NILQ (2008) 59(3):249–89

New landlords: problems and solutions: Part 1

ALAN DOWLING

Senior Lecturer in Law, Queen's University Belfast

Recent years have seen a growth in the popularity of land as an investment. Both commercial property and domestic property change hands not only for owner–occupation but because purchasers see the property as attractive in producing a healthy return on their capital investment, or in terms of capital growth, or both. Unarticulated but implicit in the marketability of land purchased as an investment is an understanding that purchasers of the land will step into the shoes of the former owners insofar as the occupiers of the land are concerned; that rent will continue to be paid by the occupiers, albeit to the purchaser instead of the original landlord, and that covenants entered into by the occupiers will continue to be performed and observed. Without the ability for purchasers to enforce payment of rent and to ensure that such covenants are performed, the attractiveness of land currently occupied by someone other than the vendor would be hard to explain.

This is the first part of an examination of the law founding the understanding mentioned above, namely that purchasers of land will step into the shoes of the former owners of the land, so far as occupiers of the land are concerned. More specifically, it considers the law regulating the relations between the various parties where a tenancy has been created and the interest of the landlord is subsequently transferred to a purchaser. In this part the law from the time of Coke until the passing of Deasy's Act[1] is considered. In the second part (to be published in *NILQ* 59(4)), the law contained in that measure, along with later developments, is examined.

Licences and tenancies

One concern for a potential purchaser of property which is occupied by someone other than the vendor will be to determine the nature of the arrangement between the current owner and the occupier. Whether an arrangement for the occupation of land amounts in law to a tenancy or to a licence is a question with which property lawyers have long been familiar. In many of the cases in which the question has been the issue, the background has been the danger for the landowner that the person with whom he has made the arrangement is protected by statutory provisions conferring security of tenure, or

1 Landlord and Tenant Law Amendment Act (Ireland) 1860.

controlling the amount which the owner can charge for the use of the land, or both.[2] Faced with the risk of such statutory provisions applying, the landowner will likely seek to establish that the arrangement amounts merely to a licence. His opponent will, of course, be taking the opposite view.

Whether the arrangement amounts to a tenancy or a licence is also important, however, for present purposes. So far as third parties are concerned, the difference between the arrangement amounting to a tenancy or to a licence is crucial. Privity of contract means that only the parties to an agreement are bound by it, so that if the arrangement is a licence, a third party acquiring the land from the owner should in principle take the land free of the obligations to the licensee created by the licence. Equally, however, the purchaser will take the land without the benefits enjoyed by the former owner in the form of the payments for the land promised by the licensee. There are, of course, ways round these problems. A novation between the original owner, licensee and new owner will bring a new contract into existence and the obligations of that contract will be enforceable between the new owner and the licensee, because they are parties to it. If, however, the licensee is not party to the transfer of the land to the new owner, novation will not assist. In cases where third parties come on the scene, attention has usually focused on the position of the licensee, with attempts being made to burden the new owner with the obligations of the licence, whether by constructive trust or estoppel, but a recent Australian case shows the weakness in the position of the new owner who wants to receive the payments for the use of the land which the licensee agreed to make to the original owner.

In *South Dowling Pty Ltd* v *Cody Outdoor Advertising Ltd*,[3] the owner of a building entered into a deed with another party whereby the latter was granted a licence to display signs on the building for a period of ten years, the owner receiving a licence fee. Later during the term the owner contracted to sell the building. The contract was completed by a transfer of the building to the appellant. Shortly afterwards, the respondent (who was now entitled to the benefit of the licence) received two letters. One was from managing agents for the appellant, directing future payments of the licence fee to be made to the agents. The other was from the original owner, advising that the building had been sold, and that the respondent should cancel further payments of the licence fee to the original owner. The respondent replied to this letter by saying that that the original owner's conduct was a repudiation of its obligations under the licence and that the respondent was accepting that repudiation and terminating the licence. To complete the narrative, shortly after the respondent's reply, a deed was prepared for execution by the original owner, the appellant and the respondent. The deed provided for the assignment, with the respondent's consent, by the original owner of its interest in the licence to the appellant, and for the latter to become bound by the obligations of the licensor as if originally a party thereto. This deed was later executed by the original owner and the appellant, but not by the respondent.

The appellant brought proceedings against the respondent for, inter alia, declarations that the respondent was bound to the appellant as assignee of the original owner, and that the respondent's purported termination of the licence was of no effect. The trial judge held that the licence had been terminated by repudiation and acceptance as the respondent had said. The New South Wales Court of Appeal upheld the decision. On the question of the appellant's right to future instalments of the licence fee, the court's view was that the

2 E.g. *Street* v *Mountford* [1985] AC 809 (Rent Acts); *Gray* v *Taylor* [1998] 4 All ER 17 (Housing Act 1988); *National Car Parks Ltd* v *Trinity Development Co (Banbury) Ltd* [2002] 2 P & CR 253 (Landlord and Tenant Act 1954 (cf. Business Tenancies (NI) Order 1996)).

3 [2005] NSWCA 407.

purported assignment "could not be effectual to assign any viable cause of action for future licence fees, either at law . . . or in equity . . . [W]hat was required was a novation, and that did not occur".

South Dowling shows the position of a successor in title to someone who has granted a licence. If the arrangement between the owner for the use of his land amounts not to a licence but to a tenancy, the case of a successor in title to the owner is very different. A combination of the common law and statutory provisions operate to enable a landlord's successor in title effectively to step into the shoes of his predecessor. As we will see, recovery of rent was not the problem. Enforcement of covenants made by the tenant was, however, a different matter, requiring the legislative provisions mentioned. Enacted by Henry VIII, to ensure that purchasers of land acquired from the monasteries following their dissolution could take the advantage of tenancies of the monastic lands, the first measure survived in England until the property reforms of 1925. As well as ensuring that purchasers could obtain the benefit of existing tenancies, the legislation subjected the purchasers to the burdens of the former landlords, so that, at the risk for the moment of some inaccuracy, the law of landlord and tenant became such that a successor in title to the landlord would simply take the place of the original landlord, so far as concerned the ability to enforce the obligations of the tenant, and the liability of the landlord. Henry's legislation did not apply in Ireland, but a century later the Irish Parliament introduced an Act in the same terms. These measures, and the development of the law in the years which followed them, form the subject of this article. Examination of the situation in the time of Coke and subsequently is not only worthwhile for its own sake, but is useful in showing the dual nature of tenancies as contracts and as grants, and in showing the evolution of the principles of privity of contract and of estate which remain fundamental today. It also allows for a better understanding of the rights and remedies open to a successor in title to a landlord whose tenant neglects to do what the tenancy requires of him. Finally, such examination affords an opportunity to consider some cases which receive little notice in modern texts, yet which form the foundation of our law of landlord and tenant.

The relation of landlord and tenant

As background to the discussion which follows, it will be helpful to consider both the aspirations of a landlord upon the creation of the relation of landlord and tenant, and the means by which he can ensure the fulfilment of such aspirations, as what a successor in title to the landlord can hope to enjoy from the relation will be the same. Whether a new landlord enjoys the same means as the original landlord for realising the benefits is one of the questions to be addressed.

What a landlord obtains from granting a tenancy of his land is the rent payable by the tenant, and the benefit of any covenants the tenant enters into. The landlord's concerns will therefore be to ensure that the rent is paid and the covenants are performed. Today, failure by the tenant to pay the rent or perform his covenants will likely lead to an action for the debt owed or for damages, or result in termination of the tenancy by forfeiture. So too in the period with which we are concerned, but consideration of the situation in the seventeenth century requires a more precise analysis, because of the different forms of action which existed to afford the landlord a remedy on the tenant's default, and because of the different view taken at the time of the relation of landlord and tenant.[4]

4 While Lord Hoffmann has recently commented that the forms of action no longer trouble us (*Douglas* v *Hello! Ltd* [2007] UKHL 21 at [5]), Maitland's well-known comments remain valid: "Already owing to modern reforms it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question [What was a form of action?], but it is still one which must be answered if [*cont.*]

Nowadays, we think of the relation of landlord and tenant in terms of a contract between the parties for the use of land by the tenant in consideration of the rent he agrees to pay.[5] Indeed, one question for the courts at present is the extent to which disputes arising under leases can be resolved simply by application of rules of contract law.[6] The contract will likely contain other obligations on the part of the tenant – such as to keep the premises in repair, or not to use them in a particular way – and it may contain obligations on the part of the landlord as well. Either way, the arrangement looks like a contract for hire of land, much the same as a contract for the hire of a car. There are, however, of course, significant differences. A tenancy of land gives the tenant an estate or proprietary interest in the land. The tenant can, unless he has agreed otherwise, transfer this interest to a third party by assignment, or create a derivative interest by subletting. Again, while the benefit of a contract can be assigned, the burden cannot: in the case of an assignment of a tenancy, however, the assignee will take on the burdens of the assignor under the tenancy, or at least those which touch and concern the land.[7] And the remedies which exist where a tenant defaults may not be the same as those where our hirer of a car fails to observe the terms of the agreement. These differences reflect the view of a tenancy not simply as a contract, but as the grant of an estate in land. The contractual obligations of the original tenant pass to the assignee not because the burden of a contract passes – it does not – but because they are imprinted on the estate which the assignee has acquired.[8] A similar point was made recently by Neuberger LJ when explaining the right of a new landlord to recover rent payable under the lease:

> when the reversion to a lease is transferred, the transferee, that is the new landlord, has the right to recover the rent under the lease in his own right, and does not need to claim through the transferor, that is the original landlord. The position in this connection should be contrasted with an assignment of a right to recover a debt or other chose in action. In such a case the common law courts did not recognise the assignment, so that the assignee had to sue in the

---

[*n. 4 cont*] he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves..": F W Maitland, *The Forms of Action at Common Law* (Cambridge: CUP 1909/1981, page numbering from 1981 reprint), p. 1. Less well-known, but equally persuasive of the need for understanding of the forms of action, are Sutton's comments: "If you can fit the facts laid before you in your instructions into one of them, you may feel fairly confident that if the facts are true . . . you will be successful but if you cannot, the strong probabilities are that you will fail . . . There is no better means of finding out exactly where the strength or weakness of your case lies, than by going back to the old system and ascertaining in what way it would have been necessary to formulate your case under it." (R Sutton, *Personal Actions at Common Law* (London: Butterworth, 1929), p. 13), quoted in W S Holdsworth, *History of English Law* 5th edn (London: Methuen, 1942), vol. xv, p. 105 (hereafter Holdsworth).

5 See e.g. *Smith* v *Muscat* [2003] EWCA Civ 962 at [11] per Sedley LJ: "It has been common ground before this court that a lease or tenancy agreement is today to be regarded as a contract like any other. If it has special characteristics, these are a function of construction or statutory interposition, not of principle." The contractual element of the relation is emphasised in s. 3 of Deasy's Act which provides that the relation of landlord and tenant "shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service".

6 See *Highway Properties Ltd* v *Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710; *Progressive Mailing House Property Ltd* v *Tabali Property Ltd* (1985) 157 CLR 17. The courts in England have accepted the principle that the law of contract can be applied to resolve landlord and tenant disputes but have been more conservative than their counterparts in Australia. See *Hussein* v *Mehlman* [1992] 32 EG 59; *Abidogun* v *Frolan Healthcare Ltd* [2001] EWCA Civ 1821; *Reichman* v *Beveridge* [2006] EWCA Civ 1659; contrast *Apriaden Pty Ltd* v *Seacrest Property Ltd* [2005] VSCA 139.

7 See below p. 284.

8 *City of London Corp* v *Fell* [1993] QB 589, at 604 per Nourse LJ, cited with approval on appeal, [1994] 1 AC 458. See also *Friends Provident Life Office* v *British Railways Board* [1996] 1 All ER 336.

> name of the assignor. . . . However, the right of a transferee of the reversion to recover rent is, both in common law and under statute, an incident of the ownership of the reversion.[9]

He continued:

> while it is fair to say that the contractual character of a lease has tended to become more prominent over the past 50 years, it remains a fact that it is also an interest in land, and it is not hard to see that the right to recover the rent should be an incident of the reversion, and that accordingly it may have different features from the right to recover a debt unassociated with any interest in land.[10]

It is the proprietary nature of a tenancy that can be seen from a consideration of the early cases. In the analysis of the situation at the time of Coke, a landlord who granted a tenancy of his land was seen as reserving to himself out of the land demised an item of property, the rent.[11] The rent was not just a payment the tenant had promised to make.[12] Indeed, the landlord's entitlement to this rent did not require any promise for payment to be made by the tenant.[13] The land, rather than the tenant of it, was seen as the debtor.[14] The landlord was entitled to the rent as it fell due because it had been reserved to him on making the tenancy. If the tenant covenanted to pay the rent, so much the better for the landlord, for he then had two remedies available to him if the rent was not paid: a remedy based on the rent as an item of property unlawfully detained by the tenant and a remedy based on failure of the tenant to perform his promise to pay. And, independently of these remedies, he had the right to take the law into his own hands by distraining for the rent due. Each of these requires explanation. Before that, however, we may note two illustrations of how the difference between payments to be made by a tenant being classified as rent reserved by the landlord or simply as money covenanted to be paid was important. In *Drake* v *Munday*,[15] an action was brought by the plaintiff as executor of a landlord. The action was brought on

9 *Edlington Properties Ltd* v *JH Fenner & Co Ltd* [2006] EWCA Civ 403 at [13]–[15].

10 Ibid. [16].

11 For the changing perception of rent, from that of an item of property reserved to the landlord and issuing out of the land demised to that of consideration under a contract made between the landlord and tenant, see *CH Bailey Ltd* v *Memorial Enterprises Ltd* [1974] 1 All ER 1003; *United Scientific Holdings Ltd* v *Burnley DC* [1977] 2 All ER 62; *Smith* v *Muscat* [2003] EWCA Civ 962 at [30] per Sedley LJ: "it is far too late to correct the asymmetry by restoring the aura of inviolability with which the law came, during the seventeenth and eighteenth centuries, to invest rent. It would be wrong in principle to do so: rent today is correctly regarded as consideration not merely for granting possession but for undertaking obligations which go with the reversion."

12 See *Ards* v *Watkin* (1598) Cro Eliz 637 per Gawdy and Fenner JJ: "there is no doubt but that rent may be devised, and be divided from the reversion; for it is not merely a thing in action, but quasi an inheritance". The report of the case sub nom. *Ardes* v *Watkins* at Cro Eliz 651 makes the same point: "although a contract, or thing in action, cannot be transferred or divided, yet rent only may be".

13 See F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* 2nd edn (Cambridge: CUP, 1898 (hereafter Pollock and Maitland)), vol. II, p. 125: "We have here no enforcement of an obligation: we have the recovery of a thing . . . the idea of a personal obligation or contract plays but a subordinate part in the relation between lord and tenant . . . the landlord who demands his rent that is in arrear is not seeking to enforce a contract, he is seeking to recover a thing." Also Holdsworth, vol. III, p. 151; vol. VII, p. 262.

14 Pollock and Maitland, vol. II, p. 129: "the governing idea is that the land is bound to pay the rent, and it is by no means necessary that any person should be bound to pay it". See also *Kidwelly* v *Brand* (1551) 1 Plowd 69 at 70: "if a man makes a lease for life or years, rendering rent at such a feast, and if it be in arrear that he shall enter, there the lessor ought to come to the land and demand the rent, or else he shall never enter, for the rent is only payable upon the land, and the land is the debtor, for in assise for the rent the land shall be put in view, and he shall distrain in the land for the rent, so that the land is the principal debtor, and the person of the lessee is no debtor but in respect of the land". The same view is put forward in argument in *Walker's Case*: (1587) 3 Co Rep 22a. See further T C Williams, "The incidence of rent" (1897) 11 *Harv LR* 1.

15 (1631) Cro Car 206; Jones W 231.

an agreement whereby in consideration of covenants by the landlord that the defendant should have the use of a house for six years, the defendant covenanted to pay an annual rent. The plaintiff argued that the action lay on the covenant, and not on the basis of a reservation of rent, for in an action on the covenant the plaintiff could succeed as the landlord's executor, whereas if the action were based on reservation of rent, the death of the landlord would have resulted in the land passing to the landlord's heir, and the plaintiff would have had no right to sue. The action was unsuccessful, the court holding that the agreement amounted to a lease for six years, the wording to a reservation of rent, and that the reversion passed on the landlord's death to the heir. To like effect is *Attoe* v *Hemmings*,[16] in which an action of covenant was brought by an assignee of the devisee of a landlord, as a result of non-payment of rent. The tenant argued that the sum he had covenanted to pay was not rent, but merely an annual payment, so that the plaintiff had no right to sue. The court held that the wording in the tenancy was sufficient to amount to a reservation of rent, the right to which had passed on the landlord's death to the heir, with the result that the plaintiff was entitled to succeed.[17]

Recovery of rent

The concerns of the landlord following the grant of a tenancy will be to ensure that the rent is paid and the covenants entered into by the tenant are performed. The remedies available to ensure such concerns are met need to be understood for the discussion following. Beginning with the rent, we need to examine both recovery by action, and the landlord's ability to distrain for it.

Actions of debt for rent

So far as an action based solely on the reservation of the rent is concerned, it might seem surprising that there is anything to discuss. Today, landlords who are owed rent would surely be surprised to be told that there was any doubt that they could sue for the rent as a debt due to them. Nor of course is there: but the case is really the exception rather than the rule. To explain why this is so, we need to understand the difference between cases involving rent payable under a lease where the tenant held a life estate, and cases where the tenant was entitled to the land for a term of years. To the former may be added cases where no relation of landlord and tenant existed at all: cases in other words where the rent payable was a rentcharge rather than a rent service.[18]

As at the beginning of the period we are considering, rent was looked on as an item of property of the person entitled to receive it, so the failure to pay rent was seen as the unlawful detention of such property by the person who ought to pay it. The situation was much the same as that where someone was wrongfully in possession of land belonging to someone else. The only essential difference was that rent was an incorporeal hereditament, whereas land was a corporeal one. Just as dispossessed landowners had an action for recovery of their land, so rent owners had an action for recovery of the rent which they had not received. The action was what the law calls a real action rather than a personal action, and would lead to recovery of the property, rather than compensation, in the same way as

16 (1612) 2 Bulst 281; sub nom. *Athowe* v *Heming* 1 Rolle 80; sub nom. *Alfo* v *Henning Owen* 151.

17 See also *Browning* v *Beston* (1552–1554) 1 Plowd 131.

18 For a full discussion of the nature of rent as a charge payable out of the land, see Williams, "Incidence" (n 14 above); T C Williams, "Landowners' liability to pay rentcharges in fee – an argument against the doctrine of *Thomas* v *Sylvester*" (1897) 13 LQR 288. See also *In re Herbage Rents* [1896] 2 Ch 811.

a landowner dispossessed of his or her land would recover possession.[19] An action of debt was not available for recovery of rent,[20] so long as the estate out of which the rent was reserved was in existence.[21] Eventually, Parliament did provide that a landlord who had made a lease for life would be entitled to bring an action for debt,[22] and later again, on the abolition of the real actions in 1833, the courts determined that an action of debt for rent would lie for others who were entitled to rents.[23] Finally, actions of debt became possible for owners of fee farm rents by legislation in 1851.[24]

In the case of a lease for years, the situation was different, and an action of debt had always been available to the landlord where rent was unpaid.[25] Bacon explains:[26]

> The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rent; the reason whereof is this: actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were, or wheresoever he should remove them: but when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon were pledged for the rent . . .

The fact that an action of debt was available to recover rent reserved on a lease for years should not obscure the view that failure to pay rent was the unlawful detention of property belonging to the landlord. A comparison of the writs of debt and detinue shows the similarity between the two forms of action: in the examples given by Maitland[27] the writ in an action of debt commands the defendant to render £100 *quas ei debet et injuste detinet*; in detinue, that the defendant render chattels *quae ei injuste detinet*. It can be seen from the examples that in an action of debt, as in an action of detinue, the allegation was that the defendant was unjustly detaining the plaintiff's property. Holdsworth makes the point that in an action of debt the plaintiff sought *restoration* of money belonging to the plaintiff.[28] The nature of the action led Maitland to comment that: "We are tempted to say the Debt

19 Pollock and Maitland (n. 13 above), vol. II, p. 126: "Mere default in render of services will not be a disseisin, but the tenant will probably become a disseisor if he resists the lord's distraint . . . The lord will bring against him an assize of novel disseisin. The writ will be word for word the same as that which a man brings when he is ejected from the occupation of land. It will report how the plaintiff alleges that he has been disseised of 'his free tenement' in such a vill, and only at a later stage will come the explanation that the thing to be recovered is, not so many acres of land, but so many shillingsworth of rent." For recovery of rent by real actions, see Holdsworth (n. 4 above), vol. VII, 263. Further, ibid., vol. III, pp. 19, 99, 151.

20 *Andrew Ognel's Case* (1587) 4 Co Rep 48b; *Marler* v *Wright* (1589) Cro Eliz 141; *Webb* v *Jiggs* (1815) 4 M & S 113; *Kelly* v *Clubbe* (1821) 3 Br & B 130; *Randall* v *Rigby* (1838) 4 M & W 130; *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

21 Once the estate out of which the rent was reserved was determined, an action of debt was available to recover arrears of rent: *Lillingston's Case* (1607) 7 Co Rep 38a.

22 Distress for Rent Act (Ireland) 1710, s. 5.

23 See *Thomas* v *Sylvester* (1873) LR 8 QB 368; *Whitaker* v *Forbes* (1875) LR 1 CPD 51.

24 Fee Farm Rents (Ireland) Act 1851, extending provisions already in existence for owners of such rents reserved in grants made under the Renewable Leasehold Conversion Act 1849. See *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

25 *Prescott* v *Boucher* (1832) 3 B & Ad 849; *Bally* v *Wells* (1769) Wilm 341; 3 Wils KB 25; *Midgleys* v *Lovelace* (1693) 12 Mod 45; sub nom. *Midgley* v *Lovelace Carthew* 289; Holt KB 74.

26 *Bacon's Abridgement* 7th edn (London: 1832 (hereafter *Bac Abr*)), vol. VII, p. 47.

27 Maitland, *Forms of Action* (n. 4 above), p. 71; cf. Holdsworth (n. 4 above), vol. III, p. 420 and sample writs at pp. 662–3.

28 Holdsworth (n. 4 above), vol. III, pp. 366, at 368.

is a 'real' action, that the vast gulf which to our minds divides the 'Give me what I own' and 'Give me what I am owed' has not yet become apparent."[29]

Finally, an action of debt for rent could be maintained in all cases where there was a demise, whether the demise was by deed, by instrument in writing not under seal, or by word of mouth.[30]

Actions of covenant

Apart from an action of debt, the landlord might be able to bring an action of covenant if the rent was not paid. If successful, the action would lead to an award of damages. The action depended on there being a promise by the tenant (to pay the rent), and such promise being made under seal. If the landlord considered that difficulties stood in the way of successfully bringing an action of debt, it might be preferable to bring an action of covenant instead. In doing so the landlord would have to show that a promise was made by the tenant to pay the rent. In cases where the lease did not contain an express covenant by the tenant to pay the rent, the landlord might still be able to succeed if he or she could rely on an implied covenant.[31]

Assuming that a covenant by the tenant did exist, express or implied, to pay the rent, it might be expected that an action of covenant would not present any difficulties. That was not the case: the courts took the view that if the covenant was to pay a sum of money, an action of debt, rather than an action of *covenant*, was the appropriate action available for the money sought by the plaintiff.[32] Eventually, however, the law came to allow an action of covenant where the covenant was to pay rent, so that by the early part of the seventeenth century landlords had a choice of action available to them.[33]

---

29 Maitland, *Forms of Action* (n. 4 above), p. 31.

30 *Gibson* v *Kirk* (1841) 1 QB 850 at 856 per Lord Denman CJ.

31 In a number of instances, actions of covenant for rent were brought by landlords in reliance on the words of the reddendum in the lease "Yielding and Paying". Whether the covenant arising from such wording was an implied covenant or an express one gave rise to different views, though the weight of authority is in favour of the covenant being implied rather than an express one. The authorities are collected in T Platt, *A Practical Treatise on the Law of Covenants* (London, 1829), pp. 503: see *Newton* v *Osborn* (1653) Sty 387; *Porter* v *Swetnam* (1654) Sty 406 & 431; *Hellier* v *Casbard* (1665) 1 Sid 240 & 266; sub nom. *Helliar* v *Casebrooke* 1 Keb 923; sub nom. *Helliar* v *Caseborough* 1 Keb 839; sub nom. *Helier* v *Casebert* 1 Lev 127; *Hollis* v *Carr* (1676) 2 Mod 91; 3 Swanst 647; *Barker* v *Keete* (1678) 1 Freem 250; sub nom. *Barker* v *Keate* 1 Mod 262; 2 Ventr 35; sub nom. *Barker* v *Keat* 2 Mod 249; *Norris* v *Elsworth* (1678) 1 Freem 463; *Anon* (1670) 1 Sid 447; *Harper* v *Burgh* (1678) 2 Lev 206; sub nom. *Harper* v *Bird Jones* T 102; *Webb* v *Russell* (1789) 3 TR 402; *Vyvyan* v *Arthur* (1823) 1 B & C 416; *Iggulden* v *May* (1804) 9 Ves 330; *Church* v *Brown* (1808) 15 Ves 264. The point becomes important in relation to the ability for grantees of the reversion to sue on the covenant without reliance on the Statute of Reversions (see below, p. 266).

32 See Holdsworth, vol. III, p. 419. J B Ames (*Lectures on Legal History* (Cambridge, Mass: Harvard University Press, 1913) p. 98) explains: "The earliest covenants were regarded as grants, and suit could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the money, and executed itself. For failure to pay the money, debt would lie. Afterwards an action of covenant was allowed."

33 See Ames, *Lectures* (n. 32 above), pp. 152–3. The relevant authorities are *Anon* (1585) 3 Leon 119; *Anon* (1589) 1 Leon 208; *Sicklemore* v *Simonds* (1600) Cro Eliz 797; *Chawner and Bowes' Case* (1613) Godb 217 where the court is divided on the point; *Browne* v *Hancocke* (1628) Hetley 111; sub nom. *Brown* v *Hancock* Cro Car 115; *Mordant* v *Wats* (1619) 1 Brownl 19; *Anon* (1646) Sty 31; *Frere* v ____ (1648) Sty 133.

Assumpsit

Similar concerns existed with the ability of a landlord to bring an action of *assumpsit*.[34] Developments in this form of action relevant for present purposes coincide with the early part of the period we are looking at. The form of action had certain advantages over those of debt and of covenant. The action was based on a promise made by the defendant and, following *Slade's Case*,[35] a promise to pay might be implied from there being a debt already in existence. It would seem that a count of *indebitatus assumpsit* would therefore be open to landlords seeking payment from their tenants, as an alternative to an action of debt. Not so, however, at least at the outset. A series of cases makes clear that where the action was for rent, the only form of action available to the landlord was debt.[36] Ames notes this was the case even where there was an express promise by the tenant to pay the rent, citing a number of decisions.[37] *Munday* v *Baily*[38] is one, in which judgment in an action of *assumpsit* was given against the landlord, despite the tenant having lost earlier on his plea of *non assumpsit*. Ames notes also the one exception where an action of *assumpsit* was successful, *Slack* v *Bowsal*,[39] but draws attention to the reporter's note that the point that debt was the appropriate action was not argued. The cases refusing to allow *assumpsit* by landlords speak of debt being "a higher remedy",[40] or being the "proper action",[41] and of *assumpsit* being of "a less nature".[42] In *Acton* v *Symon*,[43] the reason put forward for the view that *assumpsit* did not lie for rent was that the execution of a lease determined the personal promise upon which the *assumpsit* was founded.[44] The argument divided the court. The same case marks, however, the possibility of *assumpsit* being brought if there was an *actual* or *express* promise (and not just a promise implied merely from the existence of the debt) by the tenant to pay

34 For the history of the action see Ames, *Lectures* (n. 32 above), pp. 152–71; also D Ibbetson, "Assumpsit and debt in the early sixteenth century: the origins of the indebitatus count" (1982) 41 *CLJ* 142.

35 (1602) 4 Co Rep 92b.

36 *Reade* v *Johnson* (1590) Cro Eliz 243; sub nom. *Read and Johnson's Case* 1 Leon 155; *Symcock* v *Payn* (1599) Cro Eliz 786; *Clerk* v *Palady* (1598) Cro Eliz 859; *Green* v *Harrington* (1619) Hobart 284; 1 Brownl 14; Hutton 34; *Dartnal* v *Morgan* (1620) Cro Jac 598; *Ablaine's Case* (1621) Winch 15; *Brett* v *Read* (1634) Cro Car 343; Jones W 329; *Munday* v *Baily* (1647) Aleyn 29; *Ayre* v *Sils* (1648) Sty 131.

37 Ames, *Lectures* (n. 32 above), p. 167, citing *Green* v *Harrington* (1619) Hobart 284; *Munday* v *Baily* (1647) Aleyn 29; *Anon* (1647) Sty 53; *Ayre* v *Sils* (1648) Sty 131; *Shuttleworth* v *Garrett* (1689) Comb 151; sub nom. *Shuttleworth* v *Garret* 1 Show KB 35; sub nom. *Shuttleworth* v *Garnet* 3 Mod 229; sub nom. *Shuttleworth* v *Garnett* Carthew 90.

38 (1647) Aleyn 29.

39 (1623) Cro Jac 668.

40 *Carter's Case* (1586) 1 Leon 43. See also *Gibson* v *Kirk* (1841) 1 QB 849 at 859.

41 *Read and Johnson's Case* (1590) 1 Leon 156. See also *Mason and Welland* (1685) Skin 238 & 242: "where a rent certain is reserved . . . there the law, where the thing savours of the realty, will not permit an action quite personal to be brought, but will restrain the party to his proper action, without confounding of them".

42 *Green* v *Harrington* (1619) Hutton 34.

43 (1634) Cro Car 414; sub nom. *Acton* v *Simonds* Jones W 364.

44 Cro Car 415 at 415: "the action lies not, because it is grounded upon a personal promise in a real contract; which real contract being executed, the *assumpsit*, which is merely personal, is determined; and the rent being real, [the landlord] cannot bring this action for the non-payment thereof"; Jones W 364: "le feasance del' lease pur ans extinguish le assumpsit, come un obligation extinguish personal contract". See also *Gibson* v *Kirk* (1841) 1 QB 849 at 859 per Lord Denman CJ: "the action of assumpsit was always looked upon, not only as a personal action, which the action of debt equally is, but as one wholly inapplicable to realty or matters arising out of it, as rent is: whereas the action of debt was always applicable to rent and some other matters connected with realty."

the rent.[45] Where such existed, the promise was "collateral, and *quasi* a special agreement to pay the rent, of the same effect as an express covenant in a lease by deed".[46]

Actions for reasonable satisfaction

An action of debt would, if successful, lead to recovery of the rent by the landlord. An action of covenant or of *assumpsit* on the promise of the tenant to pay the rent would, if successful, lead to an award of damages, which might be measured by the amount of the rent agreed on. Parliament later added to the remedies available to landlords seeking payment for the use of their land by tenants. By s. 3 of the Landlord and Tenant Act (Ireland) 1741, landlords were enabled to recover "reasonable satisfaction" for the use and occupation of land. Speaking of the comparable legislation applicable in England, the Distress for Rent Act 1737, Eyre LCJ explained in *Naish* v *Tatlock*[47] that "[u]nder the statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise".

The section recited its purpose was "to obviate some difficulties which many times occur in the recovery of rents where the demises are not by deed". Ames[48] identifies these difficulties as two: first, that a landlord bringing an action for *a quantum meruit* would be nonsuited if a demise were proven showing that rent in a fixed sum had been agreed; and, secondly, that if the landlord sued for a fixed sum, the landlord would have to show an express promise by the tenant to pay the sum.[49] The section addressed these problems by providing that in cases where the tenancy had not been created by deed, the landlord might recover a reasonable satisfaction for the tenant's use and enjoyment of the land, and that proof of a parol demise in which a certain rent was reserved should not nonsuit the landlord, but the amount of the rent could be used in the assessment of damages in the action. Ames concludes by saying of the 1737 Act that "the statute gave to the landlord . . . the right to sue in assumpsit as well as in debt, without proof of an independent express promise".[50]

The statutes of 1737 and 1741 provided that landlords could recover reasonable satisfaction for the use of their land "in an action on the case", hence Ames' reference to *assumpsit*. Following the statute, however, actions of *debt* to recover reasonable satisfaction for the use of land became common. Lord Denman CJ referred to such actions in *Gibson* v *Kirk*[51] as being of modern introduction, tracing the earliest to *Stroud* v *Rogers*[52] in 1792.[53] Pleading in such actions did not share the technicalities which existed in actions of debt for

45 Also *Anon* (1647) Sty 53; *Trever* v *Roberts* (1664) Hardres 366; *Lance and Blackmore* (1655) Sty 463; *How* v *Norton* (1666) 2 Keb 8; 1 Sid 279; 1 Lev 179; *Chapman* v *Southwicke* (1667) 1 Lev 205; sub nom. *Chapman* v *Southwick* 2 Keb 182; 1 Sid 323; *Freeman* v *Bowman* (1667) 2 Keb 291; *Stroud* v *Hopkins* (1674) 3 Keb 357; *Falhers and Corbret* (1733) 2 Barn KB 386; *Johnson* v *May* (1683) 3 Lev 146 & 150.

46 *Johnson* v *May* (1683) 3 Lev 150.

47 (1794) 2 H Bl 319 at 323.

48 Ames, *Lectures* (n. 32 above), p. 170.

49 See also *Churchward* v *Ford* (1857) 2 H & N 446 at 449 and *Beverley* v *The Lincoln Gas Light and Coke Co* (1837) 6 Ad & E 829 at 841n: "Before the statute, an action for use and occupation might be maintained, unless an actual demise were shewn: but proof of such a demise was held . . . to be fatal to the action, either on the ground of its shewing a real contract, or because, the demise having passed an interest, the defendant could not be said to occupy by the plaintiff's permission."

50 Ames, *Lectures* (n. 32 above), p. 170.

51 (1841) 1 QB 850 at 854.

52 Noted at 6 TR 63.

53 For further early instances, see *Wilkins* v *Wingate* (1794) 6 TR 62; *King* v *Fraser* (1805) 6 East 348.

rent.[54] The ability to bring actions of debt for reasonable satisfaction was questioned in *Gibson* v *Kirk*, the tenant seeking to nonsuit the landlord in such an action on the basis that there had been a demise at an agreed rent, and that the English provision equivalent to s. 3 of the 1741 Act only applied in actions of *assumpsit*. The court, however, upheld the verdict which the landlord had obtained in the action. The result was that:

> Upon the relation which subsists between the lessor and the lessee upon a parol demise, either of two actions is maintainable at Common Law – either an action of debt for rent, or, according to *Gibson* v *Kirk*, an action of debt for use and occupation . . . In either case the contract of demise governs the relation between the parties, and precisely the same sums of money and at precisely the same times will be recoverable, whether in the action of debt for the rent, or in an action for the same amount for use and occupation.[55]

Distraint for rent

Actions, in whatever form, would involve the cost and delay inherent in litigation. Independently altogether of litigation, landlords had an effective remedy to secure payment of rent in the process of distraint. The law allowed them to enter onto the lands the tenant held under the tenancy and to seize and detain personal property which they found there.[56] Such property did not have to belong to the tenant. The property seized was not intended to be a substitute for the rent the landlord was owed: rather, the seizure and detention were intended to bring about payment by the tenant of the rent. By a statute of Edward IV,[57] landlords were entitled to sell the goods seized (and recover the money they were owed from the proceeds) if the tenant did not pay the rent and recover the goods seized within a certain time.

Breach of covenant

Leaving rent aside, the other benefit the landlord obtains from granting a tenancy of his or her land is the performance of covenants entered into by the tenant. Failure by the tenant to perform such covenants would entitle the landlord to bring an action of covenant,[58] the essentials of which have been noted. For cases where the tenant's promise was not under seal, an action of *assumpsit* was available.

Rights of re-entry

The last thing to be mentioned concerning the remedies available to a landlord where the tenant failed to perform his or her obligations relates to termination of the tenancy. If the tenancy contained a right for the landlord to re-enter the land on the tenant's default, then the failure of the tenant to pay rent or to perform covenants he or she had entered into put the tenancy at risk of termination. At common law, however, rights of re-entry could not be exercised by anyone other than the original grantor and his or her heirs.[59] Accordingly,

---

54 See *King* v *Fraser* (1805) 6 East 348.

55 *Shine* v *Dillon* (1867) IR 1 CL 277 at 280 per Pigot CB.

56 For abolition of the remedy in Northern Ireland and England respectively, see Judgments (Enforcement) Act (NI) 1969, s. 122, and Tribunals, Courts and Enforcement Act 2007, s. 71.

57 Sale of Distress Act (Ireland) 1478.

58 The difference between covenants, breach of which would lead to an action, and conditions, breach of which would lead to entry, is brought out in *Michell* v *Donton* (1587) Owen 92; sub nom. *Michell* v *Dunton* Owen 54; sub nom. *Manchel* v *Dounton* 1 And 179; sub nom. *Machel and Dunton's Case* 2 Leon 33.

59 T Littleton, *Treatise on Tenures*, ss. 325, 326; *Coke on Littleton* 18th edn (1823), p. 201a n. 1; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

until the Statute of Reversions, discussed below, a grantee from the landlord of the reversion on the lease was unable to rely on any right of re-entry the lease contained.

The landlord's liability

So far we have been considering the aspirations of the landlord and the means by which he or she was able to ensure such aspirations were fulfilled. The lease might, however, contain obligations on the part of the landlord as well as obligations on the part of the tenant. What has been said about actions of covenant and *assumpsit* applies where the tenant was the injured party, and it was the landlord who was in default.

New landlords

The premise for the examination of the law presently being carried out is the arrival on the scene of a new party claiming the rights of the landlord under the lease. The easiest situations to envisage where such is the case are those of a purchaser acquiring the estate and interest of the original landlord, or where the latter dies and the claimant is the inheritor of the deceased's estate. Alternatively, the claimant may be someone who has acquired a lesser estate than his or her predecessor, as where the landlord has made a lease, rather than an outright transfer of the estate, to the claimant. The various possibilities are considered below. All mentioned so far, however, involve the acquisition of the landlord's reversion, or an estate in the reversion. There is, however, another possibility which needs to be considered, namely that our new party is someone who has acquired merely the right to receive the rent reserved by the lease.[60] In such a situation the original landlord remains the owner of the reversion, but the tenant will have to pay the rent to the person to whom the right has been granted. The rent has become severed from the reversion.

Severance of rent from reversion

Such a situation presented new difficulties: the lease continued in existence between the original landlord and the tenant, but there was now a third party interested in it. It was the relation between the third party and the tenant that was the problem. However, before looking at how the courts saw the rights of the parties, there was, of course, a preliminary issue to address, namely whether it was possible for the landlord to convey the rent separately from the reversion. The courts held that it was: as we have seen, rent was

60 For a modern instance, see *Inland Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35 (Lightman J); [2003] Ch 513 (CA). The judgment of Lightman J is of more interest for present purposes than those in the Court of Appeal, which deal only with the fiscal consequences of the transaction. The judgment of Lightman J contains also discussion of the effect of the assignment as transferring an interest in land or merely contractual rights.

regarded as an item of property, and not simply a chose in action incapable as such of transfer at common law.[61]

Where the rent reserved by a lease was assured without the conveyance also of the reversion, the rent was known as a rent seck. As the owner of such, the grantee had no right to distrain for the rent, until a right was conferred by s. 7 of the Distress for Rent Act (Ireland) 1712. In the absence of a power to distrain, the possible remedies for a grantee of the rent to recover payment were an action of debt or an action of covenant. Each presented difficulties.

A number of cases deal with the question of whether the owner of a rent seck could bring an action of debt for the rent. *Robins* v *Cox*[62] shows the concerns, Foster CJ and Mallett J thinking no action lay, since there was neither privity of contract nor privity of estate between the parties to the action, the reversion not having passed to the plaintiff. Twysden and Wyndham JJ, however, thought the action did lie, the latter of the view that privity of contract had passed to the plaintiff. The court being divided on the point, the case was adjourned and it seems later that the plaintiff obtained judgment by consent.[63] In *Allen* v *Bryan*,[64] *Robins* v *Cox* was seen as authority that an action would lie.[65] Attornment by the tenant to the grantee (which had taken place in *Robins* v *Cox*) was considered the determining factor in *Goodman* v *Packer*[66] and *Marle* v *Flake*,[67] as making a privity between tenant and grantee, sufficient to allow the latter to bring an action of debt.

There remains the question whether an action of covenant would lie for recovery of the rent by the grantee. No direct authority appears to exist. In the case of a rentcharge, however, the courts held that a transfer of the rent would not enable the grantee to bring an action of covenant on a covenant to pay the rent.[68] The situation appears to be similar to that where the rent reserved by a lease is severed from the reversion.

---

61 *Austin and Smith's Case* (1588) 1 Leon 316; *Ards* v *Watkin* (1598) Cro Eliz 637; sub nom. *Ardes* v *Watkins* Cro Eliz 651; Moore KB 549. For choses in action at common law, see Holdsworth (n. 4 above), vol. VII, p. 520; G. Tolhurst, *The Assignment of Contractual Rights* (Oxford: Hart Publishing, 2006), para 2.07; M Smith, *The Law of Assignment* (Oxford: OUP, 2007), para 2.14. Shortly after choses in action became assignable at law by s. 25(6) of the Judicature Act 1873 (in Ireland, Supreme Court of Judicature Act (Ireland) 1877, s. 28(6); now Judicature (NI) Act 1978, s. 87) it was held in *Knill* v *Prowse* (1884) 33 WR 163 that a letter given by a landlord to his creditor, directing a tenant to pay rent in future to the creditor, amounted to an absolute assignment of a chose in action for the purposes of the subsection, with the result that the creditor was entitled to sue the tenant for the rent when it became due. The decision was cited by Nicholls LJ in *Rhodes* v *Allied Dunbar Pension Services Ltd* [1989] 1 All ER 1161 at 1166 when stating that "in law there can be an assignment of the right to recover rent simpliciter". The assignment of the right to receive rent was recently held by Lightman J in Inland *Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35 at [16] to be an assignment of an interest in land (point not discussed on appeal at [2003] Ch 513).

62 (1661) 1 Lev 22; Raym T 11; sub nom. *Robins* v *Coxe* 1 Keb 153 & 250; sub nom. *Robinson* v *Coxe* 1 Keb 153; sub nom. *Robins* v *Warwick* 1 Keb 1 & 72; sub nom. *Coxe* v *Warwick* 1 Keb 42.

63 1 Keb 250.

64 (1826) 5 B & C 512.

65 See also *Brownlow* v *Hewley* (1697) 1 Raym Ld 82; 3 Raym Ld 88; *Clarke* v *Coughlan* (1841) 3 Ir LR 427; *Williams* v *Hayward* (1859) 1 El & El 1040; *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

66 (1670) Jones T 1; sub nom. *Goodwin* v *Parker* 1 Freem 1.

67 (1701) 3 Salk 118.

68 *Milnes* v *Branch* (1816) 5 M & S 411, disapproving a dictum of Holt CJ in *Brewster* v *Kidgill* (1698) 12 Mod 166 at 170. Other reports of the case (sub nom. *Brewster* v *Kitchell* 1 Salk 198; sub nom. *Brewster* v *Kidgell* 3 Salk 340; Holt KB 670; Carthew 438; sub nom. *Brewster* v *Kitchin* Comb 466; 1 Raym Ld 317; sub nom. *Brewster* v *Kitchel* Holt KB 175; 2 Salk 615; sub nom. *Brewster* v *Kidgil* 5 Mod 368) do not contain the dictum. See also *Executors of Kennedy* v *Stewart* (1836) 4 Law Rec (NS) 160 and *Butler* v *Archer* (1860) 12 ICLR 104; *Grant* v *Edmondson* [1931] Ch 1.

Successors to the reversion

Turning to the more common situation where the new claimant is someone who has acquired the reversion on the lease rather than just the rent reserved by it, the arrival of the new landlord brings about problems that hitherto have not existed. The most obvious perhaps relates to covenants in the lease. Not being party to the original agreement, if our new landlord is to enforce covenants made by the tenant he or she has to overcome the rule that only a party to the covenant can sue on it. The other side of the coin of course is that the burden of covenants undertaken by the landlord should not trouble our new landlord. The difficulty this time lies with the tenant, who will be unable to enforce the obligations the landlord undertook. Leaving covenants aside, however, other consequences of a transfer of the reversion on the lease exist for consideration. Initially, a distinction needs to be made between cases where the new landlord is a successor as a result of the death of the original landlord, and cases where there has been a transfer of the reversion *inter vivos*.

Post mortem successors

Until the Wills Act 1540 made it possible in England to devise land by will, the death of a landowner would result in land owned by him or her passing to his or her heir.[69] The same was the position in Ireland until corresponding legislation was enacted in 1634. Following the legislation, the land would pass to the devisee of the deceased owner or to his or her heir, according to whether the owner had made a will or not. For the purposes of this section, we need not distinguish between testate and intestate successors. The question we need to consider is how the law apportioned the rights of a deceased landlord on his or her death between his or her heir or devisee on the one hand and those interested in the landlord's personal estate on the other. The question would arise if rent payable during the lifetime of the landlord had not been received by the landlord, or a breach of covenant by the tenant had taken place before the landlord's death.

For rent which was payable, but which had not been paid, during the lifetime of the original landlord, the landlord's heir had no cause of action. By definition, the rent was not due to the heir. It might be expected that for such rent the landlord's executors or administrators would have a cause of action to recover the money due, as it would increase the personal estate of the deceased. Such, indeed, was the case where the lease was a lease for years. To that extent the executors and administrators of a landlord who had created a lease for years were in a better position at common law than those of a landlord who had created a tenancy for life. For the latter, no power existed at common law to recover rent due to the landlord before the landlord's death. Legislation was enacted to remedy this problem.[70] It did so by empowering executors and administrators to bring an action of debt and to distrain for rent due to the deceased. After some doubts,[71] this legislation was held not to apply to cases where the rent was payable under a tenancy for a term of years,[72] for the reason that the legislation was seen as intended to apply only in cases where no power existed at common law to recover rent payable during the lifetime of the deceased landlord. The result was that from being in a better position than executors and administrators of a deceased landlord who had created a tenancy for life, the executors and administrators of a

69 "Land" in this context does not include land held by the deceased under a lease, such being personal property and vesting on the deceased's death in his executors or administrators. See Pollock & Maitland (n. 13 above), vol. II, pp. 115, 331.

70 Cestui Que Vie Act 1540; Arrears of Rent Act (Ireland) 1634.

71 *Meriton* v *Gilbee* (1818) 8 Taunt 159.

72 *Prescott* v *Boucher* (1832) 3 B & Ad 849.

deceased landlord who had created a tenancy for a term of years were now in a worse position, in that while they could bring an action of debt for the rent, they did not have the right to distrain which the statute conferred. They could of course bring an action of covenant, assuming a covenant by the tenant to pay the rent existed, since failure to pay the rent would be a breach of covenant, and breaches were choses in action which formed part of the deceased's personal estate.[73] The same would be true for covenants made by the tenant other than for payment of rent, and broken during the deceased landlord's lifetime. Eventually, the right to distrain for rent due to a landlord in the landlord's lifetime was conferred on all executors and administrators by s. 61 of the Debtors (Ireland) Act 1840, which provided that the executors and administrators of any lessor or landlord might distrain for arrears due to the lessor or landlord in like manner as the lessor or landlord might have done in his or her lifetime.

As on the death of a landlord the land owned passed to his or her devisee or heir, so rent payable after the death of the landlord by a tenant of the land became the property of the devisee or heir.[74] Even if the landlord died the day before rent for a quarter or half year became due, the heir would be entitled to the full gale accruing the next day, for there was no apportionment of rent in respect of time at common law.[75] The position was changed by statutory provisions discussed below.[76]

The only danger for the landlord's heir in claiming rent was payable to him or her after the death of the landlord appears to be that the death of the landlord resulted in the cessation of the rent: in other words, that the original landlord had a life estate only in the rent. The manner in which the rent was reserved was crucial. If the rent had been reserved to the landlord, the danger was that this was construed to mean it was payable only for the lifetime of the landlord. That the law was uncertain is clear from *Sury* v *Brown*.[77] A reservation to the landlord and his wife and the survivor of them failed to make the rent payable beyond the life of the landlord in *Bland* v *Inman*.[78] The difficulties were not removed if the lease provided that rent was reserved to the landlord or his or her heirs,[79] or to the landlord, the landlord's executors and assigns,[80] or to the landlord and the landlord's assigns.[81] The answer to the problem which the courts arrived at was that the rent

73 *Raymond* v *Fitch* (1835) 2 CM & R 588.

74 *Norris* v *Elsworth* (1678) 1 Freem 463. See also *Sealy* v *Stawell* (1867) IR 2 Eq 326.

75 *William Clun's Case* (1613) 10 Co Rep 127a; *Capron* v *Capron* (1874) LR 17 Eq 288; *Glass* v *Patterson* [1902] 2 IR 660. See also the notes to *Ex parte Smyth* (1828) 1 Swanst 337. The position was explained by Patteson J in *Slack* v *Sharpe* (1838) 8 Ad & E 366 at 373 in a passage which shows also the difference in this context between rent and compensation for use and occupation: "Rent accrues when it becomes due, and at no other time. If there be no demise, and an action be brought merely for use and occupation, then the compensation due for such actual occupation accrues, like interest, de die in diem. But when there is an actual demise, and an express reservation, the rent accrues on the day named in the reservation, and on no other." See also *Grimman* v *Legge* (1828) 8 B & C 324, where, in an attempt to avoid the consequence that no rent was recoverable from a tenant because the tenancy determined before the rent fell due, the landlord brought an action for compensation for use and occupation for the period for which he had occupied the land. The action failed, Holroyd J saying (at 325) that "Where, by express contract, rent is reserved, payable quarterly, the landlord cannot recover a proportionable part of the rent for the occupation of his premises for any period less than a quarter", and Bayley J stating (at 327) that "the parties having entered into an express contract, by which the rent was to be paid quarterly, I think the law will not imply a contract to pay rent for any period less than a quarter".

76 Below, p. 287.

77 (1623) Latch 99.

78 (1632) Cro Car 288; Jones W 308.

79 *Mallory's Case* (1601) 5 Co Rep 111b; sub nom. *Pain* v *Malory* Cro Eliz 832.

80 *Richmond's Case* (1591) Owen 9; sub nom. *Richmond* v *Butcher* Cro Eliz 217; 1 And 261.

81 *Wooton* v *Edwin* (1607) 12 Co Rep 36; sub nom. *Wotton* v *Edwin* Latch 274.

should be reserved *during the term*,[82] and so long as this was the case, the addition of a reference to the landlord, executors and assigns would not matter so far as the rent passing to the heir was concerned.[83] It was clear from the reference to rent being payable during the term of the lease that the rent was intended to be payable throughout, and was not limited to the lifetime of the landlord. The best thing, however, was not to mention anyone at all, and to leave the law to make the distribution, so long as "during the term" appeared in the reddendum of the lease.[84]

Assuming, however, that the rent did not cease to be payable on the landlord's death, it passed to the landlord's heir who could enforce payment by distraining for it, or by bringing an action of debt. As Wilmot LCJ explained in *Bally* v *Wells*,[85] "it [rent] always went with the reversion to grantees or heirs at law, and the legal remedy goes along with it". Unlike cases where the landlord's successor took by grant from the landlord,[86] attornment by the tenant to the landlord's heir was not needed.[87] An action of covenant might be available also, if there was a covenant by the tenant to pay the rent. Equally, an action of covenant would lie for the heir for breach of any other covenant entered into by the tenant. For such an action to succeed, it was not necessary that the covenant had been made with the landlord "and his heirs". In *Lougher* v *Williams*,[88] an action of covenant by the heir of a landlord was successful, even though the word "heirs" did not appear, the covenant being made with the landlord, and the landlord's executors and administrators.

Inter vivos successors

Where the successor to the original landlord was not someone who had become entitled to the land following the death of the original landlord, but was someone who took the land by disposition *inter vivos*, the position was more difficult, and led to legislation which formed the basis of the modern law in relation to the rights and obligations of the tenant and the new landlord. The difficulty was not that the grantee was unable to recover rent under the lease: grantees of reversions had the ability to bring an action of debt for the rent based simply on their ownership of the reversion and the tenant's ownership of the land out of which the rent has been reserved.[89] Levinz reports the court in *Thursby* v *Plant*[90] resolving that:

82 *Sury* v *Brown* (1623) Latch 99.

83 *Sacheverell* v *Froggatt* (1671) 2 Wm Saund 361 & 367; sub nom. *Sacheverel* v *Frogate* Raym T 213; 1 Vent 161; sub nom. *Sacheverell* v *Frogat* 2 Keb 798.

84 *Whitlock's Case* (1609) 8 Co Rep 69b.

85 (1769) Wilm 341 at 348; 3 Wils KB 25. See also *Overton* v *Sydall* (1595) Popham 120; Cro Eliz 555; Gouldsb 120; *Glover* v *Cope* (1692) 4 Mod 80 at 81: "it was premised, that without the aid of the statute [the Grantees of Reversions Act 1540] a grantee of a reversion might bring an action of debt; for so was the law before the statute was made; and it was grounded upon this reason, that wherever a man was entitled to a reversion, so that he had the rent which was incident to it, and which was given by law, there the law likewise created the privity on purpose to maintain an action of debt for the rent"; 1 Show KB 284; 1 Salk 185; Carthew 205; Holt KB 159; 3 Lev 327.

86 Below, p. 276.

87 *Ards* v *Watkin* (1598) Cro Eliz 637; sub nom. *Ardes* v *Watkins* Cro Eliz 651; Moore KB 549; *Doe d Wright* v *Smith* (1838) 8 Ad & E 255; W Sheppard, *Touchstone of Common Assurances* (1651, hereafter *Shep Touch*), p. 257; A Fitzherbert, *New Natura Brevium* (1666), p. 291; below, p. 285.

88 (1673) 2 Lev 92.

89 *Bally* v *Wells* (1789) Wilm 341; 3 Wils KB 25; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Standen* v *Chrismas* (1847) 10 QB 135.

90 (1669) 1 Lev 259; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Ventr 10.

> debt is maintainable only upon the privity of estate, and goes with the reversion at common law, and that an assignee could maintain it before the statute[91] upon the privity of estate, and perception of the profits; but covenant did not go to the assignee before the statute, because it lies only on the privity of contract.

Equally, grantees had the ability to distrain for the rent without the need for legislation. It seems also from *Standen* v *Chrismas*[92] that a grantee of the reversion might bring an action for reasonable satisfaction for the tenant's use and occupation of the property, as an alternative to an action of debt for the rent, notwithstanding the fact that the permission to occupy, on which the action was based, came from the original landlord rather than the grantee.[93] Lord Denman CJ considered that such an objection could be met by considering the permission of the grantee as included in the permission given by the original landlord:

> The permission to occupy emanated from Richardson, the grantor of the lease, and was complete when the lease was executed, and never could emanate from the person who subsequently became assignee of the reversion; unless indeed Richardson having granted for himself and his assigns, the permission of any person who might become assignee of the reversion during the lease can be said to be virtually included, so that the occupation became in point of law the permission on the part of the assignee as soon as his interest took place. We think that this is the right view of the case, and that the occupation being in point of law by the permission of the plaintiff, the action is maintainable . . .[94]

The quotation above from *Thursby* v *Plant* makes clear that it was the inability of a grantee of the reversion to bring an action of covenant that was the problem. Nor, however, was it the only one: we have seen already that rights of re-entry in the lease were exercisable only by the landlord and the landlord's heirs. It was these difficulties that the Grantees of Reversions Act 1540 and its Irish counterpart, the Statute of Reversions, addressed.

The statute of reversions

The Grantees of Reversions Act 1540 was enacted by Henry VIII to allow purchasers of reversions of land confiscated from the monasteries and later sold by Henry to enforce the obligations of the lessees of the lands under existing leases. The preamble of the statute makes clear its purpose in this regard. The volume of land passing into the hands of purchasers made clarity essential.[95] A century later, the Irish Parliament enacted in the Statute of Reversions similar provisions to those in the Grantees of Reversions Act, including a preamble referring to the same mischief. By this time, however, the dissolution of the monasteries was long complete, and the purpose of the Irish measure seems to have

91 The Grantees of Reversions Act 1540 (below).

92 (1847) 10 QB 135.

93 The problem could be overcome in the case of periodic tenancies by considering forbearance of the grantee from serving a notice to quit as evidence that a new tenancy had been created, between the grantee and the tenant:: below, p. 275.

94 *Standen* v *Chrismas* (1847) 10 QB 135 at 142.

95 For acquisition and later disposal of land by the Crown on dissolution of the monasteries see A R Buck, "The politics of land law in Tudor England, 1529-1540" (1990) 11 *JLH* 200; H J Habakkuk, "The market for monastic property, 1539–1603" (1958) 10 *Econ Hist Rev* (NS) 362; D Knowles, *The Religious Orders in England*, vol. III, *The Tudor Age* (Cambridge: CUP, 1959), ch. 32; F A Gasquet, *Henry VIII and the English Monasteries*, vol. II (London: John Hodges, 1902), ch. 10 and app. III; see also A G Dickens, *The English Reformation* (New York: Schocken Books, 1964), ch. 7.

been harmonisation of the law in Ireland with that in England.[96] By then also, a considerable body of case law existed on the effect of the Grantees of Reversions Act.

The preamble

The preamble of the Statute of Reversions reads:

> WHERE before this time divers, as well temporall as ecclesiasticall and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry mannors, lordships, farmes, meases, lands, tenements, meadowes, pastures or other hereditaments, for terme of life or lives, or for terme of years by writing under their seale or seales containing certaine conditions, covenants and agreements to be performed as well on the part and behalfe of the said lessees and grantees, their executors and assigns, as on the behalfe of the said leassors and grantors, their heires and successors; and forasmuch as by the common law of this realm no stranger to any covenant, action or condition, shall take any advantage of the same by any means or wayes in the law, but onely such as be parties or privy thereunto, by reason whereof aswell all grantees of reversions, as also all grantees and patentees of the King our soveraign lord, and of his predecessors, of sundry mannors, lordships, granges, farmes, meases, landes, tenements, meadowes, pastures, or other hereditaments late belonging to monasteries and other religious and ecclesiasticall houses, dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come into the hands and possession of the King's Majesty, or of some of his predecessors, since the last day of Aprill, in the eight and twentieth yeare of the raign of King Henry the eight of famous memory, be excluded to have any entry or action against the said leassees and grantees, their executors or assignes, which the leassors before that time might by the law have had against the same leasees, for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants . . .

It is apparent from the preamble that one mischief addressed by the statute was the inability of grantees of reversions to take advantage of covenants in the lease. Whether grantees were in that position was a matter of discussion in a number of cases on the corresponding preamble in the Grantees of Reversions Act. Different views can be found in the decisions, and the cases lead to no definite conclusion.

First, there are cases indicating that no action was possible at common law for grantees of reversions.[97] These are in line with the statement of the law found in the preamble to each of the statutes. While Holdsworth suggests that the preambles of Tudor statutes may

96 A number of other measures were enacted by the Irish Parliament in 1634 which corresponded to measures already in existence in England. The Statute of Wills and the Statute of Uses are the best known. The Arrears of Rent Act empowering executors and administrators to recover rent due to a deceased landlord has already been mentioned.

97 *Thursby* v *Plant* (1669) 1 Lev 257; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Vent 10; *Thrale* v *Cornwall* (1747) 1 Wils KB 165; *Webb* v *Russell* (1789) 3 TR 393; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Bickford* v *Parson* (1848) 5 CB 920; *Martyn* v *Williams* (1857) 1 H & N 81; *Wyse* v *Myers* (1854) 4 ICLR 101. See also G D Muggeridge, "The liability of an original lessee" (1934) 50 *LQR* 66. Williams' note at 1 Wm Saund 241 to *Thursby* v *Plant* that covenants ran with the land but not with the reversion, comes in for criticism by two American writers: see P Bordwell, "The running of covenants – no anomaly" (1950) 36 *Iowa LR* 1 & 484, at 498–501 and H Sims, "The law of real covenants: exceptions to the restatement of the subject by the American Law Institute" (1944) 30 *Cornell LQ* 1, at 11.

be open to doubt,[98] the preamble of the respective English and Irish statutes was relied on in argument in a number of cases[99] to show that at common law grantees of reversions could not sue on covenants by the lessee. The clearest statement is in *Butler* v *Archer*[100] where Lefroy LCJ considered that the recital in both the English and Irish enactments

> must be deemed conclusive as to the state of the Common Law upon this subject, [and] shows clearly that, at the Common Law, the assignee of the reversion, not being a party or privy to the covenants in the lease, could not take advantage of them.

Another view to be found in some of the cases is that a distinction must be drawn between *real* covenants and *personal* covenants, and that an action by the grantee of a reversion was possible at common law on the former but not the latter. Coke is reported in *Attoe* v *Hemmings*[101] as saying that it was "very plain and clear that such a grantee [a lessee of the reversion] may have an action of covenant at the common law, the old difference was between a covenant personal and real". The difficulty, however, is to determine which covenants fall into the former category, so that a grantee of the reversion could sue on them, and which into the latter. Two covenants are mentioned in the reports of *Attoe* v *Hemmings*. In Owen's report,[102] it is said that if a lessee covenants to do anything on the land, for example to carry out repairs, an action would lie at common law for a grantee of the reversion.[103] According to Rolle's report,[104] Coke considered that a covenant to pay rent would also be enforceable at common law by a grantee of the reversion, on the basis that as the rent went with the reversion, so a covenant to pay it would go also.

A third view is to be found in more recent authorities,[105] namely that a grantee of the reversion could sue at common law on covenants implied by law but not on express covenants. The distinction goes back, however, to the time we are considering. In *Harper* v *Burgh*,[106] the grantee of a reversion brought an action of covenant for rent. According to Levinz, the court held in favour of the plaintiff "for they would intend the action to be grounded upon the reddendum, which is a covenant in law, which ran with the reversion at

98 Holdsworth (n. 4 above), vol. VII, p. 288. See also Bordwell, "The running of covenants", 495–7, and Sims, 'The law of real covenants' (n. 97 above), p. 10: "The Statute has never been carefully construed by the courts. But it has been made the basis of the assumption that voluntary assignees of reversions before the Statute did not have the right to enforce covenants in leases, although . . . there is nothing in the early law to justify such a position."

99 See *Webb* v *Russell* (1789) 3 TR 393; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Twynam* v *Pickard* (1818) 2 B & Ald 105.

100 (1860) 12 ICLR 104.

101 (1612) 2 Bulst 281 at 282; sub nom. *Athowe* v *Heming* 1 Rolle 80; sub nom. *Alfo* v *Henning* Owen 151.

102 Sub nom. *Alfo* v *Henning* Owen 151.

103 The same view can be found elsewhere: see *Barker* v *Damer* (1690) 3 Mod 336; Carthew 182; 1 Salk 80; sub nom. *Barker* v *Dormer* 1 Show KB 191; also *Brett* v *Cumberland* (1616–1618) 1 Rolle 359 at 360: "l'assignee averoit advantage de cest covenant al comen ley, car ceo est un covenant pur reparation d'el chose leased, car Coke dit que appiert per Co. 5. Spencer. que un covenant gist vers l'assignee del lessee al comen ley, & sic pur mesme reson l'assignee d'un reversion avera action al comen ley sur tiel covenant"; Cro Jac 521; sub nom. *Bret* v *Cumberland* Cro Jac 400; Popham 136; sub nom. *Brett* & *Cumberland* 2 Rolle 63; sub nom. *Sir John Bret and Cumberland's Case* Godb 276.

104 Sub nom. *Athowe* v *Heming* 1 Rolle 80 at 81.

105 *Wedd* v *Porter* [1916] 2 KB 91; *Re King (deceased)* [1963] 1 All ER 781.

106 (1678) 2 Lev 207; sub nom. *Harper* v *Bird* Jones T 102.

common law, before the Statute of H. 8, and passed with the reversion".[107] In *Vyvyan* v *Arthur*,[108] the devisee of a reversion was successful in an action of covenant against the lessee for failure to perform an obligation to grind corn at a mill owned originally by the lessor and now by the plaintiff. The obligation was considered analogous to rent reserved by the reddendum, and the benefit of the obligation to run to the plaintiff at common law. A more modern example is *Wedd* v *Porter*,[109] in which a grantee of a reversion was successful in an action against a tenant for breach of an obligation to look after land in a proper manner. The plaintiff could not rely on the statute since the tenancy under which the tenant held the land had not been created under seal.[110] However, the plaintiff succeeded on the ground that the obligation on which the action was based was one arising by implication of law, for which a grantee of the reversion could sue without the statute.

The provisions of the statute

To enable successors to the landlord to enforce the obligations of tenants, the Statute of Reversions provided that:

> as well all and every person and persons, and bodies politique, their heires, successors and assignes, which have and shall have any gift or grant of our said soveraign lord, or of any his predecessors, by letters pattents, of any lordships, mannors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong to or appertaine to any of the said monasteries, and other religious and ecclesiasticall houses dissolved, suppressed, relinquished, forfeited, or by any other meanes come to the King's hands since the said last day of Aprill, in the eight and twentieth yeare of the raign of King Henry the eighth, or which at any time heretofore did belong or appertaine to any other person or persons, and after came to the hands of our said soveraign lord, or any of his predecessors, as also all other persons being grantees or assignees, to, or by the King's Majesty, or to, or by any other person or persons, than the King's Highnesse and their heires, executors, successors and assignes, and every of them, shall and may have and enjoy like advantage against the lessees, their executors, administrators and assignes, by entry for non-payment of the rent, or for doing of waste or other forfeiture, and also shall and may have and enjoy all and every such like and the same advantage, benefit and remedies, by actions onely, for not performing other conditions, covenants or agreements contained and expressed in the indentures of their said leasses, demises or grants, against all and every the said leassees, and farmors, and grantees, their executors, administrators and assignes, as the said leassors or grantors themselves, or their heires or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form, as if the reversion of such lands, tenements, or hereditaments had remained and continued in the said grantors or lessors, their heires or successors.

As with the preamble, this provision was in substance the same as its English counterpart.

---

107 The report of the case by Jones indicates that there was an express covenant for payment of rent. The report does not, however, suggest the action would have failed without the express covenant, recording that covenant lay on the reddendum in a lease, and that a release by the lessor, after assignment of the reversion, was no bar to the action by the grantee "and this by the common law, and also by the stat. of 32 H. 8, for this covenant runs with the reversion".

108 (1823) 1 B & C 410.

109 [1916] 2 KB 91.

110 Below, p. 275.

As we have noted, the background to the Grantees of Reversions Act was the dissolution of the monasteries and the confiscation of the monastic lands by Henry VIII. Both the preamble and s. 1 of both English and Irish measures refer expressly to lands coming into the possession of the Crown as a result of such confiscation. Had the statutes been held applicable only in such cases, their benefit would have been enjoyed by purchasers of a large amount of land, but for land which had not been confiscated, the mischief recited in the preambles to the statutes would have remained. Unless the statutes were measures of general application, and so a fundamental part of the law of landlord and tenant, grantees of reversions of land which had not been confiscated would be unable to enforce the covenants of their lessees. Whether the provisions of the Grantees of Reversions Act were of general application was one of the matters argued in *Hill* v *Grange*.[111] The attitude of the courts in the case, and in other cases mentioned below, was of a willingness to give the Act a wide application, resulting in its becoming one of the cornerstones of the modern law.

The case involved two leases. The first had been made by one Pate to the defendant. Later, Pate granted the reversion to the plaintiff. The second had been made by the prior of a monastery. Again, the defendant was the lessee. After the lease was made, the prior surrendered the lease to Henry VIII. On Henry's death the reversion passed to his son, Edward VI, who granted it by letters patent to the plaintiff. In the case of each lease, the defendant failed to pay the rent, and the plaintiff re-entered. The defendant later ousted the plaintiff, and the plaintiff brought proceedings for trespass. The plaintiff succeeded in his claim based on the first lease, but failed (for reasons we need not pursue) in his claim based on the second lease. What is relevant for present purposes are the arguments concerning the applicability of the Act. Two difficulties had to be overcome if the plaintiff were to succeed. The first was that, in the case of the first lease, the reversion had not come to the plaintiff through the hands of the Crown as a result of confiscation of monastic land: rather this was the simple case of a grant of the reversion by the original landlord to the plaintiff. This difficulty did not arise with the second lease, but the problem was that the plaintiff was the grantee not of Henry, but of Edward.

With regard to the question whether the Act were one of general application, the defendant argued that the mischief addressed by the statute was traceable to the Dissolution of the Monasteries Act 1539, the statute by which the monastic lands had been vested in Henry. While no difficulty existed for Henry to enforce the obligations of the lessees of the land, the Act of 1539 conferred no power to enforce such obligations on grantees from Henry: hence the need for the Grantees of Reversions Act, and the remedy provided by it. The defendant argued that the legislation had no more general mischief in mind. The court, however, considered that Parliament had intended to deliver all grantees of reversions from the mischief recited in the preamble, and saw justification for its view that the Act was not limited to cases involving confiscation of monastic lands in the references in the statute to lands demised by temporal landlords as well as to cases involving religious houses.

On the point concerning the second lease, that the plaintiff was the grantee of Edward rather than Henry, the court was able to read the statute so as to include grantees of Edward within its terms. More important, however, is the view expressed that, even if this had not been the case, yet what the court called the equity of the statute required that the plaintiff should succeed. This view that the Act should be given a wide application can be seen also in other decisions.

It did not take much ingenuity to hold the Act applicable in cases where the estate passing to the grantee of the reversion was itself a leasehold estate, and the grantee was

111 (1555) 1 Plowd 164; 2 Dyer 130b.

seeking to enforce covenants in a sublease.[112] However, more of a challenge was presented by copyhold land. The trouble here was that succession took place not by the grant of the reversion by the landlord to the grantee, but by surrender of the land by the landlord to the copyhold lord and the latter's admittance of the successor in the landlord's place. Therefore, the issue was whether the successor was a grantee of the reversion for the purposes of the Act, when strictly he or she was not the grantee of the landlord at all. The court in *Glover* v *Cope*[113] held that the Act should apply to the successor in such cases.[114] According to the report by Carthew, it was

> adjudged by Holt CJ and the court that the grantee of the reversion of copyhold lands was within the intention and the equity of the statute, which is a remedial law, and of great and universal use, and absolutely necessary as well for copyholders as others.[115]

A more obvious example (not involving copyhold land) of the Act being held to apply to someone who was not a grantee from the landlord is *Sunderland Orphan Asylum* v *River Wear Commissioners*[116] in which the landlord's successor had taken the estate of the landlord by operation of statutory provisions rather than by act of the landlord.

Another situation in which the willingness of the courts to give the Act a wide application can be seen concerns leases of incorporeal hereditaments. Such leases presented a number of difficulties, one of which was whether the landlord had a reversion, so that a grantee from the landlord came within the provisions of the Act.[117] The matter was raised in *Martyn* v *Williams*,[118] the tenant arguing that on the termination of a lease of the right to extract clay, there was no reversion to the landlord in the same way as on the termination of an estate in possession of corporeal land. The court, however, saw the situations as sufficiently similar to conclude that the landlord had a reversion and the Act applied to enable his successor to enforce the covenants in the lease.[119]

---

112 *Matures* v *Westwood* (1598) Cro Eliz 600 & 617; Gouldsb 175; sub nom. *Mathuris* v *Westoray* Moore KB 527; *Davy* v *Matthew* (1598) Cro Eliz 649; Moore KB 525; *Bristow & Bristowe's Case* (1610) Godb 161.

113 (1692) 1 Show KB 284; 4 Mod 80; 1 Salk 185; Carthew 205; Holt KB 159; 3 Lev 327.

114 The statute did not apply where the lessor held under a lease and surrendered the lease to the plaintiff: *Miles* v *Phillips* (no date) Moore KB 876.

115 Earlier authorities had taken the view that the statute did not apply or had left the matter unresolved: see *Beal* v *Brasier* (1612) Cro Jac 305; sub nom. *Brasier* v *Beale* Yelv 222; sub nom. *Brasier* v *Beal* 1 Brownl 149; *Swinnerton* v *Miller* (1617) Hob 177; *Platt* v *Plommer* (1622) Cro Car 24.

116 [1912] 1 Ch 191.

117 Another difficulty with such leases was whether payments to be made by the lessee were rent, the problem being that rent was reserved out of land onto which the landlord could enter and distrain. Such was not possible in the case of leases of property such as tithes, fairs, or profits *à prendre*. If payments the tenant had undertaken in such leases were merely contractual payments, the obligation to pay them would not pass to assignees of the lease. In *Jewel's Case* (1588) 5 Co Rep 3a, payments made by a tenant under a lease of a fair were considered not to amount to rent, as the fair was "but a franchise or liberty, not manurable, out of which a rent cannot be reserved". Later cases, however, made the distinction between payments undertaken by the lessee in a lease of an incorporeal hereditament being unenforceable by the remedy of distraint, yet the case being sufficiently analogous to a lease of a corporeal hereditament to enable the lessor to recover against an assignee of the lease in an action on a covenant to pay the rent. See *Tippin v Grover* (1661) Raym T 18; sub nom. *Tipping* v *Grover* 1 Keb 62; *Dean & Chapter of Windsor* v *Gover* (1670) 2 Wm Saund 296 & 302; 2 Keb 688, 727, 737 & 795; 1 Lev 308; 1 Vent 98; *Bally* v *Wells* (1769) Wilm 389; 3 Wils KB 25; *Earl of Lucan* v *Gildea* (1831) 2 Hud & Br 635; *Earl of Egremont* v *Keene* (1837) 2 Jon 307; *Earl of Portmore* v *Bunn* (1823) 1 B & C 694.

118 (1857) 1 H & N 817. See also *Coxe* v *Warwick* (1661) 1 Keb 42: "As on lease of a fair reserving rent, debt lieth, and yet no reversion but only a contract."

119 See also *Hooper* v *Clarke* (1867) 2 Ch 674; *Lord Hastings* v *North Eastern Railway Co* [1898] 2 Ch 674 (HC); [1899] 1 Ch 656 (CA); [1900] AC 260 (HL).

Finally, this willingness to apply the Act can be seen also in cases in which the Act was held applicable though the successor to the landlord did not possess the same estate as the original landlord. So those who had taken from the landlord a lesser estate than that held by the landlord, such as lessees of the reversion, were held to be able to rely on the provisions of the Act.[120] Equally, those who took a life estate in the reversion could benefit from the legislation.[121] The most interesting application of the Act, however, is in the case of land held in settlement, the lease being made by the tenant for life. On the death of the landlord, the remainderman would of course be entitled to the land, but the question was whether he could rely on the provisions of the Act to enforce the covenants in the lease. The argument that he could not was that the remainderman was not the grantee of the tenant for life. In *Isherwood* v *Oldknow*,[122] however, the court was prepared to consider the lease as having been created by the settlor for the purpose of allowing the remainderman, as the grantee of the settlor, to enforce the covenants.[123]

The operation of the statute

The Grantees of Reversions Act and the Statute of Reversions enabled grantees of reversions to sue in actions of covenant and to re-enter for breach of covenant though they were not party to the covenant. The absence of privity of contract between the plaintiff and defendant was, in other words, cured by the provisions of the statutes. In *Ashurst* v *Mingay*,[124] the effect of the Grantees of Reversions Act on a grantee was said in argument to be "as much as if he had been party to the deed". In *Isherwood* v *Oldknow*,[125] Lord Ellenborough CJ said that "the statute makes them [grantees of the reversion] privies to the covenants made with the original grantors".[126] In *Webb* v *Russell*,[127] the position was described thus by counsel in a passage cited with approval in *Bickford* v *Parson*:[128]

> There are three relations at common law, which may exist between the lessor and the lessee, and their respective assignees. First, privity of contract, which is created by the contract itself, and subsists forever between the lessor and lessee. Secondly, privity of estate, which subsists between the lessee, or his assignees in possession of the estate, and the assignees of the reversion. And thirdly, privity of contract and estate, which both exist where the term and reversion remain in the original covenantors. The statute 32 H. 8, c. 34, seems to have created a fourth relation, a privity of contract in respect of the estate, as between the assignees of the reversion and the lessees or their assignees. The statute *annexes, or rather creates, a privity of contract between those who have privity of estate* . . .[129]

120 *Leonard's Case*, unreported, noted at 2 Bulst 282; Godb 162; 1 Rolle 81; *Attoe* v *Hemmings* (1612) 2 Bulst 281; sub nom. *Alfo* v *Henning* Owen 151; sub nom. *Athowe* v *Heming* 1 Rolle 80; *Birch* v *Wright* (1786) 1 TR 378; *Horn* v *Beard* [1912] 3 KB 181; *Cole* v *Kelly* [1920] 2 KB 106. Contrast *Smith* v *Day* (1837) 2 M & W 684.

121 *Dowse* v *Cale* (1690) 2 Vent 126; sub nom. *Douse* v *Earle* 3 Lev 264. *Mascal's Case* (1587) Moore KB 242 is also authority, the report saying the grantee had taken an estate *pur vie*, but the report by Leonard (1 Leon 62) is that the grantee took an estate *in fee*.

122 (1815) 3 M & S 382.

123 Authority for this view of the situation existed in a line of cases on the validity of leases made by tenants for life pursuant to powers in settlements, going back to *Whitlock's Case* (1609) 8 Co Rep 69b. See also *Berry* v *White* (1662) Bridg O 81; *Hotley* v *Scot* (no date) Lofft 317; *Greenaway* v *Hart* (1854) 14 CB 340; *Yellowly* v *Gower* (1855) 11 Ex 274; *Bath* v *Bowles* (1906) 93 LT 801.

124 (1680) 2 Show KB 133.

125 (1815) 3 M & S 382.

126 (Ibid., at 395.

127 (1789) 3 TR 393.

128 (1848) 5 CB 920 at 929.

129 (1789) 3 TR 393 at 394, emphasis added.

Thursby v *Plant*[130] shows the effect of the Grantees of Reversions Act in creating the relation last described. The question in the case was whether the plaintiff's action of covenant for non-payment of rent had been laid in the wrong county. The covenant on which the action was based was contained in a lease by the plaintiff's predecessor in title of land in Lincolnshire. However, the action was laid in London, where the lease had been made. A series of decisions[131] had established that had the plaintiff brought an action of debt for the rent owed to him, the action would have been local, that is to say, the plaintiff would have had to lay the action in the county where the land was situated, as the plaintiff was not party to the contract and the action was not therefore based on privity of contract.[132] In *Thursby* v *Plant*, the defendant argued that the same was the case in an action of covenant. In reaching its decision that the action had not been mislaid,[133] the court held, firstly, that the plaintiff's right to bring the action arose by reason of the Act and, secondly, that the statute put the plaintiff in exactly the same position so far as the covenant was concerned as the lessor had been. The statement in Saunders' report[134] that the Act transferred the privity of contract was repeated in later decisions.[135]

Elsewhere, it is said that the effect of the Act was to put grantees of the reversion in the same situation and give them the same remedy against lessees as the heirs at law of the lessor had before the statute.[136]

Future breaches

The English and Irish enactments enabled grantees of the reversion to sue on covenants in the lease. Where the tenant breached his or her obligation after the grant of the reversion, the grantee could now bring an action on the covenant. The position of the grantor after the grant remained to be considered. It appears from *Bickford* v *Parson*[137] that where the Grantees of Reversions Act did not apply, the grantor could bring an action on the promises made to him by the tenant, notwithstanding the grant of the reversion, on the basis that the privity of contract enjoyed by the grantor as covenantee remained.[138] If the

130 (1669) 1 Lev 259; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Vent 10.

131 *Buskin* v *Edmunds* (1595) Cro Eliz 636; *Trahearne* v *Cleabrooke* (1619) Jones W 43; sub nom. *Trea* v *Cleabrooke* 2 Rolle 382; sub nom. *Treherne* v *Cleybrooke* Hutton 68; *Smith* v *Wayt* (no date) Latch 197; *Bord* v *Culmore* (1625) Cro Car 183; see also *Keyly* v *Bulkley* (1667) 2 Keb 260; *Thrale* v *Cornwall* (1747) 1 Wils KB 165. The problem of actions having been mislaid was eventually solved by statute: see *Mayor etc of London* v *Cole* (1798) 7 TR 583. The relevant Irish legislation is the Arrest of Judgment Act (Ireland) 1665.

132 Had the action been by the lessor rather than his successor, no such difficulty would have arisen, the privity of contract enabling the lessor to bring an action where he chose: see *Wey* v *Rally* (1704) 6 Mod 194; sub nom. *Wey* v *Yalley* Holt KB 705; *Stevenson* v *Lambard* (1802) 2 East 575.

133 Saunders' report records that a writ of error was brought against the decision and the judges in the Exchequer Chamber were divided: no decision was necessary, however, as the parties settled the action. In *Creswick* v *Saunders* (1682) 2 Show KB 200, the court purports to follow *Thursby* v *Plant* but reaches a decision contrary to it.

134 1 Wm Saund 237 at 241.

135 See *Barker* v *Damer* (1690) Carthew 182; 1 Salk 80; sub nom. *Barker* v *Dormer* 1 Show KB 191. The report of the case at 3 Mod 336 has the court of the view that the statute *did not* transfer the privity of contract. For other statements that it did, see *Midgley* v *Lovelace* (1693) Carthew 289; Holt KB 74; sub nom. *Midgleys* v *Lovelace* 12 Mod 45; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Mayor etc of Swansea* v *Thomas* (1882) LR 10 QBD 48.

136 *Webb* v *Russell* (1789) 3 TR 393.

137 (1848) 5 CB 920.

138 Ibid. at 932 per Maule J: "As to the plaintiff being entitled to maintain this action, notwithstanding that he may have parted with his interest, by assigning the reversion, I do not think that there can be any doubt. The demise not being by deed, the right to sue is not transferred by the assignee of the reversion by force of the statute 32 H. 8, c. 34. If not transferred, how is it extinguished?"

effect of the Act was to *transfer* the privity of contract, it would seem to follow that the grantor would have no power to sue for breaches of covenant following the grant. In *Beely* v *Parry*,[139] however, the argument was made that the provisions of the Act operated to allow a grantee of the reversion to sue on covenants in the lease, but did not operate by passing the covenants themselves, with the result that the grantor remained able after the grant to sue for breach of covenant, albeit that it was accepted that the tenant could not be liable twice. The court was able to dispose of the case without determining whether the argument was valid. The argument was made again, this time on the effect of the Statute of Reversions, in *Conran* v *Pedder*,[140] but this case too was decided on a different point. The effect of the English provisions on the grantor's position was, however, determined in *Harper* v *Burgh*,[141] where the question was whether the tenant could defend an action of covenant for rent brought by the grantee of the reversion by relying on a release of the covenant by the grantor made after the reversion had been transferred. The court held that he could not, the covenant having run with the reversion.

Past breaches

For breaches that had taken place *before* the grant of the reversion, the question whether the effect of the Statute of Reversions was to pass the right to sue to the grantee of the reversion or left the grantor able to sue is one of some difficulty. While Luxmoore J in *Snowdon* v *Ecclesiastical Commissioners for England*[142] considered that it

> ha[d] been settled long ago that the grantee of a reversion ha[d] no action against the lessee, whether for arrears of rent due at the date of the grant or for breaches of covenant (although those covenants run with the land), committed before that date . . .

Diplock LJ in *Re King (deceased)*[143] described the law as to the rights of assignors and assignees with respect to breaches of covenant committed by tenants before the date of the assignment in respect of leases to which the Grantees of Reversions Act applied as "confused and uncertain". A review of the authorities makes it difficult to disagree with the latter view. *Lewes* v *Ridge*[144] is an early authority that the grantee of land benefited by a covenant could not sue for breaches of the covenant which took place before the grant. The case was followed in *Canham* v *Rust*[145] and in *Wedd* v *Porter*,[146] but the cases do not answer the question, since in none of them was the Act applicable. The Act was applicable in *Mascal's Case*,[147] in which a tenant sought to defend an action brought by the grantee of the reversion on a repairing covenant on the basis that the dilapidations had occurred prior to the grant. Again, however, the case does not answer the question, since the court found that the breach consisted in not effecting the repairs *after notice* to the tenant, and accordingly had taken place in the grantee's time, the grantee having given notice and repairs not having been effected thereafter.

---

139 (1684) 3 Lev 154.

140 (1852) 2 ICLR 200.

141 (1678) 2 Lev 206; sub nom. *Harper* v *Bird* Jones T 102.

142 [1935] Ch 181 at 186.

143 *Re King (deceased)* [1963] 1 All ER 781 at 797.

144 (1601) Cro Eliz 863.

145 (1818) 8 Taunt 227.

146 [1916] 2 KB 91. Note, however, the comment of Upjohn LJ in *Re King (deceased)* [1963] 1 All ER 781 at 794 that *Wedd* v *Porter* was "rather difficult on the question of the respective rights of assignor and assignee of a leasehold reversion".

147 (1587) 1 Leon 63; Moore KB 242.

In *Flight* v *Bentley*,[148] the question arose in a suit in Chancery whether following an assignment of a reversion in July the assignee was able to sue for rent which had fallen due at Midsummer previously. The report records that Shadwell V-C consulted some of the judges of the Courts of Law, whose opinion it was that the assignee was unable to sue for the antecedent rent, the reason being that it "had been severed from the reversion and was a mere chose in action". Upjohn LJ protested against this reasoning, in *Re King (deceased)*,[149] saying that rather than the right to sue being severed from the covenant, it remained part of it. *Flight* v *Bentley* was considered by Upjohn LJ to be not very satisfactory, but was seen as no longer representing the law, because of later statutory provisions.[150] The same view was taken in *London and County (A&D) Ltd* v *Wilfred Sportsman Ltd*.[151] Lord Denning MR, on the other hand, in *Re King (deceased)* thought the case still good law notwithstanding the later legislation. In his view, there was a distinction between breaches which caused damage exclusively to the person who owned the reversion at the time, and breaches which caused damage not only to that person but to a grantee of the reversion from him. For breaches falling into the first category, only the original reversioner could sue; for breaches falling into the latter category an action lay only for the grantee of the reversion. Failure to pay rent was an example of a breach falling into the first category, so explaining the decision in *Flight* v *Bentley*. Breaches of repairing covenants and covenants to reinstate were examples of breaches which caused damage to both reversioner at the time and any grantee, and accordingly fell into the latter category.

Finally, so far as an action for damages is concerned, in *Johnston* v *Churchwardens etc of the Parish of St Peter, Hereford*,[152] the court considered the appropriate means of dealing with breaches before the grant of the reversion to be that the grantor should sue.[153] If because of the breach he had received less in consideration from the grantee than he would otherwise have done, the grantor would be entitled to the monies recovered for himself. If he had received full value, the grantor would sue effectively as trustee for the grantee.

A breach of covenant might give rise not only to an action for damages, but, if the lease contained a right for the landlord to re-enter for breach of covenant, the breach could lead to forfeiture of the lease. However, just as a new landlord was unable to bring an action for damages for a breach of covenant which took place before the transfer of the reversion, so too was the new landlord unable to exercise a right of re-entry for such a breach.[154] The situation differed for the lessee, however, in that while the lessee remained liable to be sued for damages by the person who was landlord at the time of the breach,[155]

148 (1835) 7 Sim 149.

149 [1963] 1 All ER 781 at 792.

150 Conveyancing and Law of Property Act 1881, s. 10; Law of Property Act 1925, s. 141.

151 [1971] Ch 764.

152 (1836) 4 Ad & E 520.

153 In *Midgley* v *Lovelace* (1693) Carthew 289; Holt KB 74; sub nom. *Midgleys* v *Lovelace* 12 Mod 45, grantees of a reversion were able to sue in an action of covenant for rent notwithstanding that they had by the time the action was brought in turn transferred the reversion to someone else. *Anon* Skin 367 seems to be the same case.

154 See *Cohen* v *Tannar* [1900] 2 QB 609. Contrast *Rickett* v *Green* [1910] 1 KB 253, where a successor in title to a lessor was able to recover possession based on half a year's rent being due, although part of the rent was due before the transfer of the reversion. The inability of a new landlord to exercise a right of re-entry for a breach which took place before the transfer of the reversion was not remedied by s. 6 of the Real Property Act 1845: *Hunt* v *Bishop* (1853) 8 Ex 675; *Hunt* v *Remnant* (1854) 9 Ex 635.

155 See *Dale* v *Hatley Chase Corpn* [1920] 2 KB 282 at 297 per Scrutton LJ: "It appears to be clear law that where a reversioner has assigned his reversion he cannot claim any rent accruing due after completion of the assignment . . . but that in the absence of special agreement he can claim rent which accrued due before the assignment."

the transfer of the reversion meant that that person was no longer able to exercise any right of re-entry the lease contained.[156] Eventually, Parliament addressed the position of the new landlord, enacting provisions enabling the new landlord to exercise a right of re-entry where the breach had taken place before the transfer of the reversion, so long as the breach had not been waived.[157]

LIMITATIONS

While the courts were liberal in their application of the Grantees of Reversions Act, there were a number of limitations on the operation of the statute which meant that a grantee of the reversion did not simply step into the shoes of the original landlord.

Requirement that lease be by deed

To begin with, if the legislation was to apply, the tenancy must have been created by deed.[158] Both the Grantees of Reversions Act and the Statute of Reversions refer to indentures of lease. If the tenancy had been created orally, or by an instrument in writing but not under seal, a grantee of the reversion could not look to the legislation for assistance to enforce promises by the tenant to the original landlord, and without the legislation the grantee was unable to enforce such promises. The weakness of the grantee's position can be seen in *Standen* v *Chrismas*,[159] where the grantee of a reversion brought an action of *assumpsit* against a tenant for breach of a promise made by the tenant to keep the property in repair. The action failed. As Lord Denman CJ put it, "it was objected, that stat. 32 H. 8, c. 34, applies only to cases of demise by deed, and that the assignee of the reversion cannot sue in assumpsit on the contract made by the assignor. We are entirely of this opinion".[160]

Ways around the problem of enforcement of obligations made by tenants where the tenancy had not been created by deed might, however, be found. First, the doctrine of *Walsh* v *Lonsdale*[161] might assist a grantee of the reversion if no lease under seal existed, but there was an agreement which was enforceable in Equity. In *Manchester Brewery Co* v *Coombs*,[162] successors in title to a landlord sought to enforce a solus tie in a lease which had been executed by the tenant, but not by the landlord. The action was successful, one ground for the decision being that specific performance would have been available to the plaintiffs to require the defendant to take a lease.[163] Secondly, the court might be able to find a *new* tenancy had been created, between the grantee of the reversion and the tenant, so that there was privity of contract between the parties and the problem addressed by the statute did not exist. This was an alternative ground for the decision in *Manchester Brewery Co* v *Coombs*,

156 *Fenn d Matthews* v *Smart* (1810) 12 East 443; *Doe d Marriott* v *Edwards* (1834) 5 B & Ad 1065; M Pawlowski, *The Forfeiture of Leases* (London: Sweet & Maxwell, 1993), p. 61.

157 Conveyancing and Law of Property Act 1911, s. 2.

158 *Buckworth* v *Simpson* (1835) 5 Tyr 344; the report at 2 CM & R 834 does not mention the point; *Cardwell* v *Lewis* (1836) 2 M & W 111; *Standen* v *Chrismas* (1847) 10 QB 135; *Bickford* v *Parson* (1848) 5 CB 920; *Rickett* v *Green* [1910] 1 KB 253; *Wedd* v *Porter* [1916] 2 KB 91; *Cole* v *Kelly* [1920] 2 KB 106.

159 (1847) 10 QB 135.

160 Ibid. at 141.

161 (1882) LR 21 Ch D 9.

162 [1901] 2 Ch 608.

163 Per Farwell J at 618: "the plaintiffs, being clearly entitled in this Court against the defendant to specific performance of the agreement under which the defendant has been for years and still is in possession of the land, can sue him on the covenants in the same manner as they could have done if [the original landlord] had already executed the original agreement". See also *Rickett* v *Green* [1910] 1 KB 253; *Purchase* v *Lichfield Brewery Co* [1915] 1 KB 184; *Blane* v *Francis* [1917] 1 KB 252.

and can be seen in a series of cases beginning with *Buckworth* v *Simpson*.[164] In it, an action of *assumpsit* was brought following the creation of a yearly tenancy by the plaintiff's guardians, the plaintiff being at that time a minor. The defendants were the executors of the tenant. The action was not based on the tenancy created by the guardians, but on a new tenancy, alleged to have arisen following the death of the tenant, between the plaintiff (now of age) and the executors. The court held that a new contract between the plaintiff and the executors could be implied, as there had been continuance of occupation and forbearance on the part of the plaintiff to serve a notice to quit. In *Cornish* v *Stubbs*,[165] *Buckworth* v *Simpson* was taken by Willes J as authority for the proposition that:

> stipulations pass to successors in the case of yearly tenancies also, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection – that a jury, in fact, may infer from such payment, and from the fact of notice to quit not being given, a consent to go on, on the same terms as before and a conventional law is thus made equivalent to that of Henry VIII in the case of leases under seal.[166]

In consequence, in *Cornish* v *Stubbs*, a successor in title to the landlord was held bound to give effect to a term that the tenant should have a reasonable time to clear his goods from the property after notice was given.[167]

Collateral covenants

A further limitation on the application of the Act was that it did not enable all the covenants in a lease to be enforced by a grantee of the reversion. Even if the lease had been made by deed, the Act did not put the grantee of the reversion in the same position as the original landlord so far as enforcing covenants by the tenant was concerned. The courts held that the Act enabled the grantee to sue only on covenants which touched and concerned the land.[168] For covenants which did not, the grantee had no cause of action.

Attornment

Finally, the Act did not enable a grantee of the reversion to enforce covenants if the tenant had not attorned to the grantee. In *Mallory's Case*,[169] the court held that the absence of attornment would prevent a new landlord from relying on a condition for re-entry in a lease.[170] In this regard the Act had made no difference: in speaking of a grantee of the

164 (1835) 2 CM & R 834; 5 Tyr 344.

165 (1870) LR 5 CP 334.

166 Ibid. at 339.

167 For the argument based on *Buckworth* v *Simpson* to be effective, it was essential that there be some acknowledgment or act between the landlord's successor and the tenant, from which such an agreement to go on on the same basis as between the original landlord and tenant should be capable of being inferred. If there were none, as where the landlord's successor did not acknowledge the tenant, the argument would not work: *Elliott* v *Johnson* (1866) LR 2 QB 120; *Smith* v *Eggington* (1874) LR 9 CP 145. Equally, if it was not possible for the landlord to terminate the original tenancy, no new tenancy could arise in its place, suggesting the argument would be unlikely to succeed in cases where the tenancy was for a fixed term: see *Brydges* v *Lewis* (1842) 3 QB 603; *The Marquis Camden* v *Batterbury* (1860) 7 CB (NS) 864; cf. *Standen* v *Chrismas* (1847) 10 QB 135.

168 *Spencer's Case* (1583) 5 Co Rep 16a; *Anon* (1584) Moore KB 159; *Vernon* v *Smith* (1821) 5 B & Ald 1; *Sampson* v *Easterby* (1829) 9 B & C 505; *Sparrow* v *Cooper* (1833) Hay & Jon 404; *Woodall* v *Clifton* [1905] 2 Ch 257. See also *Isteed* v *Stoneley* (1580) 1 And 82.

169 (1601) 5 Co Rep 111b; sub nom. *Pain* v *Malory* Cro Eliz 832.

170 See also *Anon* (no date) 4 Leon 34.

reversion the Act meant a complete grantee, or a grantee who had all the ceremonies and incidents required by the law. Eventually, the need for attornment was abolished.[171]

Liability of the new landlord

Hitherto we have been considering the ability of the new landlord to step into the shoes of the original landlord so far as the benefit of the lease is concerned. We need also to consider the other side of the coin, namely whether the burdens undertaken by the original landlord pass to the grantee of the reversion.

We have seen that the prevalent view was that, prior to the Grantees of Reversions Act or the Statute of Reversions, a grantee of the reversion was unable to sue on the covenants of the tenant contained in the lease. The same view was taken of the ability of the tenant to enforce against a grantee of the reversion covenants made by the original landlord.[172] Section 2 of the Statute of Reversions made provision for grantees of the reversion to be bound by such covenants. It provided that:

> all farmors, leassees and grantees of lordships, mannors, lands, tenements, rents, parsonages, tiths, portions, or any other hereditaments, for tearm of years, life or lives, their executors, administrators and assignes, shall and may have like action, advantage and remedy against all and every person and persons, and bodies politique, their heires, successors and assignes, which have or shall have any gift or grant of the King's Majesty, or of any other person or persons, of the reversion of the same mannors, lands, tenements, and other hereditaments, so letten, or any parcell thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease or leases, as the same leasses, or any of them, might and should have had against the said leassors and grantors, their heires or successors (all benefit and advantages of recoveries in value, by reason of any warranty in deed or law, by voucher or otherwise, onely excepted).

Not surprisingly, in considering the comparable provisions of the Grantees of Reversions Act, the courts applied similar rules to the original landlord who had granted the reversion as they applied to the original tenant after the assignment of the term. Thus, while the Act rendered the grantee of the reversion liable, such liability extended only to those covenants which touched and concerned the land.[173]

Severance of the reversion

Matters were more complicated if the situation was that the grantor did not transfer all the land which had been demised to the lessee, but merely part of it: where in other words the grantee acquired the reversion in part only of the land demised. The case might arise where the landlord themself remained owner of the remainder of the land not transferred to the grantee, or alternatively, where the landlord divested themself of all the land demised by the lease by conveying part of it to one grantee and part to another. Either way, the question is: what was the effect of a transfer of part of the land which was subject to the lease? The situation is usually referred to as severance of the reversion.[174] The view that the result of a transfer by the landlord of part of the land demised would be that there

171 Below, p. 285.

172 *Eccles* v *Mills* [1898] AC 360; *Muller* v *Trafford* [1901] 2 Ch 54; *Re Hunter's Lease* [1942] Ch 124.

173 *Woodall* v *Clifton* [1905] 2 Ch 257; *Re Hunter's Lease* [1942] Ch 124.

174 The term is ambiguous, however, as it is used also to describe the situation, already considered, where the landlord transfers to the grantee a different estate in all the land demised by the lease, for example, where he is an owner in fee simple subject to the lease, and then makes a lease of the reversion.

would exist two tenancies,[175] instead of the original one, was rejected by the Court of Appeal in *Jelly* v *Buckman*.[176] That being so, what was the position of the grantee of part of the land demised by the lease?

With regard to the effect of the transfer on the rent payable under the lease, an argument was advanced in *Collins* v *Harding*[177] that the result was that the rent ceased to be payable. This was rejected, Coke referring to the "great inconvenience" that would ensue were such the case, and describing an opinion to the contrary as *nihil valet*.[178] Rather, in such circumstances, the rent was apportionable, according to the respective values of the parts created by the transfer, and an action of debt would lie for each of the apportioned parts for the party entitled to it.[179] Other remedies as a result of non-payment of the rent, notably an action of covenant and termination of the lease pursuant to a condition allowing the lessor to re-enter, raise other issues.

To begin with, there was a question whether a grantee of part of the land demised by the lease was someone to whom the Grantees of Reversions Act applied, so as to be able to rely on the covenants in the lease. The question received an affirmative answer in *Twynam* v *Pickard*,[180] both in principle and by analogy with cases in which the courts had allowed a landlord to sue an assignee of part of the land demised by the lease for breach of covenant,[181] and vice versa.[182] Accordingly, in *Twynam* v *Pickard*, a grantee of part of the land demised by the lease was able to recover in an action of covenant against the lessee for failure to repair that part of the demised land which the plaintiff had acquired. The decision was relied on in *Mayor etc of Swansea* v *Thomas*,[183] in which a lessor successfully brought an action on a covenant by the lessee to pay rent, after the grant by the lessor of part of the land demised by the lease.

Twynam v *Pickard* shows also, however, that the situation was different when we come to consider the effect of a transfer of part of the land demised by the lease on the ability to rely on a condition for re-entry; and that while the Grantees of Reversions Act enabled a grantee of the reversion in part of the land to sue in an action of covenant, "that part [of the statute] . . . which applied to conditions which in their very nature are entire, is necessarily confined to the assignees of the reversion of the whole of the premises."[184] Until the statutory provisions mentioned below were enacted, the position was that such a transfer would have the effect of extinguishing the condition. In *Winter's Case*,[185] three manors had been demised at various rents, with a condition for re-entry in the event of

175 Or presumably as many as the number of separate parcels of land as had been created by the transfer.

176 [1973] 3 All ER 853. The point at issue was whether the plaintiff had lost the protection of the Rent Acts as a result of the transfer of part of the land demised to him. For similar difficulties in connection with other statutory provisions protecting tenants, see *William Skelton & Sons Ltd* v *Harrison & Pinder Ltd* [1975] 1 All ER 182; *Nevill Long & Co (Boards) Ltd* v *Firmenich & Co* (1984) 47 P & CR 59; *Persey* v *Bazley* (1983) 47 P & CR 519.

177 (1597) Moore KB 544; Cro Eliz 606 & 622; sub nom. *Collins and Harding's Case* 13 Co Rep 57.

178 13 Co Rep 57.

179 *West* v *Lassells* (1601) Cro Eliz 851; *Bac Abr* (n. 26 above), vol. VII, p. 61. On apportionment following a transfer of part of the land demised, see also *Bliss* v *Collins* (1822) 5 B & Ald 876; *Mayor etc of Swansea* v *Thomas* (1882) LR 10 QBD 48; *Mitchell* v *Mosley* [1914] 1 Ch 438; *Barnsmere Pty Ltd* v *Corpn of the Society of the Missionaries of the Sacred Heart* (unreported 17 July 1990, Tadgell J, Victoria SC).

180 (1818) 2 B & Ald 105.

181 *Congham* v *King* (1631) Cro Car 222.

182 *Palmer* v *Edwards* (1783) 1 Doug 187.

183 (1882) LR 10 QBD 48.

184 (1818) 2 B & Ald 105 at 109 per Bayley J. See also *Pain* v *Malory* (1601) Cro Eliz 832; sub nom. *Mallory's Case* 5 Co Rep 111b.

185 (1572) 3 Dyer 308b; sub nom. *Lee and Arnold's Case* 4 Leon 27.

non-payment. The lessor subsequently sold the reversion in one of the manors, and later sold the reversion in the other two, to someone who re-entered following non-payment of rent. The entry was held unlawful as, following the severance of the reversion, the condition was no longer extant. There were, however, exceptional cases, in which the transfer of part of the reversion would not extinguish the condition, as where the Crown was the transferor.[186] In *Dumpor's Case*,[187] the distinction was drawn between, on the one hand, cases where the reversion was severed by act of the parties (in which cases the condition would be extinguished) and, on the other, cases where severance was effected either by act in law or by act and wrong of the lessee (in which cases the condition would survive). *Moodie* v *Garnon*[188] and *Piggott* v *Middlesex CC*[189] are examples of survival of a condition following severance by act in law: the former involving succession of different parties to separate parcels of the land;[190] the latter involving a transfer as the result of compulsory purchase by a local authority. For Eve J in the latter case, the question of what was meant by an act in law was whether the transfer of part was voluntary or involuntary. While the transfer to the authority had been effected by a conveyance by the plaintiff, this was seen by Eve J as merely a ministerial act rather than a voluntary act, with the result that the condition survived and could be relied on notwithstanding the transfer.

Parliament addressed some of the issues raised above at the end of the period under consideration here. Section 3 of the Law of Property Amendment Act 1859 provides as follows:

> Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

It will be apparent that, while the section enables the grantee from the landlord of part of the land demised by a lease to rely on a condition in the lease, it does so only where there has been a legal apportionment of the rent. This was said by Romer LJ in *Smith* v *Kinsey*[191] to mean where the tenant had recognised the severance or the division of his tenancy.[192] The requirement of a legal apportionment, in order that conditions would be enforceable after severance of the reversion, was later abandoned for leases made after 1881.[193]

Whom to sue

We have reached the position that at common law the grantee of a reversion could, in common with the heir of a deceased landlord, bring an action of debt for rent due to the

186 *Knight's Case* (1588) 5 Co Rep 54b; Moore KB 199; 1 And 173.

187 (1603) 4 Co Rep 119b.

188 (1615) 1 Rolle 330; sub nom. *Moodie* v *Garnance* 3 Bulst 153.

189 [1909] 1 Ch 134.

190 See also *Ewer* v *Moyle* (1599) Cro Eliz 771.

191 [1936] 3 All ER 73 at 76.

192 In the absence of the tenant's acceptance of the apportionment, the apportionment would be made by a jury. A purchaser of a severed part of the reversion was not safe in accepting an apportionment made by the landlord, as the purchaser ran the risk that the tenant could later seek an apportionment by a jury. See *Bliss* v *Collins* (1819) 4 Madd 229; (1820) 1 Jac & W 426; (1822) 5 B & Ald 876.

193 Conveyancing and Law of Property Act 1881, s. 12.

grantee, or could distrain for it. Equally, if there was a covenant for payment of the rent, both the heir, at common law, and the grantee, by virtue of the Statute of Reversions, could bring an action of covenant or exercise a right of re-entry. The question now to be considered is against whom such action could be brought. The question arises, of course, only if there has been an assignment of the term by the lessee. In such a case, the plaintiff might have a choice of defendant:[194] the original lessee or the assignee in whom the term had become vested.

The original lessee

To understand the liability of an original lessee to a grantee of the reversion, after the lessee had assigned the term, we need first to understand the situation where there had been no transfer of the reversion, and the plaintiff was the original lessor.

So far as an action of debt was concerned, the law allowed the lessor to recover against the original lessee, notwithstanding an assignment of the lease by the latter, so long as the lessor had not adopted the assignee of the term as his or her tenant.[195] Unless and until that occurred, the lessor could bring an action of debt against the original lessee. The basis of the action was the privity of contract between the parties. So long as that continued, an action would lie by the lessor against the lessee.[196] It was considered unjust to the lessor that the lessee should rid themself of liability to the lessor by his or her own act of assigning the lease.[197] The same concern did not exist if the act relied on as bringing the lessee's liability to an end was an act of the lessor. Thus, if after the assignment the lessor accepted the assignee as his or her tenant, there could be no injustice to the lessor in saying the lessee's liability was at an end. If, for example, after assignment of the term the lessor accepted payment of rent from the assignee, the lessee's liability would come to an end, and any later failure by the assignee to pay the rent would give rise to an action of debt only against the assignee, not the lessee.[198] The position was conveniently summarised by Pigot CB in *Shine* v *Dillon*:[199]

> The incidents of a parol demise, so far as relates to the action of debt for rent, are precisely the same as those of a demise by deed. One of those incidents is, that an action of debt for the rent lies at the suit of the lessor against the lessee, although the lessee has assigned over all his interest in the leasehold, provided the lessor has not accepted the assignee as his tenant. Such action is so maintained against the lessee, not upon the privity of estate, but upon the privity of contract involved in the original demise of the lessor to the lessee, the lessee, by the contract of demise, contracting to render a specified rent for the lands. That

194 *Devereux* v *Barlow* (1669) 2 Wm Saund 181.

195 *Walker's Case* (1587) 3 Co Rep 22a; sub nom. *Walker* v *Harris* Moore KB 351. See also *Rushden's Case* (1532) 1 Dyer 4b. *Walker's Case* is reported to have been denied to be good law in *Marrow* v *Turpin* (1599) Cro Eliz 715; Moore KB 600; 2 And 133, though the editor's note to Croke's report suggests the report may be open to doubt.

196 See *Overton* v *Sydal* (1595) Cro Eliz 555 at 556 per Gawdy J: "the first lessee was chargeable, as well by reason of the possession as also for the privity of contract; and therefore, although he assigns over his term, yet, by reason of the privity of contract, he shall always be chargeable to the lessor for the rent, as well for that due afterwards as before"; sub nom. *Overton* v *Sydall* Popham 120; Gouldsb 120.

197 *Walker's Case* (n. 195 above)*; Humble* v *Glover* (1594) Cro Eliz 328; Gouldsb 182; sub nom. *Humble* v *Oliver* Popham 55; *Anon* 1 Brownl 56 appears to be the same case. Cf. *Wadham* v *Marlowe* (1784) 8 East 315 per Lord Mansfield CJ: "A lessee cannot by his own act, without the assent of the lessor, destroy the tenancy; and therefore, until such assent is given, the lessor may avow upon the lessee as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land."

198 See *March* v *Brace* (1613) 2 Bulst 151; *Ashurst* v *Mingay* (1680) 2 Show KB 132; Jones T 144.

199 (1867) IR 1 CL 277.

> privity of contract continues in law, notwithstanding the assignment of the lessee, until his assignee has been accepted as tenant by the lessor. When such acceptance takes place the privity of contract between the lessor and lessee is destroyed, so far as relates to an action of debt, but that action may be maintained by the lessor against the assignee upon the privity of estate created between them by the assignment.

Shine v *Dillon* shows also that the same principles applied where the action was one of debt for reasonable satisfaction for use and occupation rather than for rent.

Where the plaintiff was not the lessor, but a grantee of the reversion, the privity of contract which enabled the lessor to bring an action of debt against the original lessee after the lessee had assigned the lease was absent. Accordingly, the courts held that an action of debt would not lie for a grantee of the reversion against the lessee after the lessee had assigned the lease, though it would of course lie against the assignee.[200]

As in the case of an action of debt, an original lessee who assigned the lease remained liable to the lessor in an action of covenant.[201] The lessor's position in this form of action was stronger, however, than in an action of debt, since in an action of covenant the acceptance of rent from the assignee did not bring the liability of the original lessee to an end.[202] A grantee of the reversion would likewise be able to bring an action of covenant against the lessee after the assignment,[203] since the effect of the Statute of Reversions was to put the grantee in the same position as the lessor in this respect. Nor would it matter that the assignment of the term preceded the grant of the reversion.[204] If, however, the tenancy had not been created by deed, the grantee would not be able to rely on the statute, and without it would fail.[205]

If the covenant on which the grantee wished to bring an action was not an express covenant, but merely a covenant implied by law, the liability of the lessee for breaches taking place after he or she has assigned the lease appears to have been different. In *Brett* v *Cumberland*,[206] an action by the grantee of the reversion was brought against the executor of the lessee on a repairing covenant in the lease. The defendant pleaded an assignment of the lease by the lessee, and relied on the acceptance of rent following the assignment as precluding an action against him. The defence failed,[207] the court holding that the covenant was a covenant *en fait*, or an express covenant. The court went on, however, to say

---

200 *Anon* 1 Brownl 56. The date in the report appears to be wrong, as the case seems to be *Humble* v *Glover* (1594) Cro Eliz 328; Gouldsb 182; sub nom. *Humble* v *Oliver* Popham 55.

201 Similarly, a landlord might bring *assumpsit* against the tenant on a promise to pay rent in a yearly tenancy: *Boot* v *Wilson* (1807) 8 East 111.

202 *Anon* (no date) Brook NC 18; *Fisher* v *Ameers* (1611) 1 Brownl 20; *Barnard* v *Goodscall* (1612) Cro Jac 309; *Bacheloure* v *Gage* (1630) Jones W 233; sub nom. *Bachelour* v *Gage* Cro Car 188; *Norton* v *Acklane* (1640) Cro Car 579; *Arthur* v *Vanderplank* (1734) Kel W 167; *Ludford* v *Barber* (1786) 1 TR 90; *Auriol* v *Mills* (1790) 4 TR 94.

203 *Matures* v *Westwood* (1598) Cro Eliz 600 & 617; Gouldsb 175; sub nom. *Mathuris* v *Westoray* Moore KB 527; *Brett* v *Cumberland* (1616–1618) Cro Jac 521; sub nom. *Brett & Cumberland* 2 Rolle 63; sub nom. *Sir John Bret and Cumberland's Case* Godb 276; sub nom. *Bret v Cumberland* Popham 136; Cro Jac 400; *Ashurst* v *Mingay* (1680) 2 Show KB 133; Jones T 144; *Edwards* v *Morgan* (1684) 3 Lev 229 & 233; *Parker* v *Webb* (no date) Holt KB 75; 3 Salk 5; *Jodderell* v *Cowell* (1736) Cas t Hard 343.

204 *Arlesford Trading Co Ltd* v *Servansingh* [1971] 3 All ER 113.

205 *Alcock* v *Moorhouse* (1882) LR 9 QBD 366.

206 (1616–1618) Cro Jac 521; 1 Rolle 359; sub nom. *Brett & Cumberland* 2 Rolle 63; sub nom. *Bret and Cumberland's Case* Godb 276; sub nom. *Bret v Cumberland* Popham 136; Cro Jac 400.

207 Judgment for the plaintiff is recorded in the reports by Croke and Rolle. Popham's report indicates the case was adjourned. Godbolt's report says judgment was given for the plaintiff, but later says the case was adjourned.

> otherwise it is of a covenant in land [*sic*], which is only created by the law; or of a rent, which is created by reason of the contract, and is by reason of the profits of the land, wherein none is longer chargeable with them, than the privity of the estate continue with them.

This difference between express covenants and implied covenants can also be seen elsewhere.[208] The reference to rent suggests that a covenant to pay rent may be different to other covenants. Such a view derives some support from *Whitway* v *Pinsent*[209] in which it is said that:

> if a lessee for years assigns over his term the lessor having notice thereof, and he accept the rent from the assignee, he cannot demand the rent of the lessee afterwards, yet he may sue other covenants contained in the lease against him, as for reparations or the like.

The real difference, however, appears to be between an express covenant to pay rent and a covenant implied from the words "Yielding and Paying" in the lease. In the former case, the lessee would remain liable after assignment; in the latter, the lessee would not.[210]

Executors and administrators

In considering the ability of a grantee of the reversion to recover from the executors or administrators of a deceased lessee, we need again to begin with the simpler case where the reversion remains in the original lessor. Again, we need also to distinguish between the forms of action.

In *Walker's Case*,[211] the court was of the view that, while an action of debt would lie in favour of the lessor against the lessee for rent accruing after an assignment by the lessee, the situation was different where the lessee died and it was his executors or administrators who were the defendants: the death was seen as determining the privity of contract which was sufficient to support the action against the lessee.[212] The same conclusion, that debt would not lie against executors or administrators after assignment of the lease, was reached in *Marrow* v *Turpin*,[213] and appears to be supported by *Overton* v *Sydall*.[214] There are certainly statements in the latter to this effect.[215] It was later pointed out, however, that the cases are

208 *Bacheloure* v *Gage* (1630) Jones W 223: "il est difference enter covenant en fait, & covenant en ley, car si fuit covenant en ley en apres assignment, & acceptance null action [gist?] vers le premier lessee, mes si covenant en fait autrement est, car la sur le dit covenant en fait, action tout fois gist vers le premier lessee"; sub nom. *Bachelour* v *Gage* Cro Car 188; see also the references to the covenant being express in *Edwards* v *Morgan* (1684) 3 Lev 229 & 233; *Parker* v *Webb* (no date) Holt KB 75; 3 Salk 5; *Arthur* v *Vanderplank* (1734) Kel W 168; *Joddrell* v *Cowell* (1736) Cas t Hard 343; *Ludford* v *Barber* (1786) 1 TR 90; *Auriol* v *Mills* (1790) 4 TR 94.

209 (1651) Sty 300.

210 *Anon* (1670) 1 Sid 447. Note, however, the description of the report as "a very short and incorrect note" in *Wadham* v *Marlowe* (1784) 8 East 315.

211 (1587) 3 Co Rep 22a.

212 See also *Bayliffs of Ipswich* v *Martin* (1616) 3 Bulst 211; sub nom. *Bailiffs and Commonalty of Ipswich* v *Martin* Cro Jac 411; sub nom. *Bailiffe de Ipswich* v *Martin* 1 Rolle 404.

213 (1599) Cro Eliz 715; Moore KB 600; 2 And 132.

214 (1595) Cro Eliz 555; Popham 120; Gouldsb 120.

215 (1595) Cro Eliz 555 at 556, per Gawdy J (Fenner J agreeing, Popham J dissenting): "the executor here is not chargeable by the contract, but by the privity in law, viz. that he hath the term; which being removed, the action against him faileth". Again, per Fenner J, "this charge is by reason he hath the term, and not by reason of the contract: for no doubt, if the testator himself had assigned over his term, although he himself had been chargeable for the rent during his life; yet when he dies, his executors are not chargeable for the rent due after his death".

not so straightforward.[216] In the former, there was a plea that the lessor had accepted rent from the assignee, so the conclusion was explicable on the basis that adoption of the assignee brought the original lessee's liability in debt to an end. In the latter, the action was not brought by the original lessor, something *Walker's Case* fails to point out. By the time *Coghil* v *Freelove*[217] was heard, the courts had moved to the position that

> it is now held, and with great reason, that the *privity of contract* of the testator is not determined by his death, but that his executor shall be charged with all his contracts so long as he has assets, and therefore such executor shall not discharge himself by making of an assignment, but shall still be liable for what rent shall incur after he has assigned his interest; nay, if the testator himself had assigned the term in his lifetime, yet the executor shall be charged in the *detinet*, so long as he has assets.[218]

The concluding words of the extract just quoted indicate another matter which troubled the courts in actions of debt brought against executors or administrators. Whether in such actions the writ should allege *debet*, or *detinet*, or *debet et detinet* against the defendant, was an issue for the courts on a number of occasions.[219] Eventually it became clear that executors or administrators might be sued as representatives of the deceased lessee or, if they had gone into possession, as assignees of the term.[220] In the former case, they would be liable *de bonis testatoris*; in the latter, *de bonis propriis*.

In actions of covenant too, executors and administrators could be sued either as representatives of the deceased or as assignees. If the action was on a covenant to pay rent, an assignment by the defendant before the rent accrued would preclude an action against him or her as assignee, but not as representative of the deceased lessee, for as the lessee could have been sued on the covenant to pay after the assignment, so could his or her executor or administrator.[221] Again, as in actions of debt, whether the plaintiff would be awarded judgment *de bonis testatoris* or *de bonis propriis* would be important in the plaintiff seeking execution to meet the liability.[222]

Assignees

We have seen already that the land demised was seen as debtor so far as the rent reserved by the lease is concerned, and that the lessor or a grantee of the reversion had a remedy by

---

216 See *Iremonger* v *Newsam* (1627) Noy 97; Latch 260; *Heliar* v *Casebrooke* (1665) 1 Keb 923; sub nom. *Heliar* v *Caseborough* 1 Keb 839; sub nom. *Helier* v *Casebert* 1 Lev 127; sub nom. *Hellier* v *Casbard* 1 Sid 240 & 266; *Coghill* v *Freelove* (1690) 2 Vent 209; sub nom. *Coghil* v *Freelove* 3 Mod 325.

217 (1690) 3 Mod 325; sub nom. *Coghill* v *Freelove* 2 Vent 209.

218 3 Mod 326.

219 See *Overton* v *Sydall* (1595) Cro Eliz 555; Popham 120; Gouldsb 120; *Hargrave's Case* (1599) 3 Co Rep 31a; sub nom. *Body* v *Hargrave* Cro Eliz 711; sub nom. *Boddy* v *Hargrave* Moore KB 566; *Moule & Moodie* (1619) Palmer 116; *Caly* v *Joslin* (1647) Aleyn 34; *Royston* v *Cordrye* (1647) Aleyn 42; *Cormel* v *Lisset* (1649) 2 Lev 80; *Jevens* v *Harridge* (1666) 1 Wm Saund 1; *Boulton* v *Canon* (1673) 1 Freem 336; sub nom. *Bolton* v *Cannon* 1 Freem 393; 1 Ventr 271; sub nom. *Boulton and Camam* 3 Keb 189; sub nom. *Boulton and Cannam* 3 Keb 445 & 466; sub nom. *Bolton v Canham* Pollex 125; *Coghil* v *Freelove* (1690) 3 Mod 325; sub nom. *Coghill* v *Freelove* 2 Vent 209; *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12.

220 *Buck* v *Barnard* (1692) 1 Show KB 348; Holt KB 75; *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12.

221 *Jenkins* v *Hermitage* (1674) 1 Freem 377; sub nom. *Jenkins* v *Armitage* 3 Keb 367; *Tilney* v *Norris* (1698) 1 Raym Ld 553; Carthew 519; sub nom. *Tilny* v *Norris* 1 Salk 309.

222 *Castilion* v *Smith* (1619) Hutton 35; 1 Brownl 24; Hobart 283; *Collins* v *Thoroughgood* (no date) Hetley 171; sub nom. *Collins* v *Throughgood* Hobart 188; *Bridgeman* v *Lightfeet* (1623) 2 Rolle 415; sub nom. *Bridgman* v *Lightfoot* Cro Jac 671; sub nom. *Lightfoot* v *Bridgeman* Benloe 134; *Tilney* v *Norris* (1698) Carthew 519; Raym Ld 553; sub nom. *Tilny* v *Norris* 1 Salk 309.

an action of debt or by distraint for the rent. An action of debt for rent against an assignee of the lease, as the person in whom the term is vested, therefore presented no difficulties. The question whether such assignee was liable on the covenants entered into by the lessee was a different matter. The law could have taken the view that the assignee of the term should take the benefit of the lease and the burdens along with it, but it did not. Something like the view appears in *The Dean & Chapter of Windsor's Case*,[223] where the court considered that "in respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the less, which goes to the benefit of the assignee, & *qui sentit commodum sentiri debet & onus*". A more restrictive view prevailed, however, so that an assignee was held to be bound to perform only those covenants which "touched and concerned the land", an expression which served to distinguish some covenants from others, known as "collateral covenants", which would not bind an assignee. Whether a covenant touched and concerned the land, or was merely collateral, was a question which troubled the courts on many occasions. In *Spencer's Case*,[224] in which the distinction was drawn, a further refinement exists, between covenants relating to things *in esse* and things not *in esse*: in the former, assignees of the lease would be bound by the covenant though they were not mentioned; in the latter, they would not, unless the covenant referred to them.[225]

Assuming, however, that the covenant was one which satisfied the requirements of *Spencer's Case*, the assignee was bound to perform the obligation, so long as he of she retained the lessee's estate. If the assignee, in turn, assigned to someone else, he or she would not be liable for any subsequent breaches of covenant, and this notwithstanding that no notice of the assignment by the original assignee was given to the lessor.[226] The difference between the position of an original lessee and that of an assignee became established: the latter's liability depending on privity of estate, the former's differing by reason of the privity of contract which existed as well.

The principles in *Spencer's Case* remained the law in England until recently. In Ireland, however, measures were enacted which raise the question to what extent those principles continued to apply here. Section 6 of the Distress for Rent Act (Ireland) 1712 provided that:

> All and every person and persons who shall take any assignment of all the residue of any term for years, or life, or lives, their executors or administrators shall be liable to all the covenants whereunto the lessees, their executors and administrators, were liable by, or by virtue of the said leases.

The terms of the section seem to make assignees liable to the same extent as were the lessees. If that is what was intended, the section marks a radical departure from *Spencer's Case*. There is, unfortunately, little discussion of the section in the authorities. The provision was relied on by the court in *Earl of Clare* v *Gildea*[227] as enabling a lessor of an incorporeal hereditament to sue an assignee of the term for rent, but the case offers little assistance on the purpose and extent of the section. If the view of Gibson J in *Lyle* v *Smith*[228] is correct, however, the section was intended merely to get over the difficulties as to the venue for

223 (1595) 5 Co Rep 24a at 24b. A similar view can be found in *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12. See also *Bally* v *Wells* (1769) 3 Wils KB 25; Wilm 341.

224 (1583) 5 Co Rep 16a.

225 See J S Carr, "Covenants running with the land: the *in esse* requirement" (1976) 28 *Baylor LR* 109.

226 *Pitcher* v *Tovey* (1692) 1 Show KB 340; 4 Mod 71; 12 Mod 23; 1 Salk 81; sub nom. *Richards* v *Turvy* Holt KB 73.

227 (1831) 2 Hud & Br 635.

228 [1909] 2 IR 58.

actions.[229] The provision itself was repealed by Deasy's Act, which contains terms still governing the liability of assignees. These provisions did attract attention on the effect they had on the distinctions made in *Spencer's Case*.

The original and new landlords

The Grantees of Reversions Act and the Statute of Reversions made the new landlord liable on those covenants undertaken by the original landlord which touched and concerned the land. Not surprisingly, just as the original tenant remained liable after assignment on express covenants he or she had entered into, so the original landlord was held to remain liable after the grant of the reversion on express covenants he or she had made.[230] In *Stuart* v *Joy*,[231] Cozens Hardy LJ explained that the statement in *Thursby* v *Plant* that the Grantees of Reversions Act transferred the privity of contract meant only that the assignee of the reversion was liable in the same way as at common law the assignee of the term was liable.[232] Correspondingly, the position of the lessor with respect to covenants running with the reversion was said to be precisely similar to the position of the lessee with respect to covenants running with the lease.[233]

Reform

Abolition of requirement of attornment

While restrictions on the ability of tenants to transmit their interests to a third party are common, restrictions on the ability of landlords to transfer their interests to a third party are not. As noted recently by Lord Nicholls, "[t]enants rarely, if ever, have a right to give or withhold consent to dispositions by their landlord".[234] Purchasers today of property occupied by tenants do not seek consent to the transaction from the tenants. Sales of the landlord's interest in a building in multiple occupation would be impracticable if not impossible if consent by the various tenants were needed to effect such sales. Rather, the sale takes place, and the tenants become aware that they have a new landlord when notice is received. The ability of the new landlord to recover the rent and enforce the tenant's covenants do not depend on the tenant's consent to the transfer which has taken place. The ability of the tenant to enforce covenants entered into by the landlord against the new owner is likewise independent of any consent to the transfer taking place.

In the early days, however, the situation was different. Where a transfer of the landlord's interest *inter vivos* took place,[235] the new landlord was unable to enforce the obligations of the tenant unless the latter attorned to the new landlord. The idea was that a tenant could not be compelled to perform services to someone other than that tenant's own lord.[236]

---

229 [1909] 2 IR 58 at 75: "the statute of 11 Anne, c. 2, s. 4 [sic] (Irish) gives no assistance; its object was in Ireland, by transferring privity of contract, to get rid of the absurd anomaly . . . that a lessor's action against an assignee, not being within the statute of Charles 1, and resting therefore on privity of estate, was local and not transitory. The Act was an amendment of the Act of Charles 1, and should receive the construction impressed on that enactment."

230 See e.g. *Wright* v *Dean* [1948] Ch 686 (original landlord liable in damages where lessee unable to enforce covenant for renewal against grantee of reversion).

231 [1904] 1 KB 362.

232 Ibid. at 367.

233 Ibid. at 368.

234 *London Diocesan Fund* v *Phithwa* [2006] 1 All ER 127.

235 Attornment was not required where the new landlord was heir or devisee of the original landlord: above p. 254.

236 See *Blackstone's Commentaries* 18th edn (1809), vol. II, p. 288. See further, F W Maitland, "The mystery of seisin" (1896) 2 *LQR* 481 at 490–2.

Attornment signified the acceptance by the tenant of the new party as the person to whom the tenant's service would be owed. The precise effect if the tenant did not attorn[237] depended on the form in which the transfer by the original landlord had been effected.[238]

The problems caused by the need for attornment were alleviated by a number of statutory provisions. The first was the Statute of Uses, for, in the case of assurances operating under it, the grantee was said to be in by operation of law and attornment was unnecessary.[239] Early in the eighteenth century, attornment became unnecessary in other cases as well. Section 9 of Administration of Justice Act (Ireland) 1707 provided that:

> all grants or conveyances made . . . by fine or otherwise, of any manors, or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the lands out of which such rents shall be issuing, or of the tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

The effect of the legislation was to put the grantee of a reversion in the same position as if the tenant had attorned,[240] so the grantee could, for example, serve notice to quit without the tenant having attorned to the grantee.[241]

Having become unnecessary, attornment was later made ineffective. Section 7 of the Landlord and Tenant Act (Ireland) 1741 provided that attornment was

> absolutely null and void to all intents and purposes whatsoever; and the possession of their respective landlords or landlord, lessor or lessors, shall not be deemed or construed to be by any ways changed, altered, or affected by any such attornment or attornments.

The mischief leading to s. 7 was stated to be the practice of tenants attorning to strangers who thereupon claimed title to the lands demised, thereby putting the true owners at risk. The remedy provided was to render such attornment ineffective. There was a saving, however, for cases where attornment took place pursuant to a judgment of the court, or with the consent of the landlord.[242]

Viewing the situation from the point of the tenant, attornment served a useful purpose, in that it meant that the tenant knew he had a new landlord. Once the grant of the reversion became, as a result of the legislation, effective without attornment, the danger existed that the tenant might continue to pay rent to the original landlord after the latter had transferred the reversion, and the right to the rent, to the new landlord. For the protection of the tenant, therefore, s. 10 of the Administration of Justice Act (Ireland) 1707 provided that a tenant would have a defence to an action by the new landlord for rent, if the tenant had paid the rent to the original landlord and had not received notice of the transfer of the reversion. Such, in any case, was already the rule before the statute.[243] So the question in

237 Not surprisingly, the law was reluctant to allow tenants to refuse to attorn and thereby stultify transfers by their landlords. Various writs were available to compel tenants to attorn: see *Shep Touch* (n. 87 above), 254, 264. Legislation also provided relief: see Attornments Act (Ireland) 1542.

238 See *Birch* v *Wright* (1786) 1 TR 378; *Conran* v *Pedder* (1852) 2 ICLR 200; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

239 See Co Litt 309b & 321b; *Birch* v *Wright* (1786) 1 TR 378; *Conran* v *Pedder* (1852) 2 ICLR 200; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

240 See *Williams* v *Hayward* (1859) 1 El & El 1040; *Wedd* v *Porter* [1916] 2 KB 91.

241 *Wordsley Brewery Co* v *Halford* (1903) 90 LT 89.

242 Landlord and Tenant Act (Ireland) 1741, s. 8.

243 *Watts* v *Ognell* (1607) Cro Jac 192.

some cases was whether the lessee had or had not had notice of the transfer of the reversion.[244] That the provisions of the statute as to notice were concerned solely with protecting tenants who had paid the rent to the wrong person is evident from *Conran* v *Pedder*.[245] This was an action of covenant for rent brought by a landlord. In answer to the defendant's defence that the landlord had conveyed the reversion before the rent for which the action was brought had accrued, the landlord relied on the absence of notice to the tenant of the grant as showing the tenant was still obliged to pay the rent to him. The court dismissed the action, on the ground that the grant was effective and complete without notice, and that the provisions of the statute as to notice were intended merely to protect tenants in the circumstances mentioned.[246]

That the provisions as to notice were intended to protect tenants who had paid rent to the wrong person, but did not protect them in other circumstances, is apparent from *Scaltock* v *Harrison*.[247] Here, the grantee of a reversion successfully brought an ejectment as a result of breach of covenant by the tenant to repair. The tenant's defence, that notice of the grant of the reversion had not been given, was rejected on the ground that the tenant was bound under the covenant to repair, and the identity of the landlord did not matter. In contrast, in cases of rent, the tenant needed to know to whom the rent should be paid, to avoid the risk of paying the wrong person and having to pay again. The result was, therefore, that a new landlord would be able to succeed in an action against the tenant for breach of covenant, despite the absence of notice that the reversion had been transferred to the plaintiff, unless the action was for failure to pay rent.[248]

Apportionment of rent

We have seen already that there was no apportionment of rent as regards time at common law.[249] Where a landlord died between the days on which rent was due, the landlord's heir would be entitled to the full gale when it later became payable. The situation was similar where there was a grant of the reversion *inter vivos*. Where the grant took place otherwise than on a date on which rent was payable, the grantee would be entitled to receive on the next day rent fell due the full amount then payable, no matter that part of it was payable for a time when the grantor was landlord.[250]

---

244 *Lumley* v *Hodgson* (1812) 16 East 99; *Cook* v *Guerra* (1872) LR 7 CP 132.

245 (1852) 2 ICLR 200.

246 The effect of notice was discussed also in a series of cases in which mortgagees sought to establish their entitlement to rent reserved under leases made by their mortgagors: see *Moss* v *Gallimore* (1779) 1 Doug 279; *Keech* v *Hall* (1778) 1 Doug 21; *Pope* v *Biggs* (1829) 9 B & C 245; *Rogers* v *Humphreys* (1835) 4 Ad & E 299; *Waddilove* v *Barrett* (1836) 2 Bing (NC) 538; *Evans* v *Elliot* (1838) 9 Ad & E 342; *Brown* v *Storey* (1840) 1 M & G 117; *Wyse* v *Myers* (1854) 4 ICLR 101; *Laffan* v *Maguire* (1879) 4 LR Ir 412. Cf. *De Nicholls* v *Saunders* (1870) LR 5 CP 589. Where the lease preceded the mortgage, the position was straightforward: the mortgagee was grantee of the reversion and was entitled as such to the rent. Notice ensured that the tenant should thereafter pay the rent to the mortgagee. Difficulties existed for the mortgagee, however, where the lease was made by the mortgagor after the mortgage. Here the giving of notice did not confer any right to the rent on the mortgagee, but if the notice was acted on by the lessee paying the rent to the mortgagee, this might afford evidence of a new tenancy between the mortgagee and tenant, sufficient to allow the former to recover in an action for use and occupation: *Wyse* v *Myers* (1854) 4 ICLR 101. See also *Brook* v *Biggs* (1836) 2 Bing (NC) 572; *Partington* v *Woodcock* (1837) 6 Ad & E 690; *Cook* v *Moylan* (1847) 1 Ex 67; *Trent* v *Hunt* (1853) 9 Ex 14.

247 (1875) LR 1 CPD 106.

248 Cf. *Hingen* v *Payn* (1618) Cro Jac 475; sub nom. *Ingin and Payn's Case* Godb 272; *Anon* Popham 136 which seems to be the same case: grantee of reversion successful in an action on a bond entered into by the tenant to secure performance of the tenant's obligations, including an obligation to give up possession at the end of the term; tenant's defence, that notice of the transfer of the reversion was not given, rejected.

249 Above, p. 262.

250 *Flinn* v *Calow* (1840) 1 M & G 589.

The situation changed with the Apportionment Act (Ireland) 1783. This dealt with cases where leases had been made by tenants for life who died between gale days, and with cases of leases for life where the life dropped between gale days. The Act provided that the landlord or the landlord's executors or administrators could recover a proportionate part of the rent for the period up to the death. More extensive provisions as to apportionment of rent were enacted fifty years later: s. 2 of the Apportionment Act 1834 provided that on the termination by any means of the interest of a landlord, there was to be an apportionment as between the landlord and the landlord's successor. The legislation did not enable the landlord to recover the apportioned part of the rent directly from the tenant; the rent falling due afterwards remained payable to the grantee, but the landlord was entitled to recover the apportioned part from the tenant. The provisions of the section did not, however, apply where the parties had stipulated that there would be no apportionment.[251]

The provisions of the 1783 Act and those of the 1834 legislation continued until 1860 when they were replaced by measures in Deasy's Act.

Abolition of the forms of action

A much more radical reform took place toward the end of the period we are considering. Much of the law we have been examining is dependent on the forms of action in which the cases coming before the courts were brought. Thus, apparently contradictory statements or results can be explained because, for example, the action was one of debt in one case and of covenant in another. Nowhere is this more apparent than in the cases in which actions were brought against original lessees after assignment of the lease. Acceptance of the assignee by the lessor had the effect of bringing the lessee's liability to an end so far as an action of debt was concerned, but not so far as action of covenant was concerned. Towards the end of the period we are looking at, Parliament initiated reforms which would lead to the demise of these forms of action and their replacement by a procedure which would distinguish between causes of action and the means by which actions would be brought. We have mentioned already the abolition of most of the real actions effected by the Real Property Limitation Act 1833. The previous year had seen in England legislation which had provided for simplification of the means of initiating actions.[252] It did not, however, abolish the need for the form of action to be identified in the process. This took place later, in the Common Law Procedure Acts,[253] and was completed in the Judicature Act 1873. A similar process took place in Ireland. Section 5 of the Common Law Procedure Act (Ireland) 1853 provided that:

> The special Forms of Personal Actions heretofore used shall not be necessary, and it shall be sufficient in the Summons and Plaint hereinafter mentioned to state a Cause or Ground of Action good in Substance, according to the Provisions of this Act, without framing the Statement in any particular Form, as formerly used or known, such as of Assumpsit, Account, Debt, Covenant, Detinue, Trespass, Trespass on the Case, Trover, or Replevin.

One matter we have met already which presented difficulties in the case of purchasers of reversions was also dealt with. In place of the complexities of the action being local or transitory, it was now provided by s. 62 that the action could be laid in any county which the plaintiff should think proper.

---

251 S. 3. For consideration of the Acts of 1783 and 1834, see *Swan* v *Bookey* (1855) 4 ICLR 582; *Kennan* v *Brennan* (1857) 7 ICLR 268. See also *Oldershaw* v *Holt* (1840) 12 Ad & E 590; *Browne* v *Amyot* (1844) 3 Hare 173; E O Walford, "Apportionment of rent" (1951) 15 *Conv* (NS) 17.

252 Uniformity of Process Act 1832.

253 Common Law Procedure Acts 1852, 1854, 1860.

The Landlord and Tenant Law Amendment Act (Ireland) 1860

The end of the period we have been considering comes with the enactment of Deasy's Act. This measure put in place the statutory provisions which continue to govern the position of a grantee of the reversion, and which are considered in the second part of this examination of the law. For the moment, we can note that Deasy's Act repealed a number of the provisions examined in this part. The provisions for apportionment of rent were replaced. A more significant casualty was the Statute of Reversions: the extent to which the decisions on it were relevant after 1860 was a question which the courts would have to address. Matters were not helped by the enactment of the Conveyancing and Law of Property Act 1881, leading to the situation that Ireland enjoys two sets of statutory provisions dealing with the position of a new landlord.