the prior lease and possession.[435]

433 Thomas v. Brin, 38 Tex. Civ. App. 180, 85 S.W. 842, 845 (1905).
434 Robinson v. Street, 220 S.W. 648, 651 (Tex. Civ. App. 1920) (Beaumont).
435 McAllister v. Sanders, 41 S.W. 388, 389 (Tex. Civ. App. 1897).

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