

## CHAPTER 1.

### PURCHASE AND SALE OF LANDED PROPERTY.

ALL landed property in this Colony is held either in freehold or subject to an annual payment of quitrent, and a special duty is levied by Government on every sale and transfer of property. Every transfer is recorded in the Land Register of the Colony. Until such transfer has been duly effected before the Registrar of Deeds, and by him registered, no sale of landed property is complete, that is to say, the right in the property is, until the passing of the deed of transfer, legally vested in the seller, and whatever agreement may be made to the contrary, the legal title only passes to the purchaser on the completion of the conveyance or transfer. (See *Van der Linden's Institutes*, p. 120.) In order that the due amount of transfer duty may be ascertained and received by Government, various statutory provisions have been made from time to time, and at present solemn declarations by purchaser and seller respectively have to be made before a Justice of the Peace, setting forth the amount of purchase money and the date of sale, in accordance with which transfer duty at a certain per centage on the purchase money is payable, within a fixed period, to the Civil Commissioner of the division in which the property is situated.

Transfers are effected only in Cape Town and before the Registrar of Deeds, with the exception of transfers of property within the late Colony of British Kaffraria, which have to be effected in King William's Town in consequence of the Land Register of Kaffraria being still there.

We purpose in this chapter to treat *firstly*, of Contracts of Sale; *secondly*, Declarations of Sale by Purchaser and Seller; *thirdly*, the Payment of Transfer Duty; and *fourthly*, the Proceedings necessary to complete the transfer.

## SECTION I.

### *Contracts of Sale.*

Although it be not absolutely necessary to create a valid contract for the purchase and sale of immoveable property in this Colony that the agreement should be in writing, yet this is highly desirable in order to avoid frequently recurring disputes and consequent litigation regarding the terms of sale. The general law of contracts applies to sales of land. A minor cannot sell and transfer land, neither can he purchase, although his guardians may purchase and receive transfer on his behalf.

The essential matters to a contract of sale are, the thing to be sold, the price to be agreed on, and the mutual consent of the contracting parties. (*Van der Linden*, p. 226.) In order to apply this to the present subject, it will be seen that the property must be in actual existence at the time, and further, the seller must be not only able to make a valid contract, but must have a right in or to the property bargained for.

A correct description of the property, extent, situation, and whether in freehold or granted on perpetual quit-rent, together with all or any servitudes to which it may be subject, is also requisite, and with all these matters the purchaser should make himself fully acquainted before completing the agreement. It may be well here to explain shortly, the nature of a servitude, which is defined by *Van der Linden* (p. 167) to be—a right whereby landed property is bound or subject to the use or convenience of the neighbouring house or land; or again, the servitude or use may be of the thing to a person—

such as the right of path or footway over another's land, right of house-way, right of cattle-way, or of driving beasts over the lands of another, the right of water or to drain through another's ground. These are distinguished by the term—rural servitudes. House, or urban servitudes are those affecting buildings, such as the right to a party wall, or to have a window opening on another's ground. Personal servitudes are the usufruct or the right of use of another's property, such as the right of inhabiting a house, also rights to fines or quitrents.

When property leased to another is sold the sale does not affect the lease, the rule of law being *hire goes before sale.* (*Grotius*, 3 B., 19 D., S. 59.)

The second matter to be considered in a contract of sale is the price to be agreed on. This may be either in money or by way of exchange, but in the latter case a stipulated value must be put upon the property given in exchange, so that the Government may not be defrauded of the transfer dues. The purchase money may be payable at the time of the execution of the contract, at the time of passing transfer, or at any future time, either in one sum or in instalments; but in the latter cases, care should be taken that the due amounts and dates of payment be inserted in the contract, and whether instalments are to bear interest, and at what rate.

When the purchase money, or a portion of it, is payable at some future time, the usual course is, in order that the property may pass to the purchaser, for transfer to be effected upon the purchaser executing in favour of the seller a mortgage bond, binding the property sold for the due payment of the purchase money remaining unpaid; and in case of the insolvency of the mortgagor, a bond of this description, called a kusting-brief, takes precedence of ante-nuptial contracts and of all legal mortgages, although of older date. (*Notary's Manual*, p. 196.)

On the third requisite to a contract of sale, namely, the consent of all the parties thereto, it is only necessary to say that, such consent must be free and unrestrained, without the operation of fraud, error, or fear on any of the parties. (*Van der Linden*, p. 190.) In all cases of contracts of sale made by the agents of either seller or buyer, such contract must set forth the name of the principal.<sup>1</sup> Contracts of sale do not require to be stamped.

## SECTION II.

### *Declarations of Purchase and Sale.*

The first step towards the completion of a sale of landed property, by effecting transfer, is for both purchaser and seller to declare, before a Justice of the Peace, to the amount of purchase-money and the date of sale. This is done according to a regular form, and may either be declared to by a principal or agent; but in the latter case the agent must, in the declaration, state his capacity as such, and must name his principal. The facts that are to be declared to are, *first*, the precise amount of purchase-money; *second*, the exact date of sale; *third*, that the seller or purchaser, as the case may be, has not received or paid, nor is he to receive or pay any other valuable consideration for and in consideration of the alienation of the said property than that named,<sup>2</sup> and lastly (in a declaration of sale), that the person named as buyer is the only purchaser. It is also requisite that, a correct description of the property be given in both declarations, in order that no mistakes may arise.

Where a party acts as the agent of either seller or purchaser, he declares that, he knows, of his own knowledge, the amount of purchase-money, and that, to the

<sup>1</sup> Act 15, 1855, Section 8.      <sup>2</sup> No. 7, 1864, Section 6

best of his knowledge and belief, the said amount is the only consideration for the purchase.<sup>1</sup>

If, however, it should happen that, in addition to a certain sum of money, some valuable consideration is to be given or received, then the seller and purchaser are respectively at liberty to put, by way of solemn declaration, a value in money upon such additional consideration, and such value is added to the purchase-money, and transfer duty has to be paid upon the total amount. In case the purchaser and seller do not agree upon the value of the additional consideration, the higher of the two values is to be taken as the correct value.<sup>2</sup>

In case the Civil Commissioner, who is to receive the transfer duty, should be of opinion that the amount of purchase-money, or valuation of any other consideration, is considerably less than its just and true value, it is competent for him to cause a valuation of the property sold to be made, by appointing some competent and disinterested person or persons to ascertain, upon oath, the just and fair value of the property, and should the value exceed the amount of the purchase-money by one third, then this valuation shall be taken as the value of the property, and transfer duty charged thereupon, and also the expense of such valuation. Should, however, the valuers appointed appraise the property at an amount not exceeding one-third more than the purchase-money or consideration declared to, then that purchase-money is to be taken as the correct amount, and duty paid upon it as such, the expense of the valuation being borne by Government. A right to the review of the valuation, by any competent court, is given to the purchaser who may consider himself aggrieved by any such valuation.<sup>3</sup>

Should not the purchaser and seller, in case of a consideration not in money being given for the property,

<sup>1</sup> Ordinance 18, 1864, Section 4.   <sup>2</sup> Act 7, 1864, Section 7

<sup>3</sup> Ordinance 18, 1844, Section 16.

put any value themselves upon such consideration, then the Civil Commissioner has power to proceed in the same manner as when he is of opinion that the purchase-money stated is considerably below the real value of the property.<sup>1</sup> Every such valuation by a Civil Commissioner must be made previous to the receipt by him of transfer duty of the property, but he may receive any sum of money as a deposit to secure the payment of the amount to be afterwards fixed.<sup>2</sup>

In case of the cancellation of any contract of sale by mutual consent after declarations of purchase and sale have been signed, and before payment of transfer duty, without any part of the purchase-money having been paid, or any valuable consideration given, or promised by or on behalf of the purchaser, for the purpose of obtaining the consent of the seller to such cancellation, the transfer duty may be remitted upon declarations being respectively made to the effect that, the sale has been cancelled.<sup>3</sup>

In case of a sale of property in which it shall be made to appear that the seller or purchaser has died or left the Colony without having subscribed the necessary declaration, it is competent for the Civil Commissioner, or the Registrar of Deeds, either to dispense with such declaration altogether, or to receive in lieu thereof the declaration of such other person or persons as may, under the circumstances of the case, be in a condition to declare to the particular matters set forth in such declaration.<sup>4</sup>

A special form of declaration of sale is provided where a previous sale has been contracted and afterwards set aside, and in it the seller must state the fact of such previous sale,<sup>5</sup> and the cause or reason of its cancellation.

<sup>1</sup> Act 7, 1864, Section 7.    <sup>2</sup> Act 7, 1858, Section 10.

<sup>3</sup> Act 15, 1855, Section 10.    <sup>4</sup> Ordinance 18, 1844, Section 11

<sup>5</sup> Act 15, 1855, Sections 13 and 15

Any person wilfully making any false declaration, knowing the same to be untrue in any material particular, is deemed guilty of the crime of perjury, and may, on conviction, suffer such punishment as is by law provided.

### SECTION III.

#### *Transfer Duty.*

The next step to be taken towards the completion of a sale of landed property is the payment of transfer duty. This is payable either in Cape Town to the Treasurer-General, upon a certificate to be obtained from the Registrar of Deeds, specifying the amount of duty to be paid, or (in other divisions) to the Civil Commissioner of the division in which the property changing proprietors shall be situate.<sup>1</sup>

On payment of transfer duty the production of the declarations of sale and purchase is necessary, and they must be delivered to the official to whom the duty is paid.

All transfer duties must be paid within six months from the day of sale, after which certain additional duties or fines are imposed.<sup>2</sup>

The rate of transfer duty at present in force is *four* per cent. on the declared purchase amount, and the additional duties or fines for non-payment within the specified term of six months, as follows:—<sup>3</sup>

A delay not exceeding 10 days, 2s. per cent. on the purchase amount for every day.

„	above 10 days, and not exceeding 1 month,	2 per cent.
„	1 month,	2 months, 3 „
„	2 months,	3 „ 4 „
„	3 „	4 „ 5 „
„	4 „	5 „ 6 „
„	5 „	6 „ 8 „

<sup>1</sup> Ordinance 18, 1844, Sections 7 and 9.

<sup>2</sup> Ordinance 18, 1844, Section 13.    <sup>3</sup> Act 11, 1863, Section 4

In case upwards of twelve months shall have elapsed from the day of sale the amount of duty payable is calculated at the amount of transfer duty originally payable, added to the additional duties or fines for six months' delay, together with interest on the whole at the rate of ten per cent. per annum, reckoned from the expiration of the twelve months up to the date of payment.<sup>1</sup>

On payment of transfer duty, a receipt is furnished, which must be retained by the payer, as its production is necessary before passing transfer.

Where any person is a joint owner of any property, and shall purchase that property, he is not bound to pay transfer duty upon that proportion of the purchase-money which represents his own individual share or interest in such property, neither is it payable in case of the compulsory or voluntary partition of property between joint owners.<sup>2</sup>

It is further in the power of the Governor of the Colony, upon proof to his satisfaction, that any person, acting *bonâ fide*, has made a mistake in regard to the enregisterment of any transfer, to permit such transfer or transfers as may be necessary for the correction of the mistake, to be effected free of transfer duty.<sup>3</sup>

All transfer duties may be recovered by action in any competent court by the officer to whom such duties are payable.<sup>4</sup>

#### SECTION IV.

##### *Transfers.*

All transfers must be effected by deeds drawn by either advocates of the Supreme Court or by properly appointed conveyancers, provision for whose appointment is made in Act No. 12 of 1858. These deeds may

<sup>1</sup> Ord. 18, 1844, Sec. 14      <sup>2</sup> Act 15, 1855, Sch. 1, Cl. A and I.  
<sup>3</sup> Act 7, 1864, Clause 8.      <sup>4</sup> Ordinance 18, 1844, Section 20

either be executed in person by the party making transfer, or, as is more usually the practice, by power of attorney. This must be a special power, authorizing the attorney of the seller to appear before the Registrar of Deeds, and, in the name of the principal, effect transfer of the property described.

The chief essentials to passing transfer are, first, that the property be free and unencumbered, that is to say, that no mortgage be registered on it, or if any have existed, that it has been duly cancelled; second, that the transfer dues have been paid; and third, in case of quitrent property, that no quitrent be due at the time of passing transfer. The purchasers of property should bear this in mind, as through the non-observance of these requisites, delays in obtaining the title to property purchased frequently arise.

In addition to the transfer duty every deed of transfer requires to be either written upon or covered with stamped paper, according to the following scale:—<sup>1</sup>

		£ s. d.
Value not exceeding £10 .....		0 1 0
„ exceeding 10, and not exceeding	£20	0 1 6
„ „ 20, „	35	0 2 0
„ „ 35, „	50	0 3 0
„ „ 50, „	100	0 4 6
„ „ 100, „	150	0 7 6
„ „ 150, „	200	0 10 0
„ „ 200, „	300	0 15 0
„ „ 300, „	400	1 0 0
„ „ 400, „	500	1 5 0
„ „ 500, „	700	1 10 0
„ „ 700, „	1,000	2 5 0
„ „ 1,000, „	1,500	3 0 0
„ „ 1,500, „	2,000	3 15 0
„ „ 2,000, „	2,500	4 10 0
„ „ 2,500, „	3,000	5 0 0
„ „ 3,000, „	4,000	5 10 0
„ „ 4,000, „	5,000	6 0 0
And for every additional £500 or fraction thereof...		0 10 0

<sup>1</sup> Act 3, 1864, Schedule 8

A fee of ten shillings and sixpence for registration is chargeable upon every deed of transfer.

In cases where persons have just and undisputed lawful rights to landed property, and are prevented from obtaining transfer in the regular course by reason of the death, mental incapacity, insolvency, or absence from the Colony of the person in whose name the property is enregistered, or of other person or persons through whom the party claiming may have acquired his just rights, and also when it has, through lapse of time or otherwise, become impossible to produce such legal evidence of the contracts and transactions as will enable the Courts of this Colony to enforce the passing of transfer, provision has been made by Ordinance No. 97 (which has been continued by several subsequent statutes, up to Act No. 4 of 1860,) to enable the claimants to procure the registration of the property in their names by investigation before a Committee or Land Board. The proceedings under this Act commence by (1) a memorial to the Committee; (2) evidence is laid before them, and (3) they have the power to hear objections. The Committee, after due investigation, report the result to the Governor, and on his confirming such report (if it be favourable) the transfer can be effected.

A purchaser of property has a right of action against the seller, in the Supreme or any Circuit Court, to compel him to grant transfer upon the fulfilment by the purchaser of the conditions of sale; and it is recommended that purchasers should not, after complying with the conditions, delay to obtain transfer of the property, as should the seller become insolvent previous to the passing of transfer, the purchaser cannot compel his trustees to complete the sale, his only remedy being to prove on the insolvent estate of the seller for the amount of purchase money he has paid. Should, however, a purchaser become insolvent previous to his obtaining transfer, it is in the power of his trustees

either to abide by the purchase or abandon the same, the seller having the right to demand and sue for any damage he may have sustained by reason of this abandonment.<sup>1</sup>

<sup>1</sup> Ordinance No. 6, 1843.

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## CHAPTER II.

### LANDLORD AND TENANT.

THE law of this Colony as applicable to Landlord and Tenant, and their respective rights and relations, is not laid down specially by statute, but is founded on the Roman-Dutch Law and the common law of England. Provision is, however, made in the Resident Magistrates' Court Act (No. 20, of 1856), for the recovery of rents, and also for ejectment in certain cases.

In this chapter we purpose to consider, first, Leases, or contracts for the letting or hiring of immoveable property; second, Fixtures, and how far they are subject to the control of the Tenant, or may be removed by him; third, Rent, and the remedies of Landlords on non-payment; and, fourth, Ejectment, or the proceedings necessary for the recovery of possession of his property by the Landlord.

#### SECTION I.

##### *Leases.*

A lease is a contract or agreement made between a landlord and a tenant, whereby the landlord, upon certain considerations, permits the occupation or use of his property for a specified time, to another, who is called the tenant. A lease may be either oral or in writing, and may be for any term; but for any period, even under one year, it is most desirable that it be committed to writing—firstly, to avoid all misunderstandings and disputes; and, secondly, because the landlord can

obtain judgment on a lease for rent due to the amount of £40, in any Resident Magistrate's Court, whereas, in the absence of a lease, he cannot recover more than £20, without going through the expensive process of a Supreme or Circuit Court action. All leases in writing for six months and upwards, where the yearly rental exceeds £10, must either be written upon stamped paper, or have an adhesive stamp of the proper value affixed and cancelled by the Civil Commissioner of the District, within twenty-one days of the date of execution, or if beyond twenty-one days, and under forty-two days, the stamp must be of double the value, and if beyond forty-two and under sixty-three, treble the value.<sup>1</sup>

The stamps required for leases are as follows :—

	s. d.
Exceeding £10 per annum and not exceeding £50.....	2 0
"      50          "          "          100.....	3 0
"      100        "          "          200.....	5 0
"      200        "          "          300.....	7 6
For every additional £100 or fraction thereof .... .....	2 0

No lease can be produced in evidence in any Court of Law, unless it has been duly stamped.<sup>2</sup> This rule is subject, however, to the provision that it is in the power of the Court before which such a lease may be tendered, to admit the same on payment of a penalty, not exceeding Twenty Pounds sterling.

The most important stipulations and conditions in a contract of lease on the part of the landlord or lessor, are—First, to give possession of the property to the tenant on a certain day; second, to allow the tenant the full, free, and undisturbed possession of the property for the full term; third, to keep the premises in a proper state of repair, so that the tenant may have the due enjoyment of them. If the subject of the lease be a house, the usual stipulation is that the landlord keep the outside of the premises in repair,

<sup>1</sup> Act No. 3, 1864, Sec 14 and Sch 2. \* Act 3, 1864, Sec. 12.

while the tenant is under obligation to do the same to the interior ; fourth, to indemnify the tenant for all damages occasioned by any material defect in the thing let. (*Van der Linden's Institutes.*)

On the other part, the tenant or lessee stipulates or agrees—First, to pay punctually, on a certain day, the sum agreed upon as the rent or hire of the premises ; second, to make use of the property for no other purpose than that for which it is let to him ; third, not to make any material additions to, or alterations in the property, without the consent of the landlord ; fourth, not to sublet the property or any portion of it without the consent of the landlord ; fifth, to pay punctually all such rates and taxes as it may be agreed upon that he shall be liable for ; and, sixth, that he will, at the expiration of the term of the lease, deliver up possession of the property to the landlord or lessor, in the same condition as he shall have received it—reasonable wear and tear only excepted.

These are the usual covenants inserted in a written lease, but at the same time it must be understood that they are implied in all parole leases, and a breach of any of them will lay the party transgressing open to an action of damages, at the same time these implied covenants only exist in the absence of a special agreement to the contrary, and may be qualified by express agreement.

Where a lease is made for a period certain, the tenant is bound to give up possession at the expiration of that period, without further notice, but if he should still continue to occupy the premises after the expiry of the term, the landlord may at his election treat him either as a trespasser or as a tenant holding under the terms of his original lease, and this although he may have communicated his intention not to keep the premises after the term.<sup>1</sup>

<sup>1</sup> *Story on Contracts* Vol. 2, Section 934

If the landlord receive rent after the termination of the lease, he impliedly acknowledges the continuance of the tenancy, and must give notice to quit when he requires possession of the property.<sup>1</sup>

In the case of occupancy from month to month, where the rent is payable monthly, a month's notice by either landlord or tenant must be given; the rule being that when the time of notice is not fixed by special agreement, it must be of equal duration with the time elapsing between the periods when the rent falls due.

A notice to quit may be either verbal or in writing; the latter being desirable, in order that should any misunderstanding arise, the notice may be proved without difficulty. No particular form is requisite, so long as the notice is explicit and positive, and it must be given on the expiration of a term for which rent is payable. If the tenant refuse to give up possession at the expiration of a valid notice given him by his landlord, the latter cannot take the law into his own hands and forcibly take possession, but must have recourse to the legal mode of proceeding, by an action of ejectment. It has been held, however, that where notice has been regularly given, and the tenant refused to quit, the landlord might, in the tenant's absence, break open the door and resume possession, although articles of the tenant's furniture remained in the house; but the Court also admitted that the landlord thereby laid himself open to an indictment, although he did not render himself liable in an action.<sup>2</sup>

A lease is not cancelled by the sale of the property let, as the rule of law is that hire goes before sale. Therefore, on the sale of property, the lease still continues valid, and the new owner stands in the same relation to the tenant as the former proprietor, and is bound by the same covenants. But on the insolvency

<sup>1</sup> *Story on Contracts*, Vol. 2, Section 934 A.

<sup>2</sup> *Story on Contracts*, Vol. 2, Section 944. Note 5

of the tenant any lease that he may be entitled to immediately becomes void, his trustees, however, being liable for all rent due by the insolvent up to the date of his surrender.<sup>1</sup> The liability of the estate extends to one year's rent as a preferent claim—the balance, if any, is concurrent only.<sup>2</sup>

A landlord has a lien for rent on all property brought into the premises by the tenant;<sup>3</sup> and this lien holds whether the goods and chattels are the property of the tenant or of a third person. But should the landlord allow the goods to be removed from the premises, he loses his right of lien. He need not attach the property for the purpose of exercising his right of lien; but the safest plan of course is to do so.

This right of lien extends not only to the property brought into the premises by the tenant for his use and with the knowledge of the owner, but to that of a sub-tenant, should there be such, but only to the extent of any amount of rent that may be due by the sub-tenant to the tenant.<sup>4</sup>

## SECTION II.

### *Fixtures.*

The term *Fixtures*, in this section, is used to designate those personalities which, not being chattels or furniture, have been annexed to the freehold by some party not being the owner of the freehold; and we purpose in the present section to consider the different classes of fixtures, and the rights of the tenant or party who affixed them, to their removal or otherwise, and what degree of annexation to the freehold is necessary to take away the character of furniture or chattel, and constitute that of fixture.

Anything brought and laid upon the lands, or in, or upon, any building affixed to the land, does not thereby

<sup>1</sup> Ordinance No. 6, 1843. <sup>2</sup> Act No. 5, 1861.

<sup>3</sup> *Van der Linden's Inst.*, p. 174. *Grotius*, Book 2, Chap. 48, Sec. 1.

<sup>4</sup> *Burge's Colonial Law*, Vol. 3, pp. 307 and 599.

become a fixture, there being in such a case no annexation to the freehold, but merely contact with it.<sup>1</sup> Thus a wooden house built upon battens or blocks of wood laid on the ground, but not fixed in or to the ground, is not a fixture. So also, if buildings are merely placed, and rest upon, without being let into a brick foundation, they remain chattels, although the foundation be affixed to the soil as part of the freehold, and cannot be removed; and this, although it was constructed for the express purpose of sustaining such buildings or other articles.

In case of domestic and trade fixtures, the following rule appears to be generally adopted:—*Where the article is affixed by means of screws it is removable at the will of the tenant, but where nails are used it becomes part of the freehold.* And the reason of this distinction is obvious, it being the practice of the building trade to make use of screws where future alterations or removal may be needed, and also where neatness is desired; while nails are employed by the builder where firm and lasting work only is required.

It has further been laid down, that things which a tenant has fixed to the freehold for the purpose of trade or manufacture, may be taken away by him where the articles can be removed without causing material injury to the freehold, and where in themselves they were of a perfect chattel nature before they were put up, or in other words, where they may be removed without being entirely demolished or losing their essential character or value.<sup>2</sup>

Fixtures may be classed under three different heads, namely:—1st, Trade; 2nd, Agricultural; and 3rd, Domestic.

<sup>1</sup> *Chambers's Law of Buildings*, page 184. On Roman Law of Fixtures, see *Digest*, Title 3, Book 19. *Pothier Œuvres Posth.*, Tome 2, p. 638. *Voet ad Pand.*, Li, 18.

<sup>2</sup> *Annes on Fixtures*, pp 43 and 44

1st. Trade fixtures—may be defined as those which have been affixed to the freehold by the tenant for the purpose of carrying on his business or manufacture, and under this head are included—machinery, furnaces, boilers, pumps, tanks, counters, and shop and office fittings, as well as many others, including gas-fittings, which will occur to the reader. All of these articles are removable by the tenant when annexed by him, provided always that it can be done w'thout serious injury to the freehold or the destruction of the articles themselves. Trade buildings, such as those erected to enclose machinery, engine houses, &c., are equally removable with the things to which they are incident.

2nd. Agricultural fixtures—are those erected for the purpose of the convenience of husbandry, and are of a similar nature to those last mentioned, with the exception of trees, plants, &c. These are considered as part of the freehold, and cannot be removed by the outgoing tenant although planted by him. An exception, however, to this rule, is made in favour of gardeners and nurserymen, who can remove trees and shrubs in the course of their trade, and generally the produce of the ground, for the purpose of sale, but a private individual cannot remove fruit trees which he has planted for other purposes than those of sale.

3rd. Domestic fixtures—may be defined as those a tenant has affixed to the freehold for his own personal use or convenience, without any reference to trade or manufacture, and the principal on which he is allowed to remove them is laid down to be “that, as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommodate tenants in the enjoyment of their estates, if by every slight attachment to the freehold, the property should be immediately changed and pass over to the reversioner.”<sup>1</sup>

<sup>1</sup> *Amos on Fixtures* p 77

Domestic fixtures may be either useful, ornamental, or partaking of the nature of both. As regards useful fixtures, it has been decided that ornamental marble mantel-pieces, stoves, grates, cupboards, blinds, and many articles of this class are removable; and it must be observed that most of these articles may in ordinary cases remain mere chattels, not being fixed to the freehold at all, or else so slightly as not to be accounted fixtures, and it is only when they are actually annexed to the freehold that any question as to the right of the tenant to remove them can arise.

Although the tenant may remove an ornamental mantel-piece put up by himself, it has been ruled that he may not remove one which is not ornamental.

Among the class of ornamental fixtures may be enumerated cornices put up for ornament, and affixed by screws only, so that they can be removed without any substantial injury to the building, and such have been decided to be removable by the tenant. So also may gilt moulding round the papering of a room, provided that the edges of the paper be finished off fair, and that the moulding has been added by the tenant for merely ornamental purposes.

Hearths, doors, windows, and all buildings, such as wash-houses, stables, &c., are generally irremovable, although they may have been added by the tenant. By the same rule flowers and shrubs are not removable, also hedges, fruit-trees, &c.<sup>1</sup>

A tenant is bound to remove his fixtures before the termination of his occupancy. If he fail to do so, the presumption of law is that he has abandoned his property in everything annexed to the freehold, and it is consequently considered to belong to the landlord.

In order to assist parties in determining the question of the right of tenants to remove fixtures annexed to the freehold or renewed by them, the following lists,

<sup>1</sup> *Chambers on Buildings* p 200

compiled from *Chambers's Law of Buildings*, are added, showing those fixtures which have been decided to be not removable, those which may be removed, and those of a doubtful nature, the character of which must be determined by the particular circumstances of the tenure.

#### I. FIXTURES NOT REMOVABLE BY TENANT.

- Agricultural Buildings.
- Barns (substantially fixed on foundations).
- Birns, of brick-work.
- Bricks laid in mortar.
- Carpenter's Shop.
- Chimney-pieces (original).
- Cupboards, let into the floor or walls, or nailed to standfasts which are so let in.
- Doors.
- Dressers.
- Fastenings to gates, &c.
- Fences, living.
- Fences, dead, if substantially affixed, as post and rail.
- Flowers, planted, not in pots.
- Fruit trees planted for other purposes than those of sale.
- Glass windows.
- Hearths.
- Hedges.
- Hen-houses.
- Hinges of doors, not removable.
- Keys.
- Latches.
- Locks and lock furniture.
- Mangers.
- Partitions of every kind.
- Pigeon-houses.
- Pavements.
- Pigstyes.
- Racks.
- Rings.
- Slutters.
- Slabs, such as the slab in front of the grate.
- Verandahs, substantially affixed.
- Ventilators.
- Wells and well coverings.
- Windows.

## II. FIXTURES REMOVABLE BY THE TENANT.

- Accessory buildings, such as are purely accessory to the use of a movable fixture.
- Baize doors.
- Bar fittings in public houses.
- Barns, otherwise than substantially affixed.
- Bars to doors and windows.
- Baths.
- Beer-engines.
- Bells, with their wires, pulls, &c.
- Bins, of wood, or otherwise than of brickwork.
- Blinds, both exterior and interior, together with rollers, pulleys, &c.
- Book cases.
- Book shelves.
- Buildings built on frames, blocks, &c., or otherwise than substantially affixed.
- Cabinets.
- Chimney-pieces, ornamental.
- Chimney glasses.
- Closets.
- Coffee mills.
- Coppers.
- Cornices (ornamental).
- Counters.
- Cupboards (affixed by screws or holdfasts, not let into the walls or floor).
- Desks.
- Doors, supplementary, such as baize doors and nursery gates.
- Drawers.
- Engines employed in any trade to which the premises have been appropriated.
- Fastenings.
- Finger-plates.
- Fire-guards.
- Fittings of public house counters, and of warehouses, safes, &c
- Flowers in pots.
- Force pumps and pipes.
- Furnaces used in trade.
- Gas fittings.
- Gas pipes.
- Glass shop fronts.
- Gold mouldings (ornamental).
- Grates.
- Hat pegs

Hat rails with their pegs.  
Hinges of doors, themselves removable.  
Hooks.  
Hydraulic presses.  
Implements employed for trading purposes  
Iron boilers.  
Iron chests.  
Iron ovens.  
Iron safes, and their frames, shelves and fittings  
Jacks.  
Lamps, with their hooks and brackets  
Lead pipes  
Looking-glasses.  
Machinery affixed by frames, bolts, or screws, or in steps or caps of timber.  
Marble chimney-pieces (ornamental).  
Marble slabs (ornamental).  
Meat safes.  
Mills, on posts.  
Mills laid on (not let into) a brick foundation, such foundation itself being irremovable.  
Office desk enclosures  
Ovens.  
Paling.  
Pegs and peg nails.  
Pier glasses.  
Pipes of all kind, except rain water pipes  
Pumps, slightly attached.  
Ranges.  
Shelves and their brackets.  
Shop counters and enclosures  
Shop fittings.  
Shop fronts.  
Shutters, door or window, not affixed  
Sideboards.  
Sinks with their pipes, &c.  
Slabs, marble or wood, fixed or folding.  
Stoves.  
Sun-blinds and their casings.  
Tanks  
Tubs  
Verandahs not substantially affixed  
Warming apparatus  
Water butts  
Water closet apparatus

Window blinds and shutters.  
 Window fastenings.  
 Wires to bells.

**III. DOUBTFUL FIXTURES, THE CHARACTER OF WHICH MUST BE DETERMINED BY THE PARTICULAR CIRCUMSTANCES OF THE TENURE**

Brick kilns and sheds.  
 Buildings erected for special purposes  
 Green-houses.  
 Hot-houses  
 Lime-kilns.  
 Pavements under verandahs, green houses, &c.  
 Sheds.  
 Store-houses.  
 Temporary buildings  
 Verandahs.  
 Wind or water mills.  
 Water-wheels and runs  
 Workshops.

**SECTION III.**

*Rent.*

By the term Rent is understood the consideration in money paid to, or to be paid by the tenant to the landlord, for the use or occupation of his premises.

Rent may be made payable by special agreement at any period or periods of the term. Monthly is the prevailing period in this Colony ; and where the rent or hire of the premises is fixed on a certain sum per month, the implication is, unless a special contract can be shown to the contrary, that the rent falls due and payable at the expiration of each consecutive month from the day of occupancy.

In case of the unforeseen destruction of the property, as, for example, when a house is burnt, the term of hiring ceases.<sup>1</sup> A tenant is liable for rent, although he desert the premises on account of their unhealthiness, if the lessor have been guilty of no fraud or

<sup>1</sup> *Van der Linden* page 24 .

misrepresentation, and if he (the tenant) had the means of informing himself of the circumstances.<sup>1</sup> But where the premises are, by default of the landlord, or without default of the tenant, rendered wholly unfit for beneficial occupation, the tenant would be justified in leaving, and no rent could be recovered from him.

When no place of payment is designated in the lease, the tenant is bound to seek out the lessor, and tender him the rent.<sup>2</sup>

The remedies of a landlord for the recovery of rent due are (1) by action, and subsequent execution and sale; and (2) under special circumstances which will be presently noticed, by attachment or execution previous to action brought.

The jurisdiction of the Resident Magistrates Courts of the Colony extends to the amount of £20 only, where there is no written contract of lease, but in the case of a properly-executed lease, it may be sued upon as a liquid document, and rent due to the amount of £40 recovered on it. There appears, however, to be no objection to proceeding against a tenant, in separate actions, for rent due for different terms, each term of rent being of the nature of a distinct and different debt.

As to the remedy of landlords, under special circumstances, it is provided in the Resident Magistrate's Court Act, that "When, and as often as, the landlord of any house, land, or premises, situate within the jurisdiction of any Resident Magistrate, shall make an oath before such Magistrate, that an amount of rent, not exceeding the amount to which the jurisdiction of the Court of such Magistrate is limited, is due and in arrear in regard to the said house, land, or premises, and that the said rent has been demanded for the space of *seven days* and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the moveable property in and upon the said premises, in order to

<sup>1</sup> *Story on Contracts*, Sec. 931b.   <sup>2</sup> *Story on Contracts*, Sec. 931c.

defeat and avoid the payment of the rent so due and in arrear, and shall enter into security, together with some one as his surety, to be approved of by the said Magistrate, to prosecute in such Court as aforesaid, if need be, a suit, for the recovery of such rent so in arrear; and also to pay and satisfy all damages, costs, and charges which the tenant of such house, land, or premises, or any other person, may sustain or incur by reason of, or in connection with, the distress or seizure hereinafter mentioned, if the landlord shall fail to prove that the rent aforesaid is really due and in arrear; then, and in that case, it shall and may be lawful for such Magistrate to issue an order in writing, directed to the Messenger of the said Court, authorizing and requiring him to seize and arrest, if need be, so much of the moveable property in the place or premises in question, and by law distrainable for rent in arrear, as may be sufficient to satisfy the amount of rent due and in arrear, together with the costs and charges of the action aforesaid, to be afterwards, if need be, instituted for the recovery thereof."<sup>1</sup>

By and with the consent of the tenant whose goods and chattels are thus attached for rent in arrear, they may, in order to save expense, be sold at once, without the necessity of going through the process of an action, and for this purpose the Magistrate by whom the order for attachment was issued, upon such consent being certified to him by the tenant, both in person and in writing, may grant another order, authorizing the Messenger to sell the said property, or so much of it as shall be necessary to satisfy the claim of the landlord and costs.

Every such sale, however, must be made by the Messenger of the Court and by auction, and further, notice of such sale must be posted on the door of the Court House, and also as near as may be to the place

<sup>1</sup> Act No. 20, 1856, Section 26

where such sale is to be held, for at least seven days previous to the day appointed for the sale.

At the same time, the tenant has the privilege, any time before the sale, of releasing his goods by paying the amount of the landlord's claim, with any amount of costs, not exceeding fifteen shillings, that the Magistrate may tax for the charges of the Messenger.

#### SECTION IV.

##### *Ejectment.*

As before stated, a landlord cannot take the law into his own hands, and forcibly expel a tenant, when he desires to recover possession of his property. He must have recourse to the process provided for by law, which is termed Ejectment; and in an action of this nature the landlord sues the tenant to show cause why he should not be compelled or adjudged to deliver up possession of the premises he occupies under him, on a certain day. If judgment be given against the tenant, a writ is issued requiring the Messenger or Sheriff to put the landlord in possession of the premises, by removing the tenant, and all other persons occupying them from, through, or under him.

In all actions of ejectment against the occupiers of any lands, tenements, or premises situate within the limits of their districts, the Resident Magistrates of the Colony have jurisdiction, and such actions may be brought by any person (or his agent, administrator, or executor) under whom such occupier has held or occupied the same in virtue of any lease, contract, or agreement; or at the suit of any person (or his agent, administrator, or executor) whose name is enregistered in the land-register of the Colony as the proprietor of any such lands, tenements, or premises, against the

occupier thereof; or at the suit of any sub-tenant holding a subsisting written lease of any property under the person whose name is enregistered as the proprietor of the premises, against any occupier whose right or alleged right is not derived from the person whose name is enregistered as the proprietor; provided always that the title to the ownership of any such lands, tenements, or premises aforesaid, shall not in such action be in question, but only the right of occupation; and provided also that it shall not be shown by the defendant that the right to the occupation of any such lands, tenements, or premises, during the term or period as to which the right of occupation shall be in dispute, is to him of the clear value of Forty Pounds sterling and upwards.<sup>1</sup>

Should therefore the title to the property, from which the landlord seeks to eject the tenant, be in dispute, the action cannot be decided by a Magistrate, but must be brought before the Supreme or any Circuit Court.

In any action for the recovery of rent before a Resident Magistrate, if it shall be made to appear, either by the admission of the defendant, or otherwise, that the defendant has no moveable property against which any process of execution may be issued, the Magistrate may, without the issue of any further process, condemn the defendant to deliver up possession to the landlord forthwith.<sup>2</sup>

<sup>1</sup> Act 20, 1856, Section 10    <sup>2</sup> Act 20, 1856, Section 25

## CHAPTER III.

### MASTER AND SERVANT.

THE relative rights and duties of Masters and Servants have been made the subject of special legislation in this Colony, and will be found laid down in Act No. 15 of 1856, entitled "An Act to amend the Laws regulating the relative Rights and Duties of Masters, Servants, and Apprentices."

The provisions of this Act extend not alone to domestic servants, but to any person employed for hire, wages, or other remuneration, to perform any handicraft or other bodily labour, in agriculture or manufactures, or in domestic service, or as a boatman, porter, or in other occupation of a like nature. The Act also specially refers to apprentices.

"Masters" comprise persons, whether male or female, employing for hire, wages, or other remuneration any persons falling within the above definitions. (Sec. 2.)

For the convenience of reference, it is proposed in this chapter to consider—*First*, Contracts of Service; *second*, Contracts of Apprenticeship of minors by parents or guardians; *third*, Apprenticeship of Destitute Children; *fourth*, Circumstances justifying the Dissolution of a Contract previous to its expiration; *fifth*, Remedies of Masters; *sixth*, Remedies of Servants; and, lastly, Characters given by Masters to Servants.

### SECTION I.

#### *Contracts of Service.*

A contract of service between a master and his servant may be either oral or in writing, if the term of

service agreed upon do not exceed one year, but in all cases it is desirable that engagements of this description should be committed to writing, if only a brief memorandum be made of the terms, with the signature of both parties attached, as, where a definite understanding has not been arrived at, the rate of hiring is a frequent source of litigation and dispute between the parties.

No verbal contract is valid for a longer period than one year, and no contract of this description is valid unless it be stipulated in such contract that the service shall be entered upon by the servant within one month from the date of the contract.<sup>1</sup>

No contract in writing, for a longer period than one year is valid, unless entered into by the parties before a Magistrate, whose duty it is to subscribe such contract in attestation of the fact that it was entered into voluntarily, and with a clear understanding of its meaning and effect.<sup>2</sup>

Such a contract of service may be made for any term not exceeding five years from the date of the commencement of service. Any contract entered into out of the Colony only holds good between parties resident in the Colony, for a like term, from the commencement of the service.<sup>3</sup>

A contract, either verbal or in writing, the terms of which have not been expressly limited, is, in the absence of proof to the contrary, taken to be for the term of one month only from its commencement.<sup>4</sup>

An exception to this rule exists with reference to contracts for service in any trade or handicraft, such as in that of a carpenter, a mason, or a shoemaker, where the party employed does not reside on the premises of the master; in which case a contract of service, where no term has been expressly stipulated, is deemed to

<sup>1</sup> Act No. 15, 1856, Chap. 2, Clause 3. <sup>2</sup> Chap. 2, Clause 4.

<sup>3</sup> Chap. 2, Clause 5. <sup>4</sup> Chap. 2, Clause 2

endure only until the night of the Saturday of the week in which such contract is made and such service commences.<sup>1</sup>

Further, contracts for piece-work are not to be considered as monthly contracts, but if the work be not finished within a reasonable time, the master has it in his power to put an end to such contract.<sup>2</sup>

All engagements of service, therefore, for any longer period than one year, must be executed by both parties in the presence of a Magistrate, who has the power, as will be seen hereafter, of cancelling such contract at any time, if he shall see fit, on the complaint of either of the parties thereto. [For form of contract, see Appendix.]

In the absence of any stipulation to the contrary, a month's notice on either side is requisite in cases of service from month to month, or for a longer period; and a week's notice in cases where the service is weekly. Such notice to be calculated from and inclusive of the day of giving such notice.<sup>3</sup>

Where no such notice has been given by either party, the master has it in his power to withhold from the servant any amount that may be due to him, not exceeding one month's wages (in case of monthly service, and a week's in case of weekly service), calculated up to the day of his quitting his master's service without proper cause; and on the other hand, the servant may claim from his master a month's (or a week's, in case of weekly service,) wages in lieu of notice, subject, however, in both cases to certain conditions which will be hereafter alluded to in treating of the respective remedies of masters and servants.

Notice already given may be rendered invalid either by the master suffering the servant to remain in his employ after the time mentioned in the notice, or by

<sup>1</sup> Chap. 9 Clause 2      Chap. 2 Clause 9      <sup>2</sup> Chap. 9 Clause 7

the servant voluntarily remaining after the expiry of notice given by him.<sup>1</sup>

When a servant is engaged to reside on his master's premises, the latter is bound to provide food and lodging (if there be no stipulation to the contrary) both for the servant and such of his family as shall have been included in the contract.<sup>2</sup>

In case of an action being brought by a servant against his master for wages due and payable by virtue of any contract of service, and when the rate of wages at which such contract was made is not proved to the satisfaction of the Magistrate, it is the duty of such Magistrate to fix the wages at that rate which is usually paid at the place in which the services were performed—due regard being had to the skill and ability of the servant.<sup>3</sup>

In case of sickness or accident, not occasioned by his own fault, befalling a general or domestic servant, and rendering him incapable of performing his master's work, the master is bound to pay him his full wages for the first month of such incapacity, and the servant is also entitled to every other benefit stipulated for in his contract during the whole period of such incapacity up to two months, unless the contract should previously expire by the effluxion of time. At the expiry of two months, however, the master may put an end to the contract, but should he not elect to do so, the servant can only claim one month's wages as aforesaid.<sup>4</sup> This applies to general and domestic servants only, but servants hired by any contract to perform service in any trade or handicraft, becoming incapacitated by reason of sickness or accident, cannot claim wages during such incapacity, although they are entitled to board and lodging (if provided for in the contract) for the term of one month, at the expiry of which period the master has it in his power to rescind the contract.<sup>5</sup>

<sup>1</sup> Chap. 2, Clause 8. <sup>2</sup> Chap. 2, Clause 9. <sup>3</sup> Chap. 2, Clause 10.

<sup>4</sup> Chap. 2, Clause 11. <sup>5</sup> Chap. 2, Clause 11.

All contracts for the services of families must be made by the father or husband, as the case may be; and when such contracts are in writing, the name and age of every child must be set forth.<sup>1</sup>

When it is agreed that a servant is to reside on his master's premises, he is not allowed to keep his wife and family there, unless this is stipulated in the contract; nor does such stipulation, on the other hand, give the master a right to avail himself of the services of such wife or family of his servant.<sup>2</sup>

On the death of any servant who, together with his wife and family, were under contract, such contract becomes void in respect of the wife and family, at the expiry of one month from the death of such servant.<sup>3</sup>

## SECTION II.

### *Apprenticeship of Minors.*

Minors may be apprenticed by their parents or guardians by Articles of Apprenticeship, and such articles must be duly executed in writing by the master, and by the parent or legal guardian of the minor, and also by the apprentice, if of the full age of 16 years.<sup>4</sup>

No minor under 16 years of age, if a female, and under 18, if a male, can be apprenticed as an agricultural labourer or domestic servant for any longer period than until the minor shall have attained the age of 18, if a male, or 16 if a female; but children between the ages of 10 and 16, may be apprenticed to any trade or calling other than those above mentioned, until they attain the 21st year, or for any shorter period.<sup>5</sup>

In all articles of apprenticeship due provision must be made for the proper maintenance, clothing, and instruction of the apprentice.

<sup>1</sup> Chap. 2, Clause 12.    <sup>2</sup> Clause 14.    <sup>3</sup> Clause 13.  
<sup>4</sup> Chap. 3, Clause 1.    <sup>5</sup> Clause 8

Children under 10 years may also be apprenticed, but in this case the articles of apprenticeship must be executed before a Magistrate, and bear his attestation that the contract appears to be for the benefit of the child.<sup>1</sup>

With his own consent, but not otherwise, any minor of the full age of 16 years or upwards, may be apprenticed for any term not exceeding five years, to any trade in the practice of which peculiar art or skill is required. With their own consent, also, females above 16 may be apprenticed to domestic service for five years, or any shorter period.<sup>2</sup>

A master cannot assign an apprentice against his will, and (as will be seen hereafter) the apprenticeship is determinable by the death or insolvency of the master (subject, however, to the reservation that his widow may adopt the contract); but if the apprentice serve the assignee or representative of his master, with the consent of the parties, such service will be considered as a continuation of the original apprenticeship.

### SECTION III.

#### *Apprenticeship of Destitute Children.*

The Resident Magistrates of the Colony are, *ex officio*, guardians of all minors having no parents or guardians within the Colony, or none discoverable, and such Magistrates may, in their capacity as guardians, indenture such minors. Due provision must be made in the articles of apprenticeship for the maintenance, clothing, and wages of the apprentice.<sup>3</sup>

The contract of apprenticeship of destitute children must be drawn up in the form provided by the Act, in triplicate; one of which must be given to the master,

<sup>1</sup> Chap. 3, Clause 3    <sup>2</sup> Clause 4    <sup>3</sup> Chap. 3, Clause 5.

one to the apprentice, and the third registered in the office of the Magistrate by whom it is attested.<sup>1</sup>

The master of a destitute child cannot transfer or assign his apprentice without the consent in writing of the Magistrate, and, in case the apprentice be above the age of 16, without the consent of such apprentice himself.

#### SECTION IV.

##### *Dissolution of Contracts.*

Contracts of service, except in such cases as are hereafter mentioned, terminate after the expiration of one month from the day of the death or declared insolvency of the master. The servant can claim full wages up to that period, as well as all other benefits he may be entitled to by the terms of the contract; but at the same time he is obliged to continue in the service for that period, if so required by the representative of such master.<sup>2</sup>

An apprenticeship also terminates on the death or insolvency of a master, and if any sum of money have been paid as premium, a reasonable proportion of it may be recovered from the legal representatives of the master. Further, every apprentice is entitled to all wages due and owing to him at the time of the dissolution of the contract.<sup>3</sup>

The widow of any deceased master is entitled, however, to claim the services of any servant or apprentice contracted or bound to her husband, during the full period of the stipulated term of service or apprenticeship, provided that she consent to adopt the contract and perform all the stipulations in favour of the servant or apprentice that the master was bound to perform.<sup>4</sup>

<sup>1</sup> Chap 3 Clause 9. <sup>2</sup> Chap 4, Clause 1. <sup>3</sup> Clause 2 <sup>4</sup> Clause 4.

Where the contract of service is, by mutual consent of both parties, dissolved, the servant is entitled to a *pro rata* compensation for his services, and in the event of any servant or apprentice dying during the term of his service, his legal representatives are entitled to claim from the master full wages for the period which he had served previous to his death.<sup>1</sup>

Contracts of service or apprenticeship are also dissolved in cases of servants or apprentices not residing on the premises, by the removal of the master out of the town to any greater distance than two miles from such town, unless with the consent of the servant, or of the parents or guardians of the apprentice.

In cases where the servant or apprentice is contracted to reside on the premises of the master, he is not compelled to remove out of the district in which the town or place where he was contracted to perform service is situated.<sup>2</sup>

Masters of destitute children may, however, take them to any part of the Colony, upon giving notice of their intention to do so to the Magistrate of the district which they are about to leave; and it is the duty of the Magistrate to endorse the same on that part of the contract which is filed with him, and forward it to the Resident Magistrate of the district in which the master intends to reside.<sup>3</sup>

No servant can be compelled, against his consent, to accompany his master out of the Colony; nor can any apprentice without the consent of his parents or guardians, and, if of the age of sixteen years, his own consent also.<sup>4</sup> On the removal of a master as aforesaid, the servant is entitled not only to the cancellation of the contract, but to a month's wages also, unless notice has been previously given by the master, in which case wages can only be claimed up to the expiration of such notice.<sup>5</sup>

In the event of the marriage of any female servant during her term of service, her husband may at once dissolve the contract, and claim all wages due to her; but, at the same time, the husband is liable to the master in damages which the master may have sustained by the removal of his servant, such damages, however, not to exceed the amount which the servant would have earned from the time of her marriage to the expiration of the term of her contract had she continued in her master's service.<sup>1</sup>

A master also has the power of dissolving a contract on the marriage or pregnancy of any female servant residing in his house, on his paying her the full amount of wages due to her up to the date of such dissolution; and, in the case of a servant not residing on the premises, the master can dissolve the contract whenever the servant shall, by reason of her pregnancy or delivery of a child, become incapacitated to perform the service she has contracted to do.<sup>2</sup>

A servant is bound to obey all the just and lawful commands of his master, and to do with diligence and care his proper and appointed work, as well as to behave with decency and in a manner consistent with his station as a servant. He is not bound to risk his safety in the service of his master, but mere inconvenience to the servant will not justify him in refusing a command, and he cannot be permitted to control his master in domestic regulations.<sup>3</sup>

Again, if the master refuse the servant leave of absence, the servant is not justified in absenting himself; but a temporary absence without leave, when it was not expressly forbidden and produced no serious inconvenience to the master, has been held not to amount to such a disobedience as to justify dismissal.

<sup>1</sup> Chapter 4, Clause 12.      <sup>2</sup> Clause 13.

<sup>3</sup> *Story on Contracts*, Sec. 962 r

## SECTION V.

*Remedies of Masters.*

In all matters of dispute arising between a master and his servant or apprentice, the Resident Magistrates of the Colony are empowered to act, and may imprison, for any period not exceeding a month, a servant or apprentice, above the age of 16 years, for any of the following acts of misconduct, viz. :—

1st. Failure to commence service at the stipulated time.

2nd. Absenting himself from his master's premises without leave.

3rd. Intoxication.

4th. Negligence in the performance of his work.

5th. Making use of his master's horses or other property without leave. .

6th. Refusal of duty.

7th. Creating a disturbance, and continuing such when desired to desist.

8th. Using abusive language to his master, or to any one in authority over him.<sup>1</sup>

And in case of conviction for any of the following acts or instances of misconduct, it is in the power of a Magistrate to imprison a servant or apprentice, above the age of 16 years, for any period not exceeding two months, viz.:—

1st. Wilful injury or risk to property placed in his charge.

2nd. Wilfully refusing or omitting to do any lawful act for the safety of any property placed in his charge.

3rd. If the servant be a herdsman, failure to report the death or loss of stock in his charge, or to preserve any parts of the dead animals that he may have been

<sup>1</sup> Chapter 5, Clause 3.

directed to preserve, or wilfully allowing animals to stray or become irrecoverably lost.

4th. If, other than a herdsman, alleging the loss of property placed in his charge, when such loss was occasioned by his own act or default.

5th. Assaulting his master, or any of his master's family, or his fellow-servants ; and

6th. Desertion.<sup>1</sup>

Apprentices to the medical or legal professions, or to any merchant or dealer, and apprentices who have paid a premium of £5 or upwards, are not included in the above.<sup>2</sup>

Imprisonment does not of itself put an end to the contract of service or apprenticeship ; but the Magistrate, before whom the conviction is obtained, can, if he see fit, cancel the contract at the master's request.<sup>3</sup>

Upon the expiration of his term of imprisonment, the servant is bound, provided the contract is not cancelled as above, to resume his service, and, in case of refusal may be sent back to prison for any period not exceeding a month, and so on for successive periods (of a month each) up to six months, until he consent to resume his service under contract.<sup>4</sup>

Any term of imprisonment that a servant or apprentice may undergo under the Masters' and Servants' Act, is to be added to the term of his contract, and when convicted of desertion, the period of his absence is also to be added.<sup>5</sup>

A Magistrate has also the power of ordering compensation to be made out of the servant's or apprentice's wages, where it is proved that damage or loss to a master has been caused by means of any act or omission on the part of a servant or apprentice which constitutes an offence under this Act. Should, however, a master bring a groundless accusation against his

<sup>1</sup> Chap. 5, Clause 5      Clause 8      <sup>2</sup> Clau c 11      <sup>4</sup> Claus 1  
<sup>3</sup> Clauses 11 and 16

servant, the Magistrate before whom the charge is brought, may, if he think fit, at the request of the servant, cancel the contract.<sup>1</sup>

Any master having any complaint against his servant or apprentice may order him to appear before the Magistrate of the district, and in default of the servant's or apprentice's appearance, and upon proof of such order, a warrant is to be issued for his apprehension; and should a master order his servant to appear before a Magistrate and then make default himself, he is liable for the expenses of the servant and his witnesses.<sup>2</sup>

## SECTION VI.

### *Remedies of Servants.*

Servants and apprentices may recover wages by civil action, and any Magistrate before whom such an action is brought, if it be made to appear that the master has without reasonable cause withheld payment, may inflict on the master a penalty of not less than One Pound sterling, or more than Five Pounds.<sup>3</sup>

A servant may, by action, compel his master to deliver up any stock, the property of the servant, that may be running on his master's farm, and the master, if he refuse without just cause to deliver up such stock, is liable to a penalty not exceeding One Pound sterling for every animal detained, such penalty, however, not to exceed the sum of Five Pounds in all.<sup>4</sup>

A servant or apprentice has also a right of action against his master, for breach of contract, in the event of the master not supplying him with the food, lodging, &c., stipulated for in the contract, and in case judgment is given in favour of the servant or apprentice, it is in

<sup>1</sup> Chap. 5, Clauses 13 and 15. <sup>2</sup> Clauses 16 and 17. <sup>3</sup> Clause 20.

<sup>4</sup> Clause 21.

the discretion of the Magistrate to inflict a fine on the master not exceeding Five Pounds, and not less than Ten Shillings, and further, if desired by the servant or apprentice, to cancel the contract.<sup>1</sup>

It is also in the power of a Magistrate to cancel the contract when a master is convicted of an assault on his servant or apprentice.<sup>2</sup>

In all cases of informations being laid by masters against their servants or apprentices, or *vice versa*, no costs are allowed, except when it shall appear that the complaint is without reasonable cause, in which case the party complaining is liable to a fine not exceeding Five Pounds sterling, and the costs of the process and witnesses.<sup>3</sup>

When a servant is desirous of instituting a civil action against his master, and has not the means of paying the costs of the process, the Magistrate may cause the summons to be issued at the public charge.<sup>4</sup>

In all cases of appeal from the decision of a Magistrate respecting the relative rights and duties of master and servant, the Attorney-General, if in the Supreme Court, or, if brought before any Circuit Court, the Clerk of the Peace of the district, is bound to appear and conduct the case of the servant or apprentice free of charge, and in the latter case the presiding Judge is empowered to assign counsel to act gratuitously for such servant or apprentice.<sup>5</sup>

## SECTION VII.

### *Characters.*

No master is bound either to give a servant a character, or to assign a reason for refusing, but a master giving a false character to a servant is liable in damages

<sup>1</sup> Chap. 5, Clauses 22 and 23.   <sup>2</sup> Clause 24   <sup>3</sup> Clause 25  
<sup>4</sup> Clause 26   <sup>5</sup> Clause 27

to any third person who may have suffered loss by taking the servant into his employ on the faith of such character. He is also liable to an action by the servant if, from malicious motives, he gives him a false character.<sup>1</sup>

If, however, in giving a servant a character, a master speak disparagingly, or state what is prejudicial to the servant, he will not be liable unless his statement can be proved to be not only false but malicious. The presumption is that he states what he believes to be true, and the burden is on the servant to prove that he has spoken falsely and maliciously.

Any person forging a certificate of character for a servant, or any servant offering himself for hire with a forged character, is liable to a fine not exceeding £50, or less than £10, or imprisonment for any term not exceeding a year, or less than a month, or to both fine and imprisonment.<sup>2</sup>

<sup>1</sup> Chap. 6, Clauses 1 and 2. <sup>2</sup> Chap. 6, Clause 3.

## CHAPTER IV.

### POUNDS AND TRESPASSES

THE rights of owners and occupiers of land in this Colony, in respect of the impounding of animals trespassing on their property, are laid down in Ordinance No. 16 of 1847, which has subsequently been amended by Acts No. 1 of 1857, and No. 21 of 1867, which place Pounds under the control and direction of Divisional Councils.

The Ordinance No. 16, 1847, provides a summary remedy for trespasses similar to that in England, and is applicable to all trespasses of cattle, &c., throughout the Colony, with the exception of those which may take place within the limits of a Municipality, in which case the Pounds are subject to, and under the control of, the Municipal Commissioners or Borough or Town Council, who make their own Pound regulations.

It is, perhaps, unnecessary to observe that, in order to entitle a land-holder to the benefit of this summary remedy, he must actually find the cattle in the act of trespassing. He cannot seize, off his premises, animals which he presumes have committed damage, nor can he impound animals one day for a trespass committed on the previous day. Neither can he claim damages, when he has legally impounded cattle, for some trespass committed on a former occasion.

A Civil Commissioner, with the advice and consent of the Divisional Council, can establish and abolish Pounds, and Divisional Councils are charged with the complete

supervision, control, and management of those Pounds—not being within Municipalities—in their respective Divisions. The circumstances under which a landlord has a right to impound, together with his claim for damages, and method of ascertaining the same, will be found laid down in the following remarks, under their respective titles, commencing with the duties of the Poundmasters as regards cattle and stock placed in their custody.

## SECTION I.

### *Duties of Poundmasters.*

A poundmaster must receive into his charge all horses, horned cattle, sheep, goats, and pigs, tendered between sunrise and sunset by any owner of fixed property, or person authorised thereto in writing by such owner. Penalty for neglect, a fine not exceeding Five Pounds, and the damage that may be sustained by refusal. A receipt or certificate must be given by the Poundmaster, stating the number and description of animals, and specifying the alleged trespass. Each note or memorandum concerning impounded animals must be carefully retained by the Poundmaster, and he must keep a book in which the contents of his certificates must be entered. The following are the requisites of the Pound-book:—It must contain (1) the date in which any animals shall have been received; (2) a description of the animals in such a manner as to enable persons seeking strayed or missing cattle to identify them; (3) the names and residences of the persons who have sent the animals, and also those of the owners, or supposed owners; (4) dates of release; (5) dates and particulars of sales; and (6) any other matters which the Poundmaster is instructed by the Divisional Council to ascertain and record. This Council has also the power to fix the form in which all entries are to be made. The

Pound-book must be kept at the Poundmaster's residence, and may be inspected by any person, at all reasonable hours, upon the payment of a fee of sixpence. The Poundmaster is bound to furnish certified copies of entries, upon the payment of a shilling fee for each entry. Copies of the entries in the Pound-book must be sent to the Divisional Council at such periods as they may fix, in order to be conveniently preserved for inspection. Penalty for a wilfully erroneous entry in the Pound-book, a fine not less than five pounds, and not exceeding twenty-five pounds. The Pound-book must be taken to every Pound Sale for the free inspection of the public.<sup>1</sup> A Poundmaster is bound to keep sufficient kraals<sup>2</sup> and enclosures in good repair; to cause the animals to be turned out to graze not later than an hour after sunrise; to keep a sufficient number of herdsmen; and generally to sustain all charges of impounded animals, and take proper care of them until they be released or sold. If he ride, drive, or otherwise work any of the impounded animals, he subjects himself to a fine of five pounds. When any animal shall die or be injured from intrinsic causes or unavoidable accident, the Poundmaster must enter in his Pound-book a description of the animal and the cause of death or injury.<sup>3</sup> If a wilfully untrue entry, or none at all, be made, the Poundmaster is to be held responsible for the loss or damage. In case impounded animals are affected with any contagious disorder, or be found dangerously furious and ungovernable, then the Poundmaster can call in the nearest Justice of the Peace, or, in case he be absent or reside more than twelve miles away, then the nearest Field-

Ordinance No. 16, 1847, Sec. 15 and 16. Act No. 1, 1857.

<sup>1</sup> Three separate kraals for horses, horned cattle, sheep, goats, and pigs, respectively, are prescribed; but Divisional Councils have power to dispense with the necessity when they see good reason to do so.

<sup>2</sup> Ordinance No. 16, 1847. Section 10

cornet: if this latter officer be absent, or reside more than six miles distant, two disinterested landowners are to be called in.<sup>1</sup> If it be agreed that an animal is to be destroyed, double the usual tariff rate of horse-hire is payable to the party or parties called in as referees—recoverable from the owner. If the animal be not destroyed, or the owner cannot be found, horse-hire at single tariff rates is recoverable from the Colonial Government. When the owner is known, a summons to the examination must be served upon him, for the serving of which the Poundmaster is entitled to horse-hire from the owner at the usual tariff rate. If the owner attend the inspection, and object to the destruction of the animal, he is entitled to release it from the Pound, but must at the same time, if he have any other animals in the Pound, release them also. No examination can be called in regard to sheep and goats affected merely with *brandziekte*, or goats with scurvy, and such animals cannot be destroyed except with the owner's consent.

Poundmasters are prohibited from impounding any animals found trespassing upon their own property, but must send them to the nearest Pound, where this shall be less than twenty-five miles distant, placing a memorandum in the Pound-book, stating the number and description of the animals so sent. Penalty for confining any animal, or omitting to make a memorandum, contrary to the provisions just stated, a fine not exceeding ten pounds, and not less than two pounds.<sup>2</sup>

When the owner of impounded cattle is known to the Poundmaster, he can send written notice to him, and recover horse-hire at tariff rates, if this notice have not been sent till forty-eight hours after the animals have been impounded.<sup>3</sup>

Animals impounded more than ten days must be advertised—with their full description—as to be sold at

<sup>1</sup> Ordinance No 16, 1847, Sec 11    <sup>2</sup> Sec. 12    <sup>3</sup> Sec. 13

the next ensuing sale of impounded cattle. Sales are to be held, as near as may be, every six weeks, and Divisional Councils fix places where, and times when, they are to take place, as well as the newspapers in which advertisements must appear. Poundmasters can act as auctioneers without a licence, but cannot purchase, or be directly or indirectly interested in any purchase, under a penalty not exceeding twenty-five pounds, or less than ten pounds.<sup>1</sup>

Sales must be held between the hours of 10 a.m. and 3 p.m., and no animal can be put up for sale until it shall have been impounded for five weeks, unless the owner's consent has been obtained. All animals must be sold singly, except sheep and goats, which are to be put up in lots not exceeding ten in number. Sheep and goats are not to be put up together in the same lot, nor sheep or goats with different marks or brands. In case of contravention of these provisions, the Poundmaster who shall have sent to the sale the animals regarding which the illegality has occurred, becomes liable to a fine not exceeding ten pounds, and also to pay to the owner of the animal sold its full value. Pound sales must be for cash, and the proceeds handed over to the Divisional Council.<sup>2</sup>

A Poundmaster must be careful not to release any impounded animal until the amount for trespass and damage due be paid, otherwise he becomes responsible for the amount; at the same time he cannot detain for fees, &c., more animals than may reasonably be expected to realise the amounts due at auction. A person illegally impounding cattle is liable to the owner in damages, and to a fine of two shillings for each horse or head of cattle so impounded.<sup>3</sup>

<sup>1</sup> Ordinance No 16, 1847, Sections 18 and 22. \* Section 23

<sup>2</sup> Section 36 and Section 9.

## SECTION II.

### *Furious Driving and Rescue.*

If any person furiously drive, worry, starve, or wantonly ill-treat, any animal found trespassing, or conduct it to the Pound by any route except the nearest one, (unless some other be more desirable for the animal, or has to be taken to avoid standing crops), or separate any animals found trespassing, in order to send them separately to the Pound, and so obtain greater mileage, such person becomes liable to a fine not exceeding five pounds and also to make good the damage caused.<sup>1</sup>

Any person, either rescuing, or attempting to rescue, impounded animals, or animals seized in order to be impounded, is liable to a penalty not exceeding ten pounds ; molestation of animals on their owner's land is punishable by a fine not exceeding ten pounds.<sup>2</sup>

## SECTION III.

### *Trespass in Enclosed and Unenclosed Property.*

Any person finding any horse, head of horned cattle, sheep, goat, or pig, trespassing in his grounds, may send the same to the nearest accessible Pound, except the animal trespassing belong to the Poundmaster, or to any person residing or having the right to graze such animal upon the Poundmaster's land, in which latter case the other nearest Pound (if not more than fifteen miles farther off) must be chosen. If any person by himself, or his servants, rides or otherwise works or uses any animal found trespassing, or detains it at his place more than twenty-four hours, he is liable to forfeit a

<sup>1</sup> Ordinance No. 16 1847, Sec 30    <sup>2</sup> Sections 31 and 49

sum not exceeding ten pounds, to be recovered for his own use by the owner of the animal detained. In cases where animals are found trespassing on outspan places or at public dams, they may be sent to the nearest Pound by order of any Magistrate, Justice of the Peace, Fieldcornet, or member of Divisional Council. In cases of trespass at public dams or tanks, the duty of impounding rests with the person in charge. Where trespass has been twice or oftener committed within three months, the owner of the animals is liable to a fine not exceeding five pounds over and above all other fees and charges.<sup>1</sup>

#### SECTION IV.

##### *Trespass Money, Mileage, and Fees.*

For trespass in any garden, vineyard, or enclosure, or on cultivated land on which any crop is growing, or cut but not removed, or in any enclosed place containing grain, the owner is bound to pay one shilling and six-pence for each of his horses, horned cattle, pigs, or goats, so trespassing, and one penny for every sheep, exclusive of all Pound fees and other charges. When animals are sent to the Pound for such trespass, the person sending them must transmit to the Poundmaster a note in writing, signed by himself or his own agent or caretaker, stating the nature of the trespass and the number and description of the animals which committed it, as well as the amount of damage to which he is entitled. When the owner or occupier of the property trespassed upon personally brings the animals to the Pound, his verbal statement is sufficient, and must be recorded. If no note or verbal message be given, to the effect that trespass has been committed, then the animals shall be considered impounded for the ordinary trespass on uninclosed property.<sup>2</sup>

<sup>1</sup> Ordinance 16, 1847, Sections 25—8   <sup>2</sup> Section 32.

Whenever animals are found trespassing on property other than that already described, trespass money is payable at the rate of four-pence for every horse, head of horned cattle, pig, or goat, and one half-penny for each sheep, not exceeding three hundred, and a farthing each when there is a greater number.<sup>1</sup>

For a repetition of trespass within fourteen days, double mileage and trespass money is payable.<sup>2</sup>

A person, upon whose enclosed ground animals have trespassed, has a right to refer his claim for damage to the arbitration of the nearest Fieldcornet and two land-owners, one of whom is to be chosen by himself, and the other by the owner of the animals, if he be known, and willing to nominate; if not, the Fieldcornet must appoint the other. In cases of this description, the Fieldcornet must be informed of the trespass within twenty-four hours, and must then fix a convenient time for inspection. Award must be in writing, signed by two out of the three referees, and transmitted to the Poundmaster. Fees of referees, 7s. 6d. each. Costs to be paid by the owner of the animals when the damage assessed exceeds the tariff rate; otherwise by the complainant.<sup>3</sup>

*A Poundmaster is liable for fees, charges, and damages, if he deliver up impounded animals before these are paid.<sup>4</sup>*

Divisional Councils have the power of fixing the tariff for trespasses on inclosed property, but cannot establish any rate higher than three shillings for any animal other than a sheep, or three pence for any sheep.<sup>5</sup>

In cases of trespass by diseased sheep or goats, the damages payable are double. Where such diseased animals are found mixed with sheep or goats belonging to other people, the damages are fourfold; and whoever wilfully drives such diseased animals upon land where there are sheep and goats of another free from disease,

<sup>1</sup> Ord. 16, 1847, Sec. 33.   <sup>2</sup> Sec 34.   <sup>3</sup> Secs. 32, 41, and 42

<sup>4</sup> Sec 35   <sup>5</sup> Sec 35, and Act No 1, 1857