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A SURVEY OF LAWS AFFECTING FARM TENANCY IN NORTH DAKOTA

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INTRODUCTION

Rising land values, greater mechanization of the farming operation, the resulting growth in the average size of the farm and in increased complexity of the farming operation in the past several decades have seriously challenged long-standing farm institutions. Among these is the familiar farm-tenancy arrangement. Although there has been a marked decline in rented farms in the United States and in North Dakota in the past several decades,[1] there has been a homologous increase in the size of these farming units.[2] Quite often these farm-tenancy arrangements are based on obsolete pre-world War I customs and practices and are oral, ambiguous and incomplete. It is not surprising that discussion with lawyers, county farm agents, agricultural economists, bank officers and the parties themselves, reveal a multitude of misunderstandings between farm landlords and tenants.

Before these recurring disputes can be solved it is essential to know the precise legal status between the parties. Usually the answer to this basic proposition will also entail the solution to such diverse problems as rent disputes, crop ownership of or reimbursement for improvements and fixtures, existence and priority of liens, the right to social security coverage and other similar problems.

It must be realized that the answers supplied by law will usually yield to the express terms of the agreement between the parties. It

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1. See generally, *Statistical Abstract of the United States*, U. S. Government Printing Office (1959), especially Table 824 at 626 entitled "Farms—Number, by Color and Tenure of Operator, With Acreage and Value by Tenure of Operator: 1910-1954" and Table 825 at 627, entitled "Farms—Number, by Tenure of Operator: 1950 and 1954 (the last year for which complete figures are available); there were 61,808 farm operators of whom tenants numbered 12,758 or 20.6% of the total number of farm operators. The breakdown of farm tenants is as follows:

Cash tenants	634
Share cash tenants	3,086
Share tenants and croppers	8,301
Other & unspecified tenants	737

Agricultural Census, U. S. Government Printing Office (1954) Table 3 at 9.

2. The average farm acreage in North Dakota was 512.9 acres in 1940, 629.9 acres in 1950 and 676.1 acres in 1954. *Statistical Abstract of the United States*, U. S. Government Printing Office (1959).

is an unfortunate, but true, observation, that only rarely do the parties to the agreement intially attempt in their agreement to anticipate the manifold and diverse problems which may arise during the term of the agreement. Moreover, since farm tenancy arrangements are usually oral, honest nuances may arise concerning the explicit terms of the arrangement.

All of this coalesces to make farm tenancy agreements a fertile source of disputes, the final determination of which ultimately depends upon various rules and criteria seldom known by the parties to the agreement at the time the arrangement was created. The purpose of this article is an attempt to analyze the enigma of the farm tenancy agreement and to impart a clearer understanding of the legal nature and effectiveness of agreements between farm landlords and tenants in North Dakota, and of the rights and duties of each.

THE NATURE OF THE RELATIONSHIP AND ITS CREATION — NEED FOR A WRITTEN LEASE

> "The law concerning landlord and tenant is as old as civilization itself. It came into existence in the infancy of civilization, and has become by gradual accretion of new rights, privileges, and principles, during the centuries of its development to be considered as one of the most momentous, extensive and far reaching branches of the law."[3]

The North Dakota Century Code defines leasing as follows: "Leasing is a contract by which one gives to another the temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time."[4] This succinct statement fails to put one on notice of all the possible complexities which can and do arise under a lease of agricultural land.

A lease is more than a mere contract; it is an existing legal condition which gives rise to a legal relationship, that of landlord and tenant. Normally this relationship is created by reason of an agreement, either express or implied, between two persons one of whom is a landowner and the other is a person who is desirous of obtaining the use and possession of specific land.[5] The terms of this agreement, is one form or another, usually allow the lessee to occupy the lands of the lessor in subordination to his title and with his consent.[6]

3. Minneapolis Iron Store Co. v. Branum, 36 N.D. 355, 162 N.W. 543 (1917).
4. N.D. Cent. Code § 47-16-01.
5. See note 3, *supra*.
6. Wood v. Homelvig, 68 N.D. 735, 238 N.W. 278 (1938). The court spoke thusly: "The rule is well established that the relation of landlord and tenant exists where one person occupies the premises of another in subordination to that others title and with his consent.

Without such a contract or agreement the relationship of landlord and tenant can not exist.[7] No particular form of words is necessary to create a tenancy, but any words which show an intention on the part of the landlord to divest himself of the possession and use of the land and confer it on another will be sufficient.[8] Additionally the fact that two parties to a contract term it a lease, does not, in effect, make the written instrument a lease; the instrument must establish it's own character by its terms and conditions.[9] Usually the courts will look to the intent of the parties in determining whether or not a particular contract is a lease.[10]

Any person, who under the laws of North Dakota may contract, in any form or capacity, may enter the landlord tenant relationship. There is but a single limitation to this rule. Corporations, other than cooperatives having seventy-five per cent of their members residing on farms or depending principally on farming for their livelihood, may not engage in farming for a period longer than ten years following the date of their acquisition of any land.[11]

Under existing statutory provisions a tenant or lessee, has an interest in the land, which, technically is an estate in the land and is legally protectible as an estate in the land.[12] The early case of *Angell* v. *Egger*[13] adopted the somewhat archaic rule that a tenant, under a crop share agreement, if the title to the crops was to be reserved in the landlord, was a mere servant of the landlord. The impetus for this rule was the reasoning by the court that were the farm operator considered a tenant, the court would be constrained to hold that the title to the crops was vested in him.[14] The court stated: "True it is that, when the contract is silent touching the title to the product of the land, it becomes necessary to ascertain the exact character of the agreement so far as the land is concerned; for

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7. Lovig v. Grovom, 69 N.W.2d 800 (N.D. 1955).
8. See note 6 *supra*, at 282.
9. State v. Hall, 25 N.D. 85, 141 N.W. 124 (1913).
10. See Moen v. Lillestal, 5 N.D. 327, 65 N.W. 694 (1895).
11. N.D. Cent. Code § 10-06-04 an initiated measure, approved June 29, 1932. Held constitutional in Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943). See also McElroy, *North Dakota's Anti-Corporate Farming Act.*, 36 N.D.L. Rev. 96 (1960).
12. N.D. Cent. Code § 47-04-03.
13. Angell v. Egger, 6 N.D. 39, 71 N.W. 54 (1897) wherein the court said: "He who owns land may certainly reserve to himself any interest therein, or in the produce thereof, he sees fit to reserve, provided the other party to the contract assents to such reservation. There is nothing in the law to prevent a lessee from agreeing that he shall own none of the crops. He may even make an improvident agreement, and give everything raised on the land as a consideration for the right to occupy it. So he may agree that the title to all crops shall remain in the lessor until the happening of a certain event. Such contracts are not opposed to any principle of law and should be enforced according to their terms."
14. N.D. Cent. Code § 47-16-04.

upon the answer to this inquiry depends, in such a case, the issue of title to the crops. If the contract constitutes a lease, or in other words, a transfer of an interest in the land for a specific period, it follows that the title to all crops is in the lessee, for a grant carries with it as an incident the right to the full enjoyment of the thing granted. One who buys the right to use real property for a certain term secures all the rights of the owner to make a profit of it by its reasonable use. If, on the other hand, the agreement does not vest any interest in the land in the one who is to farm it, but he is a mere servant of the owner, the title to the crops is, in the absence of an agreement to the contrary, in the owner. The other party to the contract, not being invested with any interest in the real property, cannot, without expressed agreement to that effect, have any interest in the produce thereof."[15]

After a series of decisions in accord with this rule,[16] the Supreme Court of North Dakota expressly overruled the servant theory. In *Minneapolis Iron Store Co. v. Branum* [17] the court reconciled the problem in this manner; "We think that where one, the owner of land, leases the same to another for a certain period of time and puts the other in possession and control of the work, that in such case the relation of landlord and tenant exists, the tenant acquires an estate for years in the land, and the owner of the land and the tenant are really tenants in common of the crop. This, notwithstanding; any provision in the lease, vesting the title and ownership of the crops in the landlord until division; the clause being held, when construed in connection with all other provisions of such contracts, as being merely one for security."[18] This viewpoint is an expression of the current North Dakota law.

The law does not require that a lease contract be written; it may be either written or oral. However should a dispute arise, a written lease is certainly more expedient and will prove to be a definite boon to both parties. A written lease contains the agreement of the parties, it sets forth their rights and obligations and states the time for which the land is to be leased. Under an oral lease these stipulations and provisions will be determined by reference to common law and local custom. Should a dispute arise and both sides enter

15. Angell v. Egger, *supra* note 13, at 397.
16. Bidgood v. Monarch Elevator Co., 9 N.D. 627, 84 N.W. 561 (1900); Aronson v. Oppegard, 16 N.D. 595, 114 N.W. 877 (1907); Wadsworth v. Owens, 21 N.D. 255, 130 N.W. 932 (1911); Hawk v. Konouzki, 10 N.D. 37, 84 N.W. 563 (1900).
17. 36 N.D. 355, 162 N.W. 543 (1917).
18. *Id.*, at 550.

testimony; the decision must then be left to a jury.[19] Certainly it is more prudent and wise to have one's rights and obligations clearly delineated than to gamble them at the whim and caprice of a jury or have them decided by the hoary precedents of common law.

There is another major disadvantage in the use of an oral lease. The North Dakota Statute of Frauds provides that an unexcuted oral lease for a period of longer than one year is invalid.[20] The general rule is that a parol agreement for the leasing of land for a period of longer than a year does not become executed and therefore is not valid until the tenant actually goes into possession.[21] This gives rise to an inherent danger not usually recognized by the parties to a leasing agreement. An example is an oral lease, for a year, made during the winter, (a common practice), where the parties agree that possession is to commence in March. This is a contract which obviously cannot be performed within a one year period. Thus the period of time between the agreement and the possession is a definite hazard to both landlord and tenant, as each party has the legal right to renege the contract at any time before the tenant assumes actual possession of the property. At the moment the tenant, with the landlord's consent, enters into possession of the property, the obligation becomes binding and the Statute of Frauds does not apply.[22] Until that time there is no legal assurance to either landlord or tenant that the other party will discharge his part of the bargain. The use of a written lease in every land tenancy will eliminate this hazard and insure to each party a fair and equitable remedy in the event that the other party in some manner transgresses the terms of the lease.

TYPES OF FARM LEASES

Leasing is defined in North Dakota as "a contract by which one gives to another the temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time."[23] Types of farm leases vary from one geographic area of the country to another, in the same manner as types of farming, conditions of farming and farming customs and methods. In North Dakota four basic types of lease agreements are frequently used. These are the crop-share lease, the share-cash

19. Sandvig v. Kleppe, 44 N.D. 5, 175 N.W. 724 (1919).
20. N.D. Cent. Code § 9-06-04.
21. Merchant's State Bank of Fargo v. Ruettell, 12 N.D. 519, 97 N.W. 853 (1903).
22. Wood v. Homelvig, 68 N.D. 735, 283 N.W. 278 (1938).
23. N.D. Cent. Code § 47-16-01.

lease, the livestock-share lease and the cash lease.[24]

Perhaps the most customarily used type of farm lease is the crop-share lease. Generally the produce of the farm or the gross income from the farming operation is shared according to a percentage agreed upon in the lease agreement. Normally shares such as one-fourth, one-third, one-half constitute the landlord's share or his rent payment. In the one-fourth and the one-third agreements the landlord normally furnishes the land, pays the taxes on the land, and maintains the farm buildings in reparable condition. Generally the one-half share arrangement requires that the landlord furnish the seed used and pay an equal share of the costs of harvesting.[25] The landlord may waive his right to make a division of the crop under this crop-share lease if he so desires.[26] Thus, although the profits are shared in a crop-share lease, it varies from a farming partnership by virtue of the agreed percentage distribution of the crop profits.

"The crop-share lease provides a certain degree of equity between the landlord and tenant and will work out fairly over a period of years if each party is compensated proportionately for his average total contribution. For any particular year, however, the lease may favor one party or the other, depending upon prices, yields and cost of production."[27]

The share-cash lease is the basic crop share lease modified by the tenant paying cash rent for the homestead, hay, pasture and grazing land and additionally furnishing all of the labor and operating equipment. The landlord and tenant share, according to some prefixed ratio of distribution, the net profits from the produce producing lands Grazing land may be rented at a specified sum per acre or may rented a specified sum per head of livestock grazing of the land. In this type of lease cash "privilege" rent may be changed for the use of various buildings and the barnyard. This type of leasing arrangement presupposes a diversified type of farming where both cash crop farming (grain, sugar beets or potatoes) and general livestock grazing takes place.

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24. In North Dakota in 1954 (the least year for which complete figures are available), there were 61,808 farm operators of whom tenants inumbered 12,758 or 20.6% of the total number of farm operators. The break-down of farm tenants is as follows:

Cash tenants	634
Share-cash tenants	3,086
Share tenants and croppers	8,301
Other and unspecified tenants	737

Agricultural Census, U. S. Government Printing Office (1954), table 3, p. 9.

25. For a general discussion see Kristjanson and Solberg, *Farm Rental Bargaining in North Dakota* (1952), Bulletin 372 of the Agricultural Experiment Station of North Dakota Agricultural College, esp. pp. 10-11.

26. First State Bank of New Salem v. Farmers Coop. Elevator Co., 59 N.D. 699, 231 N.W. 859 (1930).

27. Hannah, *Law of the Farm* (1948) at 181-82.

A third type of farm lease operative in North Dakota is the livestock share lease. "In North Dakota the livestock share arrangement is usually in addition to and separate from the crop lease. The livestock enterprise is added to utilize roughage and feed crops produced. In these arrangements the owner furnishes the buildings and a portion of all of the equipment, livestock and variable expenses."[28] While in many states the fifty-fifty type of livestock share agreement has been most popular,[29] this arrangement has not proved to be most suitable in North Dakota. This may be the result of a large percentage of North Dakota farm land being utilized for farm land rather than livestock enterprises.

"In a typical 50-50 livestock share lease in North Dakota, the landlord furnishes the land and buildings, and the renter furnishes the machinery, power, and labor for crops only. The landlord furnishes the seed and the renter furnishes the fuel. On many North Dakota farms the expenses of seed and fuel are about equal in an average year.

"Therefore, in a 50-50 livestock share lease in North Dakota the additional contribution of the renter is his labor furnished for the landlord's share of the livestock enterprise. The additional contribution of the landlord may be a more elaborate set of buildings (in North Dakota buildings are rent free in a 50-50 crop share lease) and one half of the pasture rental. In few cases do these two contributions equal the renter's additional labor contribution."[30]

In a typical livestock share lease the landlord and tenant both share in the livestock increase. Questions which might arise in a livestock share agreement and which should be determined in the agreement itself are: 1) who has authority to buy and sell livestock; 2) who determines when to sell; 3) who is responsible for the feeding care and management of the livestock; and 4) who has authority to subject the animals to a chattel mortgage?

A fourth type of farm lease used in North Dakota is the cash lease This lease generally does not have widespread usage as compared with the share type leases and is perhaps the least used of the various types of leases in North Dakota.[31] A cash lease varies some-

28. Stangeland, *Livestock Share Arrangements* (1958), Bulletin No. 419 of the Agricultural Experiment Station at 3.

29. *E. g.*, Krausz, *Farm Tenancy Laws in Illinois* (1960), University of Illinois College of Agriculture, Circular 818, at 3.

30. Stangeland, *op. cit. supra*, at 4.

31. See statistics cited in footnote 24.

"Very little cropland is rented for cash in North Dakota. The 1950 census shows that only six per cent of all farm rentals were cash leases. They are confined mainly to the grazing areas, although some land for sugar beet and potato pro-

what from the other types of farm leases discussed in that the tenant has more control regarding the usage of the agricultural land and it is usually made for a period longer than one year. The basic difference between the cash lease and the share lease is that the cash lease inspires the tenant to utilize all of his skill and initiative to produce the maximum possible income from the farm. This is because the tenant's rental payment is fixed and any proceeds from the farming operation belong to him. An apparent reason for the unpopularity of the cash lease in North Dakota is the high variability of crop yields over the several past seasons. There is no particular level of income guaranteed to the tenant but there is a constant pre-fixed amount which the tenant must pay to the landlord.

An employment or cropper contract cannot be construed as creating a landlord-tenant relationship, but rather, it must be construed as creating an employer-employee relationship. A tenant owns an estate of the land and hence the crops produced, "while a cropper is merely a hired man who is paid wages in kind and has no ownership in the crops until he has received his share after actual division."[32]

Difficulties arise where a lease is written in rather ambiguous terms and it becomes difficult to ascertain which of these two relationships has been created. The North Dakota Supreme Court has held that when the landlord grants the use and possession of land to another for a specified duration of time in return for a specified percentage of the crop from the land each year and the lease agreement states "that the title and possession of all crops or grain so raised on said land during such time of such contract shall be and remain in the landlord until division thereof", a landlord-tenant arrangement is created rather than an employment arrangement.[33] In considering specific determination whether an employment or landlord-tenant relationship exists, the following guides have been suggested: 1) the person put in possession of the farm is providing no capital; 2) The landowner has reserved full power to manage the farm in himself. He is to decide what crops are to be planted and where; he is to make decisions as to fertilizing, sale of crops, management of the herd etc.; 3) The owner of the farm pays all or virtually all farming expenses; and 4) The language between (the parties) is not that of a lease."[34]

duction is leased on a cash basis. We found no interest by either renters or landlords in cash leasing ultivated acreage."

See Kristjanson and Solberg, *op. cit. supra*, at 13.

32. Beuscher, *Law and the Farmer* at 130 (3rd ed. 1960).
33. Minneapolis Iron Store Co., v. Branum, 36 N.D. 355, 162 N.W. 543 (1917).
34. Beuscher, *op. cit. supra*, at 131-32.

Another possible relationship between a landowner and land occupant which does not create a landlord tenant relationship is the partnership. This type of relationship takes place when the landowner and land occupant share in the profits of the joint undertaking and are also liable for any losses occuring as a result of their joint venture. The existence of a partnership agreement indicates that there is to be no payment by occupant to owner for either rent or labor and finding of payment for either of these purposes creates the presumption that a farm tenancy relationship was intended by the parties.

CONSTRUCTION OF LEASES

Generally, if no conflict exists with prevailing property law, the rules of construction relating to contracts will govern with references to the construction of leases.[35] If a contract is entered into in good faith, a court will not declare it void and unenforceable when its meaning can be determined by the recognized rules of construction if such rules of construction will uphold it. If a contract is capable of a construction which will uphold the contract, such construction must be adopted rather than a construction which would defeat the contract.[36] To accomplish this purpose a lease is usually construed in its entirety to give effect to all its terms and provisions, providing this can be accomplished consistently with general rules of construction.[37] If no facts are in dispute then a court of law alone must construe the contract. But if there is a factual dispute and both sides enter conflicting testimony, the decision must then go to the jury.[38]

The purpose of construction is to arrive at and give effect to the intentions of the parties.[39] If the intention of the parties is clear, this intention must control the operation of the lease rather than any particular language used in the lease agreement.[40] Inconsistent and contradictory clauses are to be construed in attempt to harmonize them.[41] Where a lease is drawn upon a printed form and filled in by typewriting, the typewritten portion of the lease will govern in case of an irreconcilable conflict as to the applicable language. Thus in *Udgaard* v. *Schindler*,[42] where a typewritten portion provided that

35. Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955).
36. N.D. Cent. Code § 9-07-08; see Young v. Metcalf Land Co., 18 N.D. 441, 122 N.W. 1101 (1909).
37. Anderson v. Blixt, 72 N.W.2d (N.D. 1955); Kermott v. Montgomery Ward Co., 80 N.W.2d (N.D. 1957).
38. Sandvig v. Kleppe, 44 N.D. 5, 175 N.W. 724 (1919).
39. Battagler v. Dickson, 76 N.D. 641, 38 N.W.2d 720 (1949).
40. Reitman v. Miller, 78 N.D. 1003, 54 N.W.2d 477 (1952).
41. Harney v. Wirtz, 30 N.D. 292, 152 N.W. 803 (1915).
42. 75 N.D. 625, 31 N.W.2d 776 (1948).

the lessor was to furnish seed and the lessees were to pay the threshing bill in 1945 and both parties were to furnish one half of the seed in 1946 and 1947, and the printed portion provided that "lessees were to thresh crops in a farmerlike style", the quoted portion was held not to be an agreement that the lessee should assume the entire cost of threshing 1946 and 1947.

In most cases when the meaning of a lease is ambigous, it will be construed in favor of the tenant and against the landlord.[43] The rationale of this rule is that the lessor is generally in a superior economic position since he is the party who usually drafts the lease. He has the power to incorporate into the lease terms and conditions in his own favor and if he neglects to do so, he is responsible for his oversight.

It is possible that this rule will change in the future in North Dakota. The present trend in North Dakota indicates that the larger farm operators are renting from the smaller ones rather than the reverse, which is the historical reason for the rule. In North Dakota the common practice is for the lessee to make the offer and draft the lease agreement; and consequently he should be the party to suffer should the lease prove ambiguous.

RENT

Two main legal definitions have been formulated for the word rent; in one case rent was defined as a profit arising out of land and payable periodically,[44] while another case defined rent as the return either in money or in kind which the tenant confers on the landlord for the use of the leased premises.[45] Rent may be paid in the form of labor or services rendered for the privilege of occupying and possessing real property.[46]

Rent is not an essential incident of the landlord and tenant relationship.[47] The payment of rent by one in occupancy of premises to the owner of the premises indicates in part, that there is a landlord and tenant relationship between such persons. Terming a contract a lease does not make it a lease,[48] since the fact that a payment is referred to as payment of rent does not make it rent, and it will not operate to establish the relationship of landlord and tenant

43. Hughes Realty Co. v. Breitbach, 98 N.W.2d 374 (N.D. 1959).
44. Wegner v. Lubenow, 12 N.D. 95, 95 N.W. 442 (1903).
45. Martin v. Royer, 19 N.D. 504, 125 N.W. 1027 (1910); Whithed v. St. Anthony & D. Elevator Co., 9 N.D. 224, 83 N.W. 238 (1900).
46. Huus v. Ringo, 76 N.D. 763, 39 N.W.2d 505 (1949). A carpenter, who paid no rent in money, but agreed to work two hours each evening in return for the privilege of living in an apartment was held to be paying rent.
47. 32 Am. Jur. 429 (1941).
48. State v. Hall, 25 N.D. 85, 141 N.W. 124 (1913).

where other facts tend to negate the existence of the landlord-tenant relationship. Where the relationship of landlord and tenant may be established, and there is no contract specifying the amount of rent agreed to by the parties, the law will imply the existence of an agreement to pay a reasonable sum for the use and enjoyment of the leased premises.[49] The standard for determining the amount of liability for rent, in the absence of specific provisions in the lease, is the fair rental value of the premises for ordinary years. This is usually ascertained by the testimony of witness familiar with the land but must be determined according to the particular circumstances of each case. Land rent must be of specified value, if the land is fit for cultivation. Under this standard, however, it has been held in some cases that the tenant's liability would not be affected by an unforeseen and unpropitious crop year which would prevent the land from producing as good a crop yield as normal during the period of tenancy.

Most leases will contain a provision specifying the time when rental payment shall be due. In the absence of such a clause, it is usually assumed that the rent will be due at the expiration of the lease or yearly at the end of each year.[50] Under most crop share leases the rent is due and payable within a reasonable time after the crop matures or is ready for market.[51] In cases where the rental date is stipulated in the lease, and the landlord makes a habit of accepting late payments, the landlord is usually held to have waived any right he might have had to prompt payment. Under these particular circumstances, should the landlord desire to exact strict compliance with the lease, he must give notice to his tenant. If he does not give notice to his tenant, he cannot declare a forfeiture for subsequent similiar defaulted rental payments.[52]

If the parties designate a particular place where rent is to be paid; it is then payable only at that place. If a tenant agrees to deliver a share of the crops, as rent, to a certan place, the risk of loss of that portion of the crop is upon the tenant until the crop is delivered to the agreed place.[53] If not otherwise stipulated in the contract, it is usually assumed that the rental, whether it be cash or share, is payable on the leased premises.[54]

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49. Farin v. Nelson, 31 N.D. 636, 155 N.W. 35 (1915). Generally see 32 Am. Jur. 430 (1941).
50. N.D. Cent. Code § 47-16-20.
51. Jones v. Adams, 37 Ore. 473, 62 Pac. 16 (1900).
52. Hanson v. Hanson Hardware Co., 23 N.D. 169, 135 N.W. 766 (1912).
53. 32 Am. Jur. 468 (1941).
54. House v. Lewis, 108 Neb. 257, 187 N.W. 784 (1922).

CROP OWNERSHIP

The North Dakota Century Code provides that; "the products received from real property during the term of a lease belong to the lessee."[55] This section is applicable only to cash leases or share crop arrangements which contain no provision in the contract which refers to the ownership of the products of the leased land. This provision does not prevent the parties to a lease contract from entering into another agreement. The lessee may waive this statutory right and be a party to a lease under which the title to the crops is reserved in the landlord.[56] Also well settled in North Dakota is the right of a landlord to require such a contract. The North Dakota Supreme Court first set forth this principle in *Merchant's State Bank* v. *Sawyer's Farmers Co-op Ass'n.*[57] In that opinion the Court said:

> "It is a well settled rule of law that the ownership of realty carries with it as an incident thereto, the prima facie presumption of ownership of both the natural products of the land, such as grass and trees and the emblements, or annually sown crops; but such presumption is not conclusive, and the owner of land may, in parting with the use of it to another, make such conditions and reservations in relation to the land, itself, or to the products growing from it, as he chooses; instead of parting with the full right and where the owner of the land, in parting with the use of it to another, stipulates that the legal title, control and possession of all crops shall be in him for certain purposes; that stipulation is entitled to be enforced, so as to carry out the intention and purposes for which it was made."[58]

If the landlord wishes to protect this reservation of title against subsequent good faith purchasers of the tenant, he is required by statute, to file a copy of the lease with the County Register of Deeds before July 15th of the year in which the crop is to be raised.[59] The landlord's failure to file the lease containing the reservation does not in any way effect his rights as against his tenant; the rights between parties remain good without filing.[60] This statute was enacted solely for the benefit of good faith purchasers of the tenant; and a lessor's failure to file will only effect his rights as against any such purchaser or encumbrancer. Prior to the enactment of this statute in 1941, no filing was necessary and any assignee or purchaser from a tenant was presumed to know the terms of the lease and could

55. N.D. Cent. Code § 47-16-04.
56. Kern v. Kelner, 75 N.D. 292, 27 N.W.2d 567 (1947).
57. 47 N.D. 375, 182 N.W. 263 (1921)
58. *Id.* at 382.
59. N.D. Cent. Code § 47-16-03.
60. Kern v. Kelner, 75 N.D. 292, 27 N.W.2d 567 (1947).

acquire no greater rights than the tenant had the power to transfer.[61]

The common reservation of title clause provides that the title and possession of all crops shall remain in the landlord until the conditions of the lease have been complied with by the lessee and a division has been made of the crops. Under a provision of this nature, until the conditions of the lease have been complied with and the crop division made, normally the tenant only has an equitable interest in the crop[62] and the landlord has a legal interest. This legal interest, prior to division, is coextensive with the entire crop and thus the landlord may maintain an action against anyone who converts any part of the crop.[63] The courts usually recognize the tenant's equitable interest as one which may be mortgaged or pledged to a third party.[64] When title is reserved, the tenant's interest is held to be subsequent to the landlords claim, but not defeated by the landlord's reservation, as long as there is a sufficient crop quantity beyond that required to compensate the landlord for any advances which he may have made. The landlord's reservation will act as security only for the amount of rent due and any advances made; it will not extend further. A landlord cannot purchase outstanding debts of the tenant, which were not incurred under the lease terms and hold the grain until such debts are paid.[65] Upon sale by the tenant to a third party, a landlord with a title reservation contract, can recover only an amount equal to the debt for which he reserved title and cannot recover the value of the entire crop.[66] If a landlord, under this type of contract, mortgages his interest, his mortgagees are entitled to recover only to the extent of his share of the crop.[67]

The landlord's reservation is solely for his benefit and it may be waived by him at any time. In most cases the question of waiver is largely one of intent and the courts in a waiver situation will view the acts of the landlord to determine their consistency with the reservation of title; if this is deemed inconsistent, the landlord will be held to have waived his reservation. Should a landlord remain

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61. Marken v. Robideaux Grain Co., 56 N.D. 94, 216 N.W. 197 (1927); Maher v. Boehmer, 49 N.D. 592, 192 N.W. 723 (1923); Merchant's State Bank v. Sawyer's Farmers Cooperative Ass'n., 47 N.D. 375, 182 N.W. 263 (1921).

62. Minneapolis Iron Store Co. v. Branum, 36 N.D. 335, 162 N.W. 543 (1917).

63. International Harvester Co. of America v. Osborne-McMillan Elevator Co., 51 N.D. 367, 199 N.W. 865 (1924).

64. Minneapolis Iron Store Co. v. Branum, 36 N.D. 335, 162 N.W. 543 (1917).

65. Aronson v. Oppegard, 16 N.D. 595, 114 N.W. 372 (1907).

66. Burns v. Columbia Elevator Co., 57 N.D. 43, 220 N.W. 630 (1928).

67. International Harvester Co. of America v. Osborne-McMillan Elevator Co., 51 N.D. 367, 199 N.W. 865 (1924).

silent and permit a tenant to sell his share of the crop, despite a reservation of title, this silence will constitute a waiver of his lien as against the purchaser.[68] Also where a landlord allows his tenant to take his share of the grain before the conditions of the lease are fulfilled, a division takes place and will constitute a waiver of any rights the landlord may have to keep additional grain in case the tenant does not fulfill all the conditions of the lease.[69] However, a landlord may accept a chattel mortgage on the tenant's share and not create a waiver of his reservation,[70] but if the landlord takes a chattel mortgage and orally invites others to accept additional mortgages on the tenant's share as security for advances; he waives his priority.[71] The reservation of title by a landlord to the crop on one portion of land, specifically mentioned in the lease, will not necessarily mean that an oral contract for another portion of his land will be covered by that reservation. This is a question for the jury.[72]

Ordinarily, in share crop contracts, a division is made at the end of the cropping season. The landlord has a duty to make this division within a reasonable time, allowing the tenant to recover his portion of the crop by legal process, or delaying recovery by unnecessary appeals has been frowned upon by the North Dakota Supreme Court. In *Walker* v. *Paulson,* [73] the court stated:

> "It was the bounden duty of the landowner to treat his cropping tenant with fairness and common courtesy, and not to take and sell his share of the crops, leaving him to recover at the end of a long, protracted and vexatious lawsuit."[74]

If at threshing time, a landlord sets aside a certain portion of the crop as his tenant's share, this action will constitute a division, so that a lien of the tenant's mortgagee will attach at the moment of division. Once this act of division has been made it will constitute a waiver of the priority of the landlord's lien.[75] Where a thresher divides the grain and the landlord takes a part of his tenant's share as security for the performance of one item of his lease, such act constitutes a division, and the landlord may not subsequently claim additional grain as security for tenant's performance of the con-

68. Ellis v. Nelson, 36 N.D. 300, 162 N.W. 554 (1917).
69. Lloyd v. Powers, 4 N.D. 62, 22 N.W. 492 (1883).
70. McFadden v. Thorpe Elevator Co., 18 N.D. 93, 118 N.W. 242 (1908). "It may be that the landlord, if he saw fit could waive the provisions as to security which were contained in the contract, but there is no evidence that he intended to do so, and the court will not presume such intent, in the absence of any evidence aside from the mere acceptance of the so-called chattel mortgage." at 243.
71. Van Gordon v. Goldamer, 116 N.D. 323, 113 N.W. 609 (1907).
72. Simmons v. McConville, 19 N.D. 787, 125 N.W. 304 (1910).
73. 36 N.D. 213, 162 N.W. 299 (1917).
74. *Id.* at 215.
75. State Bank of Maxbass v. The Hurley Farmers' Elevator Co., 33 N.D. 272, 156 N.W. 921 (1916).

tract.[76] However, if the settlement, made between the landlord and tenant, omits certain items, the division will not be final and the tenant may subsequently recover for the remaining share of the proceeds of his crop.[77]

DUTIES AND RIGHTS OF RESPECTIVE PARTIES

There are certain duties and obligations which necessarily arise from the landlord and tenant relationship. In mose cases, it is correct to assume that the tenant's duty is the landlord's right, and the landlord's duty is the tenant's right. Nearly all of these rights and duties are mentioned at one time or another during the course of this article, but there are certain ones, which necessarily require enumeration in their own right. This section will enumerate these duties and rights. A "duty", as used in this discussion, means that if relief is sought through the courts, the courts will compel the person owing the duty to fulfill his obligation.

(A) *DUTIES OF A LANDLORD TO HIS TENANT.* A landlord has a duty to secure to his tenant the quiet possession of the leased land, against all parties lawfully claiming the land and if the landlord or anyone else forcibly ejects or excludes the tenant from possession, the wrongdoer will be held liable for three times the sum which would compensate the tenant for the actual harm caused him.[78] Unless the landlord specifically guarantees peaceful possession aganst any person in the world, he cannot be held responsible for harm caused the tenant. A tenant can not recover from his landlord for threats to his possession by a third party who is a prior claimant of the land, if the third party does not base his claim on the landlord's authority.[79]

If a landlord leases a building which is intended for human occupation, barring an agreement to the contrary, he must put the building into a condition fit for occupancy by humans, and repair all future dilapidations, except those resultant from the ordinary negligence of the tenant.[80] Notwithstanding this, a tenant takes the premises as they are at the commencement of his lease and cannot recover damages for personal injuries brought about by a defect which existed at the time the bargain was made.[81]

Should the landlord retain possession of a part of the leased

76. Keplinger v. Peterson, 46 N.D. 215, 190 N.W. 803 (1920).
77. Zimbelman v. Lah, 61 N.D. 65, 237 N.W. 207 (1931).
78. N.D. Cent. Code § 47-16-08.
79. Smith v. Nortz Lumber Yard Co., 72 N.D. 353, 7 N.W.2d 435 (1943).
80. N.D. Cent. Code § 47-16-12.
81. Lunde v. Northwestern Mutual Savngs & Loan Ass'n., 59 N.D. 575, 231 N.W. 609 (1930).

premises, he will be under a duty to prevent injury to a tenant occupying the other part. The landlord will be liable in damages for failure to "exercise common care and prudence" in the management and supervision of that portion of the building which is under his special supervision and maintenance.[82]

If a landlord agrees to provide a condition necessary to making the premises livable and fails to do so, such failure will constitute a constructive eviction, for which a tenant may recover.[83]

A landlord must fulfill the terms of his oral, as well as, his written contract. If a tenant relies on his landlord's oral promise to furnish him horses to work for others, the landlord's failure to do so will constitute a breach; and the tenant will be allowed to hire horses elsewhere and recover his loss from the landlord.[84]

(B) *DUTIES OF A TENANT TO HIS LANDLORD.* A tenant is under a duty to pay rent to his landlord within three days of its due date. Should the tenant fail to so do; the landlord will be entitled to maintain an action for forcible detainer to recover possession of the land and to collect any rent due and owing.[85]

A tenant is under a duty to surrender possession of the leased land to his landlord at the expiration of his lease, or after he has given notice of his intention to vacate. If a tenant wilfully holds over at the end of his term, after due notice to quit has been given and a demand for possession has been made, he will be responsible in damages for double the yearly value of the property for the time withheld, in addition to compensation for any harm caused by his action.[86] If the tenant fails to surrender the premises after he has been given notice, he is subject to a liability in damages for double the amount of the rent he would otherwise pay.[87]

Even though a tenant's unwritten lease for a period of four years will be invalid under the Statute of Frauds, he will still have the duty to pay his rent, at the agreed rate, for the duration of his occupation. In such a case, the tenancy is at will, and may be terminated at any time by the landlord.[88]

A tenant is under a duty to inform his landlord immediately upon notice of any adverse proceedings to recover the land occupied by him and to deliver to his landlord any written notice received by

82. Kneeland v. Beare, 11 N.D. 233, 91 N.W. 56, 57 (1902).
83. Russell v. Olsen, 22 N.D. 410, 133 N.W. 1030 (1911).
84. Duffy v. Johnson, 42 N.D. 93, 172 N.W. 237 (1919).
85. N.D. Cent. Code § 33-06-01.
86. *Id.* § 32-03-28.
87. *Id.* § 32-03-27.
88. Valker v. The Nat'l Tea Co., 48 N.D. 982, 188 N.W. 306 (1922).

him. A tenant will be held responsible for any damages incurred by his landlord because of his failure to notify the landlord or to deliver any written notice.[89]

A tenant has a duty not to sell the entire crop without the consent of his landlord. Before settlement, a tenant has title only to his portion of the undivided crop.[90]

A tenant has the obligation to use the leased land only for the purposes for which it was leased. Should he use the land for any other purpose; a landlord may hold him responsible or consider the contract as rescinded.[91]

A tenant is under a duty not to take advantage of his lease to secure tax title to his landlord's land. Purchase by a tenant at a tax sale of property upon which, under the terms of his lease, the tenant was required to pay taxes did not give the tenant title, because it was his failure to pay taxes or to notify his landlord which brought about the landlord's tax delinquency.[92]

A tenant is required to give written notice to his landlord before he removes any of his personal property from the leased premises. Removal of such property "fraudulently or clandestinely" is a misdemeanor punishable by fine or imprisonment or both.[93]

A tenant has a duty to use ordinary care to preserve the leased property in safety and good condition,[94] and to repair all deteriorations and injuries to the premises caused by his ordinary negligence.[95]

TERMINATIONS AND RENEWALS

A lease of real property may be terminated by the happening of four conditions; (1) the end of the term agreed upon; (2) the mutual consent of the parties; (3) the tenant's acquisition of title superior to that of his landlord; (4) or by destruction of the leased property. These were the more common or popular common law methods of termination and as such were adopted into our code.[96] In addition to these there are certain conditions under which each party to a leasing arrangement may acquire the right to terminate it. The landlord may terminate the lease and reclaim his property

89. N.D. Cent. Code § 47-16-25.
90. Fraine v. North Dakota Grain & Land Co., 141 N.D. 172, 170 N.W. 307(1918).
91. N.D .Cent. Code § 47-16-11; See Mower v. Rasmussen, 34 N.D. 233, 158 N.W. 261 (1916), where the tenant, contrary to the terms of his lease, cut standing timber; he was held responsible in damages regardless of whether he was construed to be a tenant or a cropper.
92. Wood v. Homelvig, 68 N.D. 735, 238 N.W. 278 (1938).
93. N.D. Cent. Code § 47-16-24.
94. *Id.* § 47-16-09.
95. *Id.* § 47-16-10.
96. N.D. Cent. Code § 47-16-14.

before the end of the term if the tenant uses or permits the use of the property in a manner which is contrary to the agreement, or if the tenant does not make repairs which he is bound to make within a reasonable time after a request from his landlord.[97] The tenant may terminate before the end of the term, if within a reasonable time after request, the landlord fails in carrying out his obligations, such as placing and securing the tenant in quiet possession or putting the property in good condition or repairing it, or if the greater part of the property leased or that part which was the "material inducement" for the tenant to enter into the contract, perishes from any cause other than the ordinary negligence of the tenant.[98]

If a lease is terminated before the end of the agreed term, the tenant is liable for rent for the proportionate part of the use he actually made of the land, unless such use was merely nominal and had been of no benefit to him.[99] Another situation under which a tenant may terminate his lease is when a landlord fails to repair dilapidations,[100] within a reasonable time after notice. In such a case a tenant has three alternatives, he may: (1) make the repairs himself and deduct the expense from his rent; (2) recover it in any other lawful manner; (3) or vacate the premises and be discharged from further payment of rent.[101] Although the sections of the code give the tenant new remedies it has been held that they do not otherwise alter the common law relationship of landlord and tenant[102] or to relieve the landlord of his pre-existing common law liability for negligent repairs.[103] In like manner, if a tenant commits waste during his lease, any person aggrieved by his acts, normally the landlord or his assignees, may bring an action against him for the damage of the waste committed; and if the judgment should go against the tenant, he will be liable for treble damages, forfeiture of his lease, and eviction from the premises.[104] It appears, however, that in actual practice, this provision for treble damages has never been used.

There is a statutory presumption that, unless otherwise expressed in the lease, a lease of real property other than lodgings is to be for

97. *Id.* § 47-16-16.
98. *Id.* § 47-16-17.
99. *Id.* § 47-16-21.
100. In Torreson v. Walla, 11 N.D. 481, 92 N.W. 834 (1902), it was held that the putting in of a sewer connection does not come within the meaning of the word "repairs", "dilapidations", or "deterioration", but perhaps to an addition or an improvement of an original character.
101. N.D. Cent. Code §§ 47-16-12; 47-16-13.
102. Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).
103. Beard v. General Real Estate Corp., 229 F.2d 260 (10th Cir. 1956).
104. N.D. Cent. Code § 32-17-22.

one year.[105] If there is an express term in the lease, the lease then terminates automatically and without notice at the end of the term and if the tenant does not remain in possession, the legal possession returns to the landlord.[106] However, there is also a statutory presumption to the effect that if a tenant remains in possession after the expiration of his term and the landlord accepts rent from him, that the lease is renewed on the same terms and for the same length of time, not to exceed one year.[107] The presumption is a disputable one however,[108] and may be negated under certain circumstances. For example, if a tenant holds over but fails to pay rent or perform his obligations under the lease, such failure will invalidate the presumption of an extended lease.[109] Generally, where a tenant holds over the landlord has an election; he may either treat the person holding over as a trespasser or as a tenant under the terms of the old lease.[110] If he chooses to treat him as a trespasser, he may legally have him removed from the property, or should he elect to treat him as a tenant he may sue for rent.[111] There can be no holding over with a resulting renewal of the lease if the landlord gives his tenant notice to vacate at the expiration of the term. If a tenant willfully holds over, after notice from his landlord, he may be held liable for damages in the amount of double the yearly value of the premises for the period of withholding, plus compensation for any detriment caused by his actions.[112] Likewise if a tenant contracts for a new lease with the landlord or his grantee, before the end of the term, he cannot then hold over and be governed by the terms of the old lease.[113]

Usually where a tenant holds over and a landlord consents to the tenant's actions, all the conditions agreed to in the original lease will remain in effect. For instance, a prior agreement retaining title and possession of the crops in the landlord is usually held to remain in effect.[114] Even a holding over after a sale is deemed to follow the same terms as the original lease.[115]

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105. *Id.* § 47-16-05.
106. Brown v. Otesa, 80 N.W.2d 92 (N.D. 1956); Wilson v. Divide County, 76 N.W.2d 896 (N.D. 1956).
107. N.D. Cent. Code § 47-16-06.
108. Foster v. National Tea Co., 74 N.D. 37, 19 N.W.2d 760 (1945).
109 Botnen v. Eckre, 42 N.D. 514, 171 N.W. 95 (1919).
110. Merchant's State Bank of Fargo v. Ruettell, 12 N.D. 519, 97 N.W. 853 (1903)
111. Wadsworth v. Owens, 21 N.D. 255, 130 N.W. 932 (1911).
112. N.D. Cent. Code § 32-03-28.
112. Vincent v. Reynolds Farmers' Elevator Co., 53 N.D. 749, 208 N.W. 158 (1926).
114. Wadsworth v. Owens, 21 N.D. 255, 130 N.W. 932 (1911).
115. Hermann v. Minnekota Elevator Co., 27 N.D. 235, 145 N.W. 821 (1914).

FORCIBLE DETAINER

Under North Dakota law a landlord who desires to recover possession of his leased property must bring a suit which is called an "action of forcible detainer." This is a dispossessory proceeding in justice court and it cannot be used for trying title to land, but, in the case of a landlord tenant situation, its sole purpose is the determination of the right to possession between one person claiming to be landlord and another claiming to be his tenant. A landlord may commence this action if a tenant holds over after the expiraton of his lease or fails to pay his rent within three days after it is due.[116] Before the landlord can start the proceedings he must first give his tenant three days written notice; this notice may be served and returned in the same manner as a summons.[117] Should the judgment be adverse to the tenant, he must deliver possession of the property to the landlord and pay all rents, profits, and damages,[118] which have accrued, and the costs of the suit for recovery[119] including an attorney's fee of $10.00.[120]

Under an execution in a forcible detainer action, the officer is required to deliver possession of the premises and also to satisfy the money judgment and any costs recovered.[121] After the expiration of thirty days from the date of any execution in forcible detainer, the execution becomes functus officio unless renewed, and mandamus will not lie to compel the officer to whom it is directed to execute it.[122] Once a judgment has been given, a tenant may obtain a stay of execution by entering a written pledge that he will not commit waste during his course of his appeal and will be responsible for payment of all rents or damages during this period in the event that his appeal should be dismissed or judgment reached against him.[123] If a tenant has once been removed from his leasehold by this action and has not obtained a stay of execution, it will be a misdemeanor for him to return or settle or reside upon any of the lands from which he has been ousted.[124]

There are other grounds which will enable a landlord to maintain forcible detainer. The courts have held that an action of forcible detainer will lie if a tenant should violate any of the material provisions of his lease to the extent that such violation

116. N.D. Cent. Code § 33-06-01 (4).
117. *Id.* § 33-06-02.
118. *Id.* § 33-08-12.
119. *Id.* § 33-08-14.
120. *Id.* § 33-08-16.
121. *Id.* § 33-09-07.
122. State v. Conrath, 53 N.D. 460, 206 N.W. 777 (1925).
123. N.D. Cent. Code § 33-11-12.
124. *Id.* § 12-19-26.

would constitute grounds for cancellation of the lease, such as the cutting of standing timber or the wasting of manure.[125]

A landlord who has contracted to convey the leased premises but has reserved title, pending performance of certain conditions can maintain forcible detainer so long as title remains in him.[126] If a tenant retains possession after he has been given notice to vacate, he cannot by his action claim a tenancy at will, which requires a ten day notice period for vacation. This will be true notwithstanding a contract which provides that the tenant will become a tenant at will if the landlord sells to another during the term of his lease.[127]

Generally an action of forcible detainer cannot be brought in connection with or joined with any other action except one for rents or profits or damages[128] incurred as result of the defendants possession, and in most cases no counterclaim may be imposed other than as a setoff to a demand for these rents, profits and damages.[129] The disposition of one of these rights in a forcible detainer action will not necessarily result in the abatement of the other. Thus the disposition of the right of possession will not, in most cases, result in the abatement of the issue of rent.[130] If a tenant, pending appeal from a judgment against him, surrenders possession, the court may legally continue to determine the question of rent.

IMPROVEMENTS & FIXTURES

Since the landlord owns the remainder interest in fee simple, it may be argued that all permanent improvements to the farm by the tenant and all soil improvements during the period of the lease belong to the landlord. In most cases the question of whether a particular physical improvement can be removed at the termination of the tenancy is determined by ascertaining its general character in relation to the leased premises and whether damage might result should the improvement be removed from the premises.

The North Dakota Century Code defines a fixture as that which is "attached to the land by roots as in the case of trees . . . or imbedded in the land as in the case of walls or permanently resting upon the land as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws."[131] Generally, in the absence of an agreement to the

125. Mower v. Rasmussen, 34 N.D. 233, 158 N.W. 261 (1916).
126. Lincoln Nat. Life Ins. Co. v. Sampson, 61 N.D. 611, 239 N.W. 245 (1931).
127. *Ibid.*
128. N.D. Cent. Code § 33-06-04.
129. *Ibid;* see Vidger v. Nolin, 10 N.D. 353, 87 N.W. 593 (1901).
130. McLain v. Nurnberg, 16 N.D. 144, 112 N.W. 243 (1907).
131. N.D. Cent. Code § 47-01-05.

contrary,[132] an improvement so affixed to the land belongs to the land and unless a landlord chooses to require a tenant to remove the improvement it must remain on the land at the termination of the tenant's term.[133] However, there are two specific statutory exceptions to this rule. One is that a tenant may remove anything at any time during his tenancy which is affixed to the property for the purpose of the trade, manufacture, ornament or domestic, use. This is true only if such removal can be affected without injury to the premises and only if the thing removed has not become an integral part of the property.[134] The second exception primarily applies to agricultural leases. It provides that should a tenant place a structure on the property for the purpose of housing grain, in the absence of any agreement to the contrary, he may, at any time within eight months after the termination of the lease, remove such structure.[135] There is one qualification to this rule. If a tenant wishes to protect this right of removal against any owner of a mortgage or deed or conveyance made after the erection of the granary, he must then file with the County Register of Deeds, a description of the structure and a notice of his intention to remove it.[136]

These rather harsh rules which give to the landlord virtually all permanent improvements made by his tenant are merely a codification of the English common law rule.[137] In many cases, these rules work a serious hardship on the tenant. The North Dakota courts have held that such things as light plants, hay carriers, water tanks, and fences are fixtures and as such must remain on the land at the termination of the lease.[138]

132. See Gunther v. Baker, 48 N.D. 1071, 188 N.W. 575, (1922). In which a lease provided that the tenant might place improvements on the land which he could remove at the termination of the lease or sell to his landlord. The landlord sold the land to a third party, who in turn sold to the tenant and under the contract between the landlord and the third party the latter was entitled to have a portion of all improvements made by the tenant, and when the latter purchased from the third party the value of the improvements went into the consideration. It was held on landlord's admission that on sale of land to the third party he had agreed to pay for the house, certain fences and a windmill, tenant was entitled to an instructed verdict for the amount of these items not disputed.

133. N.D. Cent. Code § 47-06-04.

134. *Ibid.* See also Gusner v. Mandan Creamery & Produce Co., 78 N.D. 594, 51 N.W.2d 352 (1952).

135. *Ibid.*

136. *Ibid.*

137. Elwes v. Maw, 3 East 38, 102 Eng. Reprints 510 (1802), this case which came to be the accepted common law rule recognized the exemption of tradesmen from the rule that property attached to the realty becomes a part of it and cannot be removed by the tenant who placted it there on the grounds of public policy to encourage trade and industry. But no such public purpose to encourage agriculture, however, was found by the court and the tenant farmer was held strictly accountable for the value of all improvements which he had erected and removed. Although this rule has met with general judicial disfavor in the United States and has since been abandoned by the English in the *Landlord and Tenant Act*, 14 & 15 Vict., c. 9, (1851), it is still followed in North Dakota, and some other states which have hampered the movement away from it by the statutory adoption of the common law rules of real property.

138. Klocke v. Torske, 57 N.D. 404, 222 N.W. 262 (1928).

However, a tenant may evade the harshness of this rule by having a complete understanding with his landlord regarding the particular fixtures which may be removed. Generally the parties to a lease contract have the right to give fixtures the legal character of either realty or personalty and their agreement will be enforced so long as it does not prejudice the rights of any third party.[139] Thus, by agreement, a building may be considered as personalty and dealt with as such.[140] Also a tenant who builds a fence may have it considered either realty or personalty.[141]

In addition to the general harshness of the law concerning fixtures, North Dakota has added a penal statute which provides that if a tenant removes any personal property from the leased premise he must first give his landlord notice. The tenant's failure to give notice or to attempt to remove such property fraudulently or clandestinely will be a misdemeanor and punishable by fine or imprisonment or both.[142] Even if North Dakota were to adopt the most liberal rules concerning removal of fixtures there is no doubt that inequities would still from time to time arise. An improvement such as a new roof on a building belonging to the landlord would not be subject to removal, both as a matter of law or a matter of practicality. In like manner a tenant obviously cannot remove soil that he has improved or contours or terraces that he has built or plowed. In many cases an improvement of great values and usefulness, in place, may have little or no market value when removed. Most agricultural economists agree that state legislatures should enact statutes requiring landlords to compensate tenants for labor or materials expended in making improvements.[143] But since such statutes are not yet a reality, it behooves a tenant to have a clear understanding, preferably written, as to just what may or may not be removed from the land. In some cases farsighted and fairminded landlords have encouraged tenants to make improvements, by providing in the lease for compensation on a fair basis for any improvements made during the tenancy. Unfortunately this has not become the prevalent custom.

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139. Myrick v. Bill, 3 Dak. 284, 17 N.W. 268 (1883).
140. Kittelson v. Collette, 61 N.D. 768, 240 N.W. 920 (1932). In which the court said: "Buildings or other fixtures annexed to land may by agreement of the parties interested be considered and dealt with as personal property . . . . When by agreement the house in question was considered as personal property as between the plaintiff and defendant and sold as such to the former by the latter, then as between them and all others having notice of their agreement if was personal property," at 921.
141. Warner v. Intlehouse, 60 N.D. 542, 235 N.W. 638 (1931).
142. N.D. Cent. Code § 47-16-24.
143. Buescher, Law and the Farmer 123 (3d. ed. 1960).

LIENS

A lien is a charge imposed upon specific property as security for the performance of an act. Usually, it is a legal claim established to secure the payment of a debt, or to insure payment for some services or labor performed.[144] Crop liens fall into two categories, those that are created by contract and those brought into existence by operation of law.[145]

(a) Liens Created by Contract

In 1932, crop mortgages on growing and unharvested crops were abolished in North Dakota by an initiated measure. That law declared such a mortgage to be a "public nuisance and . . . a menace to the public health, welfare and well being of the people of the state.[146] Subsequently, as the federal, state and local governments found it necessary to intervene in the general economic chaos of the 1930's, further legislation was deemed expedient. Thus, in 1933 an amendment was passed authorizing crop liens to be given to the United States, the state and any country, department, or agency of any of these, including the Bank of North Dakota. Other exceptions to the general rule were crop mortgages given as security for advances of loans for the purpose of paying government insurance premiums and for liens by contract given to secure the purchase price or rental of land upon whch crops covered by the liens were to be grown.[147] In addition another statute was passed in 1933 making it a misdemeanor to solicit or procure bills of sale or other transfers of title in order to evade the law prohibiting crop mortgages.[148]

With the exception of liens given to secure the purchase price of rental of land, a lien by contract may attach only to the next maturing crop after the delivery of the contract.[149] However a lien may be created by contract to take immediate effect as security for an obligation not yet in existence.[150] In like manner, a contract may be entered into to create a lien on property which is not yet acquired or not yet in existence. The lien will attach when the party agreeing to give the lien acquires an interest. Thus, a chattel mortgage, where permitted, may be created upon an unsown crop, and will be held to be valid lien from the date of delivery and execution, and will automatically attach to the crop when it comes into exist-

144. N.D. Cent. Code § 35-01-02.
145. *Id.* § 35-01-04.
146. *Id.* § 35-05-01, (statement found in S. L. 1933, at 497).
147. *Id.* § 35-05-02.
148. *Id.* § 35-05-03.
149. *Id.* § 35-05-02.
150. *Id.* § 35-01-06.

ence.[151] A mortgage of this nature will enjoy a priority over all subsequent purchasers or encumbrancers, with notice, either actual or constructive. However liens created on the future earnings of any machine operated in whole or in part by men or animals are prohibited.[152]

A lien, irrespective of an agreement to that effect, transfers no title to the property subject to the lien.[153] Contracts which pledge a forfeiture of property subject to a lien in satisfaction of an obligation, or contracts which restrain the right of redemption are void.[154] There is no implication in the creation of a lien that any person is bound to perform the act for which the lien is security.[155] A lien upon property will not entitle the person in whose favor the lien exists to a lien for the performance of any obligation other than that which the lien originally secured.[156] Any person who has an interest in property subject to a lien has the right to redeem it at any time after the claim is due and before the right of redemption is foreclosed.[157]

(b) Liens by Operation of Law

A lien by operation of law is one which is created by statute, rather than by agreement of the parties. A lien by operation of law can arise only at the time of performance of the act to be secured by the lien.[158]

1. Thresher's Lien

A threshing lien has priority over all other liens and encumbrances upon the particular grain threshed.[159] Any person who does threshing or custom combining for another has a lien from the date of the beginning of combining.[160] This lien attaches to all grain combined, to the extent of the value of the threshers work. The thresher or combiner who wishes to take advantage of this lien must file in the office of the County Register of Deeds in the county in which the grain is grown, within 30 days after the work is completed, a written statement, verified by oath, showing the amount and quantity of the grain threshed or combined. In addition, he

151. Thompson Yards Inc. v. Richardson, 51 N.D. 241, 199 N.W. 863 (1924).
152. N.D. Cent. Code § 35-01-05, however it has been held in the case of International Harvester Co. v. Henderson, 36 N.D. 78, 161 N.W. 608 (1917), that this section does not apply to an assignment of rights under an existing contract, and does not prevent the making of a contract for threshing for the benefit of a third party.
153. N.D. Cent. Code § 35-01-08.
154. *Id.* § 35-01-10.
155. *Id.* § 35-01-11.
156. *Id.* § 35-01-12.
157. *Id.* § 35-01-16.
158. *Id.* § 35-01-04.
159. *Id.* § 35-07-03.
160. *Id.* § 35-07-01.

must set forth the price agreed upon, the name of the person for whom the work was done, and whether by acre, bushel, hour of day, and a description of the land combined.[161] In the absence of a stipulated price, a reasonable value must be claimed. Failure to file his lien within 30 days will constitute a waiver of his lien.[162]

A tenant who threshes his landlord's grain is entitled to a thresher's lien upon the landlord's portion of the crop, even though no definite price was agreed upon between the parties.[163] Usually, a thresher's lien of a tenant will not be waived by his delivery of the grain, according to the contract terms, to an elevator even though such delivery results in a commingling of the grain.[164] However another person can be estopped from asserting a thresher's lien against an elevator, where, prior to filing, the person wishing to assert the lien goes with the owner of the grain to the elevator and remains silent while the owner sells the grain.[165]

2. Seed Liens

A properly acquired seed lien has priority, as to the crops covered by it, over all other liens and encumbrances, except threshing liens and crop production liens.[166] Any person who furnishes seed to another to be planted on land owned, rented, or occupied by him shall be entitled to a lien upon the crop produced from that seed.[167] To acquire this lien he must take the following steps: (1) File a statement in the office of the County Register of Deeds in the county in which the land is located within 90 days of the contract; (2) Verify each statement by oath; (3) Describe the kind, quantity, value of the seed and name of the person to whom furnished, together with; (4) A description of the land on which the seed is to be sown.[168]

The ultimate purpose of this lien is to secure the purchase price of the seed. Failure to file within 90 days constitutes a waiver of the lien.[169] It is a misdemeanor to use the seed for any other purpose than that set forth in the agreement, without first obtaining the consent of the party furnishing the seed.[170] In the absence of proof to the contrary, it will be presumed that the grain in con-

161. *Id.* § 35-07-02.
162. *Ibid.*
163. Mace v. Cole, 50 N.D. 866, 198 N.W. 816 (1924).
164. Blank v. Fenton, 54 N.D. 837, 211 N.W. 590 (1926).
165. Branthover v. Monarch Elevator Co., 33 N.D. 454, 156 N.W. 927 (1916).
166. N.D. Cent. Code § 35-09-03.
167. *Id.* § 35-09-01.
168. *Id.* § 35-09-02.
169. *Ibid.*
170. N.D. Cent. Code § 35-09-04.

troversy was grown from the identical seed sold by the lien holder.[171] Regardless of whether all of the seed furnished is sown or not, the person furnishing the seed will be entitled to a lien on the crops produced from the seed.[172] A person furnishing seed to a tenant is not estopped from asserting his lien by his failure to disclose the existence of the lien at the time of settlement between the landlord and the tenant.[173] Should a party under a single contract furnish two different types of seed which have separate prices fixed for each, he will then be entitled to a separate lien for each.[174]

The two other liens which are quite similar to the seed lien are the Crop Production Lien and the Sugar Beet Production Lien.

Under the Crop Production Lien, North Dakota counties or the United States of America, or any of its agencies, bureaus or departments are entitled to a lien on the product of any seed furnished, if they furnish either seed, feed or repairs for equipment used in farm production. The procedure for obtaining this lien is substantially the same as that used for a seed lien.[175] The Sugar Beet Lien is created in favor of any person who enters into a contract to furnish another, "sugar beet seed to be planted, insecticides, fertilizer to be used on the land so planted, labor in connection with the cultivation, harvesting, and hauling thereof, as well as any cash advances made, or materials or services rendered on any part or portion thereof, necessary in the production and harvesting of sugar beet crops."[176] The person who furnishes these items is entitled to a lien upon the crops raised for the full amount to become due under his contract. The process for affecting this lien is similar to those already discussed, with but one exception and that being that the time limit for filing is fixed at 60 days.[177] There is likewise a similar lien for pasturage, but it appears to have never have been of any great significance nor frequently used.[178] In the same classification may be placed the Lien for Services of a Stallion or Jack which was repealed by omission in the New Century Code.[179]

3. Farm Laborer's Lien

This lien has priority over all other liens, chattel mortgages or encumbrances except seed liens, crop production liens, sugar beet

171. Fried v. Olson, 22 N.D. 381, 133 N.W. 1041 (1911).
172. Schlosser v. Moores, 16 N.D. 185, 112 N.W. 78 (1907).
173. Narveson v. Schmid, 77 N.D. 814, 46 N.W.2d 288 (1951).
174. Schlosser v. Moores, 16 N.D. 185, 112 N.W. 78 (1907).
175. N.D. Cent. Code § 35-08-01.
176. *Id.* § 35-10-01.
177. *Id.* §§ 35-10-01, 35-10-02.
178. *Id.* § 35-17-01.
179. *Id.* § 35-16.

liens, and thresher's liens.[180] A farm laborer who works on anothers farm between April 1st and December 1st of any year is entitled to a lien on all crops of every kind grown, raised, or harvested by his employer.[181] In order to acquire this lien a farm laborer must file within 30 days after the full performance of his job, a statement with the County Register of Deeds containing: 1. the terms of employment; 2. the time when services commenced and ended; 3. the name of the employer; 4. the wages agreed upon or if not agreed upon the reasonable value of his services; 5. the terms of payment agreed upon; 6. a description of the land on which any crop on which the lien is claimed is growing or has been harvested; 7. the amount of any paid him and the amount remaining; 8. that he claims a lien for the same.[182]

A laborer's claim for wages must be reasonable and not in excess of that usually charged for the same kind of work in the locality where the work was performed. If the laborer quits before the expiration of the time for which he was hired or if he has been discharged for cause, he then loses his claim to any lien on the crops.[183] A laborer can recover only wages and not for services performed by his horses or machinery, though he can maintain a separate action for the latter.[184] Any time an owner defaults in the payment of wages, a farm laborer becomes entitled to possession of the crops to which his lien attaches and any person who converts such crops is responsible to the laborer in damages.[185]

In some cases it is relatively difficult to distinguish between a thresher's lien and a farm laborer's lien. For example, where a woman cooks for a threshing crew, the thresher belonging to the owner of the grain, she has been held entitled to a farm laborer's lien, but if she cooked for a person doing custom threshing for another she would not then be entitled to a laborer's lien, but could possibly come in under the thresher's lien.[186] It might also be mentioned that a woman cannot claim a laborer's lien for ordinary housework. The courts have held that such work is not directly connected with farm labor or production of crops for which the lien was created.[187]

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180. *Id.* § 35-11-03.
181. *Id.* § 35-11-01.
182. *Id.* § 35-11-02.
183. *Id.* § 35-11-01.
184. Lee v. Lee, 48 N.D. 971, 188 N.W. 43 (1922).
185. Wonser v. Walden Farmers Elevator Co., 31 N.D. 382, 153 N.W. 1012 (1915).
186. Stevenson v. Magill, 35 N.D. 576, 160 N.W. 700 (1916).
187. Lowe v. Abrahamson, 18 N.D. 182, 119 N.W. 241 (1908).

SOCIAL SECURITY

The term "social security" is most often applied in current American society to include most public or quasi public programs which operate in the nature of social insurance or social assistance. Of the various governmental programs operative at the present time in the United States, only the old-age and survivors insurance program is operated exclusively by the Federal Government.

To determine eligibility for "social security" benefits, cognizance must be taken of the general statutory requirements that the concerned individual must have an "insured" status, and that in order to have this insured status he must have to his credit either "wages" or "self-employment income" or both.

The Social Security system initiated in our Federal System in 1935,[188] however this program applied only to wage-earners until 1951 when coverage under the old-age, survivors and disability insurance system was first made applicable to the self-employed.[189] In 1954 self-employed farmers first became covered under the Social Security system, with income from farming creditable under the act and subject to social security taxes, effective with farm income received in the first taxable year ending after 1954.[190]

Social Security or Old-Age Survivors Insurance (most often referred to as OSAI) denotes two things. "First, there is a Social Security tax levied upon farm employees (and their employers) and upon self-employed farmers who operate their own farms. Second, there are benefits paid upon retirement, disability or death of a person covered by Social Security Law. The two tie together in that a person is not eligible for benefits unless he has paid Social Security taxes."[191]

In 1954 provisions were enacted for a special "farmer's option" under which self-employed income from farming could be reported in the usual way, or as one-half of the farmer's gross income from farming.[192] This choice was amended in 1956 to provide for an optional reporting of two-thirds of the gross farm income.[193] The 1956 Amendments further provided that the rental income exclusion should not apply to a farm landlord in cases where, in accordance with an agreement with the operator of the farm, the landlord

188. 49 Stat. 620.
189. 64 Stat. 502.
190. 68 Stat. 1055.
191. O'Bryne, Farm Income Tax Manual (Revised Edition) § 1100, at 486 (1958).
192. 69 Stat. 1055. There are certain limits specified under which this provision would be operative.
193. 70 Stat. 828. The same limits are specified under which this provision would be operative.

'materially participates' in the production of the farm commodities. Another provision gave statutory recognition to a prior administrative determination that certain share-tenants are self-employed."[194]

The basic question to be considered in determining farmer eligibility for participation in the federal social security program is the question of self-empolyment. Unless a farmer actually is self-employed in farming he is not eligible. "The most difficult problem in farmers' Social Security has been the status of the farm landlord. Under the 'lease' umbrella are arrangements that range from bare rental of land to virtual partnerships. The farm landlord's activities determine whether he has self-employment income and whether he has income that will reduce his debts."[195] Thus, to qualify, the landlord must be self-employed within the meaning of the statute. The applicable statutory provision defines rentals including rentals in crop or livestock shares as not constituting self-employment income.[196] The farm landlord who "materially participates" in the farming operation and production will qualify as earning self-employment income within the purview of the 1956 amendments to the social security act.[197]

It has been suggested that there are four tests of this material participation by the landlord. These tests are:

"Test No. 1. Under this test, there is material participation if the landlord meets any three of the four requirements:

a. He advances pay, or stands good for at least half the direct costs of producing the crop.
b. He furnishes at least half the tools, equipment, and livestock used in producing the crop.
c. He advises and consults with the tenant periodically.
d. He inspects the production activities periodically.

Test No 2. The requirements are said to be met under this test if the landlord regularly and frequently makes, or takes an important part in making management decisions substantially contributing to or affecting the success of the enterprise.

Test No. 3. Material participation is said to exist under this test if the landlord works 100 hours or more, spread over a period of five weeks or more, in activities connected with producing the crop.

194. Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, *Federal Social Security* (1959) at 151.
195. O'Byrne, *op. cit, supra,* at 504.
196. Int. Rev. Code § 1402 (a) (1954).
197. 70 Stat. 840.

TestNo. 4. This is a general test and recognized that Tests Nos. 1, 2 or 3 may not cover all situations. Material participation requirements may be met under Test No. 4 if the 'total effect' of the landlord's activities shows that he is 'materially and significantly involved' in the production of the farm commodities. In doubtful cases landords are advised by the publication to consult the nearest social security district office or the district Internal Revenue Service."[198]

Various types of programs have been formulated to qualify the landlord under one of the enumerated tests. Plans, which recognize that the self-employer operator assumes most of the risks of the farming operation must also recognize that self-employment income also results for the landlord.[199] Material participation is still best exercised on the part of the landlord by actual physical and mental participation in the farming operation. The Social Security Administration makes clear that "material participation" actually envisages actual participation by the landlord in the farming operation and the lack of this actual participation prohibits the landowner from qualifying as "self-employed" under the social security program.[200]

The criteria for determining coverage by the "social security" program of farm tenants is more readily determined. A tenant farmer who is a cash renter of farm land of another is self employed for "Social Security" purposes and hence is entitled to "social security" coverage. Share-farmers are also considered to be self-employed under "social security" rules and are entitled to "social security" coverage as are custom or independent farm contractors.

For a share-tenant to be self employed within the purview of the "social security" laws and regulations, the three following conditions should be complied with:

a. The services must be performed under an arrangement in which the share-tenant undertakes to produce agricultural products on land from the landlord.
b. These agricultural products or the proceeds from them, are to be divided between the landlord and the share-tenant.
c. The amount of each of the participant's share is contingent upon the gross amount of agricultural products produced.

If any of these three tests is not met, the share-tenant is not considered self-empoyed per se, but new criteria are used to determine self-employment of the share-tenant. These criteria concern direc-

198. See Joint Committee, *op. cit. supra*, at 153.
199. Rev. Rul. 56 - 659, 1956-2, Cum. Bull. 692.
200. *Social Security and Farm Families*, OASI-25d, December, 1960, U. S. Government Printing Office, at 13, *et seq.*

tion by the landlord of the share-tenant, not only as to the net accomplishment of the tenant's efforts but also regarding the details and methods, by which these work efforts are accomplished. If the landlord actually directs all of the farming operations the tenant is not self-employed, but is an employee of the landlord. If, however, the landlord only determines types of crops raised, shares the cost of seed or fertilizer or furnishes certain equipment or machinery, the tenant is self-employed within the meaning of the social security regulations.[201]

Where a partnership operates a farm, each of the partners is credited with a part of the self-employment income of the partnership.[202] Thus the type of income of the farm partnership becomes the determining factor in ascertaining self-employment under "social security".[203]

Sham partnerships are not valid partnerships for "social security" purposes just as sham partnerships are not valid for income tax purposes. Provisions that concentrate decisions regarding the farming operations in one partner, that attempt to limit the liability of a general partner contributing land or machinery or that provided for limitations on sharing losses by one or more general partners will tend to show the existence of a sham partnership. "A livestock share lease may be very close to a partnership and the parties may even refer to it as such. But, such an arrangement is not treated as a partnership for social security purposes. In the usual case, the landlord does not intend to share losses in excess of his contribution nor does he intend to be jointly liable for all obligations and responsibility arising from the farm operation."[204] Often husband and wife or husband and son partnerships are purported to be created as farm partnerships. Only where the participants share equally in the management and control of the farm partnership is a valid partnership created and are the participants self-employed for "social security" purposes.

It is possible in a larger, more complex type of farming operation, that the participants may fall into several classes of participants, some of whom might be covered by "social security" and some of whom are not covered by "social security". Thus a factual determination must be made in each individual farming operation in ascertaining coverage of "social security".

201. 26 C.E.R. 1.1402 (a) - 1 (c) (9) (ii).
202. Int. Rev. Code § 1402 (a) (1954).
203. See White, *Taxation of the Family Farm Corporation and Partnership: Variations on a Theme*, 36 N.D.L. Rev. 87, 89 (1960).
204. O'Byrne, *op. cit. supra*, at § 1106.

"Social security" benefits pertaining to the farming opeartion consist of three categories. These categories are (1) retirement payments made to a retired farmer over 65; (2) payments made to a farmer's wife if she is over 62 or if she is caring for a child who is under 18 or payments made to children under 18; and (3) payments to certain dependent widows and parents. These are several tests used to determine coverage. These tests are: (1) currently insured, which means a person is currently insured if he had at least six quarters of coverage in the last thirteen quarters of his life; and (2) fully insured, which means a person is fully insured if (a) the person has one quarter of coverage for every three calendar quarters which have passed from December 31, 1950 to the beginning of the year in which the person died or reached retirement age, or (b) if the person attained 21 years of age after December 31, 1950 he must have one quarter of coverage for every three calendar quarters which have passed since the year in which he reached 21 to the beginning of the year in which he died, or (c) he has forty quarters of coverage since January 1, 1937.[205]

The relationship of "social security" coverage and benfits is a most important relationship which must carefully be considered in creating any type of farm tenancy.

MISCELLANEOUS

A. *Limitations on Leases.* There is one basic limitation on the leasing of agricultural land which must be considered in the creation of the farm tenancy agreement. This statutory limitation prohibits a lease of agricultural land for a period in excess of ten years.[206] The North Dakota Supreme Court has held that a lease of agricultural land reserving rent or service and continuing "so long as any one of the owners is still alive" is a lease of indefinite duration but it is not a lease for a period longer than ten years. The court stated that the lease in question was valid for the life of the surviving lessor or for at least ten years from the date of the execution of the lease.[207] In an erlier case the North Dakota Supreme Court had differentiated between an estate for years (for a period of forty years), which would be prohibited by this statutory prohibition on leases in excess of ten years, and life estates. The court stated that a lease of farm land "for the full term of forty years or during the full term of the natural life" of the lessee for definite

205. 74 Stat. 924.
206. N.D. Cent. Code § 47-16-02.
207. Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955).

cash consideration was an estate for life and consequently was not prohibited by North Dakota statutory law.[208] The basic statutory prohibition or leases of agricultural land in excess of ten years which exists in North Dakota law is similar to provisions existing in other states and is an example of statutory enactment designed to prohibit the long-term leasing of agricultural land.[209]

A sublease is created when a tenant rents a part of the property which he has leased to another person for a term which is shorter in duration than the original lease.[210] Real property in North Dakota must be leased only for a particular purpose[211] and if the original lease prohibits the subletting of the entire property, no part of the property may be sublet.[212] Thus any restriction applying to use which exists in the original lease must be complied with by the sublessee. Any restriction prohibiting subleasing is for the benefit of the landlord and may be waived by him. The waiver need not be in writing. The absence of a prohibition against subleasing in a lease, creates the presumption that the property might be subleased.[213]

B. *Abandonment.* A landlord's security for rent is endangered when a tenant abandons a farm before the lease terminates. Some states have laws which permit the landlord to seize crops grown or growing upon the farm land or the part abandoned, even though the rent has not yet become due.[214] Normally in that type of situation the tenant has the priviledge of redeeming the crops by paying the rent and reimbursing the landlord for his expenses incurred in handling the crops. North Dakota has no such statute and really no case law dealing precisely with this point. The only pertinent North Dakota case concerning abandonment is *Hermon Hanson Oil Syndicate* v. *Bentz*[215] which dealt with an oil lease. The court stated that the abandonment of property or interest in property implies a voluntary relinquishment of the property. Consequently definite proof of intention to abandon is necessary to establish that the property was abandoned. The rationale behind this decision might be applicable in a case of abandonment of farm property in North Dakota.

C. *Arbitration.* The North Dakota arbitration act provides that

208. Wegner v. Lubenow, 12 N.D. 95, 95 N.W. 442 (1903).
209. See, *e. g.*, Cal. Civ. Code § 717.
210. Minneapolis, St. P. & S.S.M.R. Co. v. Durvall, 67 N.W.2d 593 (N.D. 1954).
211. N.D. Cent. Code § 47-16-11.
212. Minneapolis, St. P. & S.S.M.R. Co. v. Duvall, 67 N.W.2d 593 (N.D. 1954).
213. First State Bank of Barton v. St. Anthony & Dakota Elevator Co., 64 N.D. 138, 250 N.W. 778 (1933).
214. See, *e. g.*, Smith-Hurd Ill. Ann. Statutes c. 80, § 32.
215. 77 N.D. 20, 40 N.W.2d 304 (1949).

"persons capable of contracting may submit to the decision of one or more arbitrators any controversy which might be the subject of a civil action between them, except the question of title to real property in fee or for life."[216]

The arbitration proceeding is a voluntary proceeding with the law directing the method by which arbitration may be conducted. The initial agreement to arbitrate may be an oral agreement.[217] However, the actual submission to arbitration . . . must be in writing and acknowledged by the parties . . . and may fix the time on or before which the award shall be made and provide that judgment may be entered upon the award by the district court . . ."[218]

The arbitration award "must be in writing signed by the arbitrators or a majority of them and acknowledged . . . If the submission provides for the entry of judgment upon the award, the arbitrators shall file the submission together with their award in the office of the clerk of the district court of the county specified in the submission and shall notify each of the parties to the arbitration thereof in writing. If the submission does not provide for the entry of judgment upon the award, the arbitrators shall deliver a copy of the award to each of the parties to the arbitration."[219]

A Motion may be submitted to district court for affirmance of the award of arbitration[220] or a motion may be submitted to district court for vacating the award of the arbitrators.[221] The arbitration proceeding is a proceeding which affords certain benefits to the parties to the agreement and should be carefully considered as a means of adjudicating disputes arising in farm tenancy arrangements in North Dakota.

D. *Game and Fish Privledges.* Although fish and game ownership rests in the state, persons living on the farm have certain hunting and fishing rights that others do not have. They have the right to hunt, fish, or trap during the open season on the land they own or lease.[222] The only exception to this rule is that a license must be obtained to hunt deer on property owned or leased, but no fee is charged by the state for the issuance of this license.[223] Only the requirement of obtaining a license is waived. The owners and occupants must comply with other Fish and Game laws and regulations.

216. N.D. Cent. Code § 32-29-01.
217. Johnson v. Wineman, 34 N.D. 116, 157 N.W. 679 (1916).
218. N.D. Cent. Code § 32-29-02.
219. *Id.* § 32-29-06.
220. *Id.* § 32-29-07.
221. *Id.* § 32-29-08.
222. *Id.* § 20-03-02.
223. *Ibid.*

A landowner or tenant may also at any time, ". . . destroy and protect wild fur-bearing animals which is committing depradations upon his poultry, domestic animals or crops. . . ."[224]

E. *Fences.* Normally the duty for repair and upkeep of fences is a responsibility of the landlord. The North Dakota law provides that "the occupants and the coterminous owners of lands enclosed with fences are mutually bound equally to maintain the partition fences between their own and the next adjoining enclosures unless one of such owners chooses to let his land lie open."[225] Thus it appears that the duty to maintain fences might be a joint duty of both landlord and tenant although other statutes refer only to the landowner's duty to keep the fences in repair.[226] In order to avoid future disputes, the lease agreement itself should specifically indicate which party should maintain and keep the fences in good repair.

F. *Emblements.* The term emblements denotes the right of the tenant to take and carry away, after the tenancy has terminated, the annual products of agricultural land which result from his own efforts. Thus a tenant, whose lease for an unspecified term is terminated not by his fault, has the right to enter the land and harvest and remove the crops which he had planted before the termination of the lease.[227] The rule of emblements only applies to a tenant whose lease is for an uncertain term. Where the lease is for a fixed term, the tenant is not entitled to crops growing on the land at the termination of the lease because he knew when the lease was due to expire and hence he would have no right to a crop which he planted, knowing it would not mature prior to the termination of the lease.[228]

In a discussion of emblements and the landlord-tenant relationship, mention should be made of manure made in the normal course of husbandry. While manure is often considered as an emblement, technically it is not. Generally, in the absence of any express agreement, manure becomes appurtenant to and is treated as realty. Thus generally where agricultural land is rented, manure remaining on the premises at the termination of the lease belongs to the landlord. Generally the percepts of good husbandry would indicate that a farm lease should provide that the tenant will spread manure over the land. English law provides that unless the lease agreement stip-

224. N.D. Cent. Code § 20-07-04.
225. *Id.* § 47-26-05.
226. *E. g.*, N.D. Cent. Code § 47-26.
227. Rosenstein v. Williams, 73 N.D. 363, 15 N.W.2d 378 (1944).
228. For a general discussion see 3A Thompson, Real Property §§ 1377-79 (1959).

ulates otherwise, the tenant may not remove manure from the land.[229]

G. *Timber.* Normally the lease will specify whether any timber growth or leased land can be cut by the tenant. The general common law rule is that timber is a part of the realty and cannot be cut except with permission of the landlord. Hence where a tenant cut timber in violation of the terms of the lease, he was held responsible for the damage, irregardless of whether he was technically a tenant or a cropper.[230] Some cases in other states have allowed a tenant to cut and remove such timber as was necessary to prepare the land for cultivation, but North Dakota courts have not adjudicated this matter.[231]

H. *Weeds.* The North Dakota laws provide that "each person owning or occupying any lands in this state shall destroy all noxious weeds growing thereon. . . ."[232] Thus the statute appears to make both the landlord and tenant equally responsible for the destruction of noxious weeds growing on the leased property. While there are no reported cases in North Dakota which construe this statutory provision, responsibility for the destruction of noxious weeds should be clearly delineated in the lease agreement.

I. *Commercial Fertilizer.* In 1954 4,518,316 tons of commercial fertilizer and fertilizing material aggregating $53,998 in total value were used on North Dakota agricultural land.[233] This constituted approximately five per cent of the cultivated agricultural land in North Dakota.[234] It is fair to speculate that the proportion of cultivated land on which commercial fertilizer is used will substantially increase in the future. Thus use of commercial fertilizer is a relatively new farming practice for the farmers of North Dakota. "It is easier to arrive at a fair basis for sharing the costs of commercial fertilizer than for other innovations, since it only calls for division of the costs of the material according to crop shares. The expense of hauling the fertilizer to the farm from the point of purchase should be included in the costs."[235] Thus the division of costs re-

229. Halsbury's Laws of England at 264 (3d ed., 1952).
230.6. Mower v. Rasmussion, 34 N.D. 233, 158 N.W. 261 (1916).
231. See Higgins v. State 58 Ga. App. 480, 199 S.E. 158 (1938); Moss Point Lumber Co. v. Bd. of Supervisors, 89 Miss. 448, 42 So. 290 (1906).
232. N.D. Cent. Code § 63-01-02.
233. *Agricultural Census,* U.S. Gov't Printing Office (1954), table 4 at 12.
234. *Id.* at 13.
235. Kristjanson or Solberg, *Farm Rental Bargaining in North Dakota,* Bulletin 372, Agricultural Experiment Station, NDAC (1952) at 21.

sulting from the use of commercial fertilizer should be considered in drafting a farm tenancy agreement in North Dakota.[236]

J. *Summer Fallowing and Fall Plowing.* Additional problems arise regarding summer fallowing and fall plowing. While there is no statutory material in North Dakota regarding these matters, problems do arise and should be delineated in the lease agreement. Two questions which have been suggested are: (1) "If a lease contains no reference to summer-fallowing and is written for just one year or one crop season, is the tenant entitled to pay for the summer-fallowing (or fall plowing if he does the work regardless of how much or how little summer-fallowing or fall plowing was on the land when he took it?") and (2) "If a lease does provide for fall plowing to be paid for at a given sum per acre in case there is no renewal, and the landlord advises the tenant during the summer that the lease will not be renewed, may the tenant still go ahead and do fall plowing during the remainder of the farming season and charge the landlord for it?"[237] The problem of summer-fallowing and fall plowing is one which should be explicitly covered in any farm tenancy agreement.

CHECK LIST FOR LEASE DRAFTING

A lease is a contract between the landlord and the tenant which sets forth terms and conditions on which both parties agree. Legal soundness alone is not the measure of a good lease. A good lease must, of necessity, be of mutual benefit to both parties and not benefit one party at the expense of another. There are several lease provisions such as description of the land, etc., which are normally included in every lease or lease form. These provsions are essential, but since they are uniformly accepted and understood, they are not here listed. In addition to these provisions, a written lease should contain provisions regarding a variety of matters, which may ferment dispute if they are not clearly delineated in the lease agreement. Some of these provisions are:

1. All purchases or sales involving more than an agreed sum should be required to have consent of both parties.
2. There should be an extremely detailed outline of who is to

236. While a total of 4,518,316 tons of commercial fertilizer and fertilizing material was used on North Dakota farmland in 1954, only 753,592 tons of fertilizer and fertilizing material was used on leased farmland in North Dakota, *Agricultural Census*, U.S. Gov't Printing Office (1954), table 4, at 12.

237. Letter of Harold D. Shaft, Esq., of the Grand Forks County Bar, to the authors, of October 22, 1960.

pay what expenses and what expenses are to be shared and in what porportions.

3. Every lease should have a provision requiring adequate records to be kept of all business transacted which concerns the lease or its products.
4. A particular banking institution should be named in the lease and all business should be transacted with it, likewise marketing should be done through named outlets.
5. Each party in the lease instrument should bind himself and his heirs and personal representatives, in order that the lease will survive the death of either principal party.
6. In most lease agreements the landlord pays the insurance on the buildings, but it would be wise to include a provision in the lease in which the tenant convenants not to do anything which will violate the terms of any insurance policy or which might increase the insurance premium.
7. The number of acres to be plowed, the use of straw, restrictions on cutting of timber, etc., should be specifically mentioned in the lease agreement.
8. There should be an accompanying inventory kept as a guide to detailing which items the tenant is to leave on the farm and it should provide in detail how feed, livestock and supplies are to be divided or dealt with at the termination of the lease.
9. Under a share lease agreement the particular crops to be raised should be specified, a method of division arranged and the time of division set forth.
10. Many problems would be more easily solved by an arbitration clause providing for arbitration of all disputes.
11. A provision should be included for renumeration of the tenant for any improvements made by him.
12. A period of notice of not less than six months should be provided for, with an automatic renewal in case of no notification.
13. The term of the lease selected should fit the seasons, crops and natural conditions.
14. The tenant should be allowed the flexibility consistent with good farming practices.
15. Usually the lease agreement should prohibit assignment of the lease or subletting by the tenant, without the landlords consent.

There are many suggestions in addition to these which have been mentioned at one time or another in the course of this article; all of these suggestions have been pointed in the direction of clarifying the technical legal rights and duties of the parties of the lease. In addition parties interested in having a comprehensive farm lease should consider clauses covering literally dozens of operating problems encountered in a lease arrangement. Some of these have been listed above, others will vary with locality and area custom and the general type of farming contemplated. All of these are important considerations and should be seriously contemplated prior to entering the relationship of landlord and tenant.