

# REGULATIONS OF FARM LANDLORD-TENANT RELATIONSHIPS

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The most obvious solution for the problems of the farm tenant is to enable the tenant to become an owner. In America, indeed, this has generally been assumed to be the only solution. In the early days it was believed that the tenant would save his money and eventually purchase a farm.<sup>1</sup> Since it has been found that the optimism which assumed that this was a natural process was unjustified, a demand has arisen for assistance by the government to aid the tenant in attaining ownership. Beginning with the Homestead Act,<sup>2</sup> where land was given to settlers, through the period where easier credit through such agencies as the Farm Credit Administration<sup>3</sup> was regarded as the solution of the problem, government assistance in some form has been available to those who desired to own farms, but the American ideal of the owner-operated farm has been accompanied by the fact of a steady increase in the number of farms operated by tenants.<sup>4</sup>

The most recent study of the farm tenancy problem, the *Report of the President's Committee on Farm Tenancy*, recommended a double approach to the problem through more liberal federal aid to tenants to become owners and through state action to improve the condition of those who remained tenants by regulation of their relationships with their landlords.<sup>5</sup> The first line of approach has already been adopted with the passage of the Bankhead-Jones Farm Tenant Act<sup>6</sup> and the establishment of the Farm Security Administration. The second line of approach has been largely overlooked. It is only with this second approach to the problem that this paper is concerned.

With regard to the number of farmers who may be immediately affected, it may well be that a regulatory program is of greater immediate importance than a farm purchase program. The funds available do not permit any immediate prospect of a

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<sup>1</sup> THE FUTURE OF THE GREAT PLAINS, REPORT OF THE GREAT PLAINS COMMITTEE (1936), 66.

<sup>2</sup> Homestead Act of May 20, 1862, as amended, 43 U. S. C., §§161-302.

<sup>3</sup> Act of July 17, 1916, 39 STAT. 360, as amended, 12 U. S. C., §§636-1148a.

<sup>4</sup> FARM TENANCY, REPORT OF THE PRESIDENT'S COMMITTEE (Nat. Resources Comm. 1937) Table V, Percentage of Farm Tenants, by States, 1880 to 1935, p. 96. (Hereinafter cited as "FARM TENANCY REPORT.")

<sup>5</sup> FARM TENANCY REPORT, 11-20.

<sup>6</sup> Pub. No. 210, 75th Cong., 1st Sess. (1937).

great reduction in the total number of tenants through the activities of the Farm Security Administration<sup>7</sup> and those of the Farm Credit Administration affect only the upper class of tenants, since the purchaser must have a 25% equity to be eligible for a Farm Credit loan.<sup>8</sup> In addition, it may well be that many tenants would prefer to remain as tenants, untroubled by the responsibilities of farm ownership, and that the number of contented farm tenants will increase if the system of tenancy is improved. Consequently, the hitherto overlooked possibilities of improving the situation of those who remain tenants are of greatest importance as a supplement to a farm ownership program.

An altruistic desire to help farm tenants, commendable as it is, is not a sufficient basis upon which to defend the constitutionality of a program for the improvement of tenancy conditions which may cut down the existing rights of landlords. But the problem affects greater interests than those of the unfortunate tenant or the property rights of his landlord. The instability of farm tenure has resulted in the deterioration of tenant-operated farms with consequent serious losses in the fertility of the soil, a basic natural resource. In addition, there are serious economic losses involved in the frequent moving of tenants and undesirable results in rural social life. The material gathered by the President's Committee on Farm Tenancy indicates clearly that the problem is one which justifies federal action and expenditures under the general welfare clause and also that the problem is one which justifies state action under the police power.<sup>9</sup> It remains merely to show that various detailed reforms have a reasonable relation to the problems which they are designed to meet, to bring the subject of farm tenancy regulation within the general welfare phase of the police power.<sup>10</sup>

The regulatory program with which this paper is concerned is properly one for state rather than federal action. Not only is it true that the regulation of landlord-tenant relationships is generally regarded as one of the powers which has been reserved to the states, but conditions vary so greatly between states that legislation which would be suitable in one state, and arouse little opposition there, might be unsuitable or very unpopular in another. Relying upon state action has the disadvantage that progress will be made unevenly, but it has the corresponding advantage, important in connection with a new program, that other states may benefit from the experiences of the experimenting states.

<sup>7</sup> The appropriation at present available to the Farm Security Administration is \$10,000,000 for the fiscal year ending June 30, 1938, Pub. No. 210, *supra* note 6, §6. There are 2,865,155 tenants in the country, FARM TENANCY REPORT, Table I, p. 89.

<sup>8</sup> Emergency Farm Mortgage Act, May 12, 1933, 48 STAT. 41, 12 U. S. C. §636. These loans have been used primarily to refinance existing indebtedness, thus preventing additional owners from joining the ranks of tenants. *The Farm Real Estate Situation 1933-34*, U. S. DEPT. OF AGR., CIRC. No. 354 (April 1935) 5.

<sup>9</sup> FARM TENANCY REPORT, 6-7, 54-60.

<sup>10</sup> Thus, the United States Supreme Court, while holding the first Frazier-Lemke Act (Act of June 28, 1934, 48 STAT. 1289) unconstitutional, recognized specifically that the problem of checking the growth of farm tenancy was a proper one for Congressional consideration and action. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 600 (1935).

## EXISTING LANDLORD-TENANT LEGISLATION

With exceptions which will be considered later, existing landlord-tenant legislation is not concerned with the improvement of landlord-tenant relationships nor with protecting the interests of the tenants. Except in the South, where it was necessary to develop a new system of agricultural relationships to replace slavery,<sup>11</sup> there is, indeed, little landlord-tenant law which applies peculiarly to agricultural conditions. In general, the landlord-tenant law of the northern and western states is concerned with codification or modification of the common law and with establishing methods whereby the landlord may collect his rent.

The state with the greatest percentage of farm tenancy outside the southern states is Iowa.<sup>12</sup> Yet Iowa has only two statutes which relate solely to farm tenancy. The first establishes the landlord's lien against crops and provides a method for enforcing it.<sup>13</sup> The second provides that agricultural leases must fix the termination of the tenancy on March 1, except in the case of croppers, whose leases expire when the crop is harvested.<sup>14</sup> Except as covered by these two statutes, all questions which arise between landlord and tenant must be settled by reference to general statutes applicable to both urban and rural conditions or to common-law principles.

Outside the South two of the most serious regional tenancy problems exist in the Corn Belt and Great Plains states.<sup>15</sup> In these states there has been a little legislation relating to tenancy in Kansas, Texas, North Dakota, and Oklahoma, which shows a beginning of a realization that tenancy presents problems which require legislation for the protection of tenants. Codifications of the common law of real property, largely adapted from the California code provisions,<sup>16</sup> have been enacted in Montana,<sup>17</sup> North Dakota,<sup>18</sup> South Dakota,<sup>19</sup> and Oklahoma.<sup>20</sup> All of the states have Statute of Frauds provisions requiring leases for a period of more than one year to be in writing and all make provisions for the enforcement against crops of a landlord's lien.<sup>21</sup> There is legislation concerning the responsibility of fencing, placing it variously upon the occupant or upon the landowner.<sup>22</sup> In Nebraska, where the put-

<sup>11</sup> FARM TENANCY REPORT, 41-43.

<sup>12</sup> *Id.* at 96-97.

<sup>14</sup> *Id.* §10160.

<sup>16</sup> CAL. CIVIL CODE (Deering 1933) §654 *et seq.* The California provisions, in turn, were adopted from New York, 49 N. Y. CONS. LAWS ANN. (McKinney 1937) §1 *et seq.*

<sup>17</sup> MONT. REV. CODE (1935) §6663 *et seq.*

<sup>19</sup> S. D. COMP. LAWS (1929) §264 *et seq.*

<sup>13</sup> IOWA CODE (1935) §§10261-10269.

<sup>15</sup> FARM TENANCY REPORT, 96-97.

<sup>18</sup> N. D. COMP. LAWS (1913) §5254 *et seq.*

<sup>20</sup> OKLA. STAT. ANN. (1921) §8391 *et seq.*

<sup>21</sup> Statute of Frauds provisions are derived from the English Statute of Frauds, 29 CAR. II, c. 3 (1676). The prevalence and effect of landlord's lien statutes are discussed in 2 TIFFANY, LANDLORD AND TENANT (1910) §32 *et seq.*

<sup>22</sup> At common law there was no obligation to fence on either landlords or tenants, but every man was bound at his peril to keep his cattle on his own premises. *Miller v. Parvin*, 111 Kans. 444, 207 Pac. 826 (1922). Some states have held that this rule was inapplicable to conditions in this country and as a result, landowners or tenants must maintain fences to keep the animals of others out. *Johnson v. Ore. Short Line R. Co.*, 7 Idaho 355, 63 Pac. 112 (1900), *Moses v. Southern Pac. R. Co.*, 18 Ore. 385, 23 Pac. 498 (1890). By statute, however, the common law rule has been restored in some states. *State v. Mathis*, 149 N. C. 546, 63 S. E. 99 (1908). Statutes now quite generally regulate the subject of fencing, and their constitutionality has been upheld under the police power, both where the object of the statute is to regulate animals running at large, *Dillard v. Webb*, 55 Ala. 468 (1876), and where it is to divide the

ting out of poison to control insect crop pests is required by statute in districts established for that purpose, the law requires that it be purchased by the landlord and that the expense of putting it out shall be borne by the tenant.<sup>23</sup> Texas has an extensive system of landlord-tenant law,<sup>24</sup> which shows both similarities to the law of the other southern states, and also an effort at reform which will be considered in detail.

This lack of legislation, in general, appears to be caused by lack of interest in the problem. Illinois is, apparently, the only state where there has been a nearly successful attempt to secure legislation of benefit to tenants, which has attracted considerable attention. There, after the appointment of a commission in 1920, a bill passed one house of the legislature providing for compensation to tenants for improvements made on farms, the value of which had not been exhausted at the time the tenant moved.<sup>25</sup> In the South there is much legislation governing both landlord and tenant and landlord and cropper relations, but it can scarcely be said to be motivated by any desire to protect the interests of the tenants or to reduce tenancy and sharecropping. Rather, it arose after the Civil War and the abolition of slavery and was motivated by a desire to get land back into production and to secure for the landowners a return on their property.<sup>26</sup> Thus it appears that, with the exceptions to be noted, the American states have been content to allow landlord-tenant relationships to go unregulated except through such statutes as have been deemed necessary

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burden of maintaining partition fences. *Zarbaugh v. Ellinger*, 99 Ohio. St. 133, 124 N. E. 68, 6 A. L. R. 208 (1918). Generally, the statutes designed to regulate the running of stock are local in operation, *State v. Mathis, supra*, and are adopted after local option elections or the filing of a petition. Cf. *TEX. CONST.*, Art. 16, §§22 and 23, requiring a referendum of freeholders on adoption of herd law. In some instances, taxes or assessments are levied to erect a fence around the district, thus placing the burden on the landowners. *Stiwell v. Fencing Dist.*, 71 Ark. 17, 70 S. W. 308 (1902). While these statutes generally use the word "owner," it has been construed to include tenants in some instances. *Peterson v. Johnson*, 132 Wis. 280, 111 N. W. 659 (1907), and *Robinson v. Schiltz*, 135 Mo. App. 32 115 S. W. 472 (1909). Where the burden of fencing is upon the owner of live stock, rather than the owner of land, tenants who own stock are, of course, included. Some statutes define occupant or owner for the purpose of the statute as including tenants, as in Wyoming, *WYO. REV. STAT.* (1931) §42-102. In Montana the burden of fencing is placed upon the occupant, *MONT. REV. CODE* (1935) §§6777-6782, where the provisions of *CAL. CIVIL CODE* (Deering 1933) §841, were adopted with the substitution of "occupant" for "owner," but the duty of repairing barbed wire fences is placed upon the owner, *MONT. REV. CODE* (1935) §3376. Delaware permits the tenant to deduct the cost of division fencing from his rent when he is required to erect it by fence viewers, *DEL. CODE* (1935) §4178.

<sup>23</sup> *NEB. COMP. STAT.* (1929) §2-1306. The act for the extermination of fruit pests upheld in *Balch v. Glenn*, 85 Kans. 735, 119 Pac. 67 (1911) provided that notice of necessary work to control the pests should be given to the tenant, but made the cost of doing it by state officials, if the tenant failed to do so, a charge against the owner to be collected as real property taxes are collected. Similar statutes relating to pests, both animal and insect, and making the cost of their extermination a lien against the landlord's property where the tenant or landlord failed to control them, have been upheld in California. *Los Angeles County v. Spencer*, 126 Cal. 670, 59 Pac. 202, 385 (1899). In Washington a statute placing the entire burden of animal pest eradication through levying an acreage or *ad valorem* tax against the landowners, has been upheld. *State ex rel. Stanger v. Bartlett*, 112 Wash. 299, 192 Pac. 945 (1920).

<sup>24</sup> *TEX. STAT.* (Vernon, 1936) art. 5222 *et seq.*

<sup>25</sup> *Harris, Compensation as a Means of Improving the Farm Tenancy System, RESETTLEMENT ADM'N, LAND USE PLANNING PUBL. NO. 14* (1937), 32-33.

<sup>26</sup> The southern law with regard to landlord-tenant relationship is discussed in Book, *A Note on the Legal Status of Tenants and Sharecroppers in the South, infra*, p. 539.

to insure the collection of rent, through codification of the common law, or through statutes generally applicable to both urban and rural conditions.

#### LEGISLATION FAVORABLE TO TENANTS

In only four states has there been legislation dealing with landlord-tenant relationships which shows a clear intention of protecting the interests of the tenants, aside from statutes affecting the right of the tenant to remove fixtures and statutes affecting the tenant's duty to repair the premises, both of which are to be considered hereafter. In North Carolina a limitation has been placed upon the advance over the retail cash price which may be charged where the landlord or merchant furnishes supplies to the tenant<sup>27</sup> and, in addition, a commission was created at the last session of the legislature to study landlord-tenant problems.<sup>28</sup> Legislation in Texas, Kansas, and Oklahoma will be considered in succeeding sections.

In connection with our discussion of this American legislation, the British landlord-tenant legislation will also be analyzed, since it has been the inspiration for some of the suggestions for the improvement of American landlord-tenant relationships and since the English common-law system is essentially similar to that in this country.

##### 1. *The Texas Legislation*

The Texas legislature, in 1915, enacted a statute<sup>29</sup> setting maximum rentals of one-third the value of the grain and one-fourth the value of the cotton where the land was cultivated by a tenant who furnished everything except the land, and maximum rentals of one-half the value of the grain and one-half the value of the cotton where the landlord furnished everything except the labor. The statute provided that leases reserving rent exceeding those amounts should be unenforceable, that there should be no landlord's lien for rent, and that if a landlord sought to collect more than the maximum rentals, the tenant could recover double the full amount of such rental.

This statute was held unconstitutional by the Texas Supreme Court in the case of *Culberson v. Ashford*.<sup>30</sup> The court held that the statute violated the due process clauses of both the state constitution and of the Fourteenth Amendment to the Federal Constitution. It denied that the agricultural industry was so affected with a public interest as to justify price fixing and relied upon such cases as *Williams v. Standard Oil Co.*<sup>31</sup> and *Tyson & Bro. v. Banton*,<sup>32</sup> both holding unconstitutional price-fixing legislation in businesses not so affected. The case of *Block v. Hirsh*,<sup>33</sup>

<sup>27</sup> N. C. CODE (Michie, 1935) §2482. This legislation, which also applies to croppers, is considered in Book, *supra* note 26, p. 539.

<sup>28</sup> N. C. Pub. Laws, 1937, Res. No. 35, p. 940. The purpose of this statute, however, is to facilitate state cooperation with the Farm Security Administration, rather than to inaugurate a reform of the existing tenancy and sharecropping systems through state action.

<sup>29</sup> Tex. Acts 1915, p. 77.

<sup>30</sup> 118 Tex. 491, 18 S. W. (2d) 585 (1929).

<sup>31</sup> 273 U. S. 418 (1926).

<sup>32</sup> 278 U. S. 235 (1929).

<sup>33</sup> 256 U. S. 135 (1921).

was distinguished on the ground that the legislation there upheld, limiting rentals for urban property, depended for its validity upon the war emergency. Other courts may follow the reasoning and decision of the Texas court since the problem of farm tenancy has not arisen as a sudden emergency. In any event, there has been no attempt to regulate agricultural rentals since that decision.

Following the decision in the *Culberson* case however, the Texas legislature re-enacted the rent-limitation statute, eliminating the provisions directly limiting rentals and authorizing double damages but providing that there should be no landlord's lien, either for rent or for supplies furnished, where the rental exceeded the shares named in the previous statute.<sup>34</sup> While this statute has not been subjected to constitutional attack, there is every reason to assume that it is valid. Dicta in a series of cases before the Texas Court of Civil Appeals indicate that the legislature has power under the Texas constitution to abolish the landlord's lien, or to restrict it in any way in which it deems best for the public interest.<sup>35</sup>

The value of legislation merely restricting the landlord's lien depends upon many factors which vary greatly. The widespread existence of landlord's lien statutes, covering both rent and supplies in the South, indicates that in the southern states, at least, landlords may rely largely upon their liens to make collections. The North Carolina experience with lien limitation indicates, however, that where a considerable reform is attempted through this device, most landlords will rely upon other methods of collection rather than submit to the loss of profits which acceptance of the restriction would entail.<sup>36</sup> It may well be that a lien limitation is of value only in preventing undesirable departures from existing practice and is of little value in encouraging new practices. The rentals specified in the Texas statutes are those prevailing generally in the cotton-growing states. Where tenants are more prosperous, the landlord does not need the aid of a lien. Thus the effectiveness of the statute depends entirely upon whether the landlord, at the time of contracting, feels that he may have to resort to his lien in order to insure collection.<sup>37</sup>

It should be noted that the maximum rental provisions, in their present and ap-

<sup>34</sup> TEX. STAT. (Vernon, 1936) art. 5222, Tex. Acts 1931, c. 100, §1, p. 171.

<sup>35</sup> *Dunbar v. Texas Irrigation Co.*, 195 S. W. 614 (Tex. Civ. App. 1917); *Hawthorn v. Coates Bros.*, 202 S. W. 804 (Tex. Civ. App. 1918); *Rumbo v. Winterrowd*, 228 S. W. 258 (Tex. Civ. App. 1921); *Miller v. Branch*, 233 S. W. 1032 (Tex. Civ. App. 1921). The last case differentiates between the power to fix maximum rentals and to limit liens, basing the latter on the right of the legislature to classify landlords and to exclude certain landlords from the benefit of the lien.

<sup>36</sup> Despite the fact that the North Carolina statute limits the lien for supplies to cases where only a 10% advance is charged, merchants and landlords generally charge a 25% advance. Wickens and Forster, *Farm Credit in North Carolina—its Cost, Risk and Management*, N. C. AGR. EXPT. STAT. BULL. 270 (1930) 44; Wooten, *Credit Problems of North Carolina Cropper Farmers*, N. C. AGR. EXPT. STA. BULL. 271 (1930), 13-18.

<sup>37</sup> Another defect of the statute, as was pointed out by the Texas Court of Civil Appeals in *Rumbo v. Winterrowd* and *Miller v. Branch*, both *supra* note 35, is that under such limitations the landlord is given no opportunity to charge a higher rental where he furnishes a superior type of farm-dwelling. The validity of this objection, in practice, is also hard to estimate. In many areas there are no farm-dwellings so superior as to justify rentals higher than the statutory maxima and in most cases the presence of a superior dwelling will attract tenants, so that the landlord who supplies such a dwelling may be amply compensated by the fact that he has the choice of the best tenants.

parently only constitutional form, afford no protection whatever to the sharecropper. Under Texas law, where the relationship of landlord and cropper, rather than landlord and tenant, exists, the two are tenants in common of the crop.<sup>38</sup> Consequently, the landlord has no need of a lien. Thus, under the Texas law, a landlord who desires to secure a greater rental than the statute permits needs merely to make a cropping agreement instead of a lease and thus hold title to the crop, rather than a lien upon it, as security for his rent.

## 2. *The Kansas Legislation*

Kansas has enacted two statutes for the benefit of tenants, both of which apply only to owners of more than 5,000 acres whose policies, different from those of most American landlords, are regarded as more objectionable. Under this system the landlord owns only the land and the tenant is forced to erect all improvements, including expensive permanent buildings, without any provision for compensation if he is given notice to move at the end of an annual tenancy. The first of these statutes<sup>39</sup> provides that these landlords must make provision in their leases for the free sale of buildings and improvements by the tenant or their purchase by the landlord, without requiring the tenant to remove them. The second section of the act provides that where the tenant owned substantially all of the buildings and improvements, he could transfer them without the consent of the landlord, and that any provision in a lease prohibiting such a transfer or requiring removal which did not require the owner or the new tenant to pay the fair value of the improvement to the tenant, should be void.

The constitutionality of this regulation has never been attacked, and it was impliedly approved in the case of *Berg v. Scully*,<sup>40</sup> which arose before its passage but was decided afterwards. In this case, where a tenant of the Scully Estate contended that a provision for compensation for the improvements erected by him was an implied term of his contract at common law because of the estate's business practice of requiring tenants to make improvements, the court upheld the tenant's contentions and remarked that the statute expressed the public policy of the state.

The second Kansas statute<sup>41</sup> first recites a number of burdensome requirements in leases used by persons and corporations whose sole business is the leasing of farm lands for money rent, and then provides that leases containing all the requirements recited are void and that tenants under them are to be required to pay only a fair rental. Further provisions limit the landlord's lien to the crops actually grown on the land, to the livestock raised on the land, and to the sums received by the tenants for pasturage. While the statute is easy to evade since it would not be operative if

<sup>38</sup> It has been held that the landlord's lien statute does not apply to a cropping contract, *Brown v. Johnson*, 118 Tex. 143, 12 S. W. (2d) 543 (1920); *Rosser v. Cole*, 226 S. W. 510 (Tex. Civ. App. 1920), and that landlord and cropper are tenants in common as to the crop. *Horseley v. Moss & Pennington*, 5 Tex. Civ. App. 341 (1893); *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881 (1896).

<sup>39</sup> KANS. GEN. STAT. (1935) §§67-501, 67-501A.

<sup>40</sup> 120 Kans. 637, 245 Pac. 119 (1926).

<sup>41</sup> KANS. GEN. STAT. (1935) §§67-531—67-533.

a single provision recited in the statute were omitted from the lease and is also so vague that it might well be held inoperative for that reason, nevertheless, it is interesting as a recital of the grievances of the cash tenants of the Middle West. The statute first recites that the cash rental reserved is itself equal to the fair and reasonable value of the lands and that the contracts are entered into by necessitous persons only because of the scarcity of other rental lands. Among the provisions objected to are the requirement that the tenants pay all taxes and assessments; that the landlord's lien shall extend to all property of the tenants in addition to the crops grown, thus depriving them of property upon which they could secure credit from merchants; and that the tenants are required to construct all buildings and improvements to which the landlord's lien also extends. In addition, the statute recites that the leases contain burdensome provisions controlling farming operations which prevent tenants from earning the money rental, such as the provision that grain stalks grown on the land cannot be fed to the tenant's stock but must be fed to the landlord's stock. As a result of these conditions, the statute recites that:

" . . . he [the tenant] is deprived of credit with merchants and banks for the purchase of the comforts and conveniences of ordinary farm life, his children deprived of educational advantages, and himself and family kept impoverished in condition and estate."<sup>42</sup>

### 3. *The Oklahoma Legislation*

The Oklahoma Legislature was the only legislature out of the many meeting in 1937 that took steps towards a solution of farm tenancy problems through state action.<sup>43</sup> The lack of action in other states may well be explained by lack of interest in the problem, by a wide-spread feeling that the only solution was a farm purchase program which could best be sponsored by the federal government, by hostility to tenant legislation on the part of landlords generally, and by the fact that the report of the President's Farm Tenancy Committee did not appear until many legislative sessions were approaching their end.

The legislation adopted in Oklahoma does not attempt to solve the problems of farm tenancy by immediate regulatory action, but rather provides for a study of the problem and for the improvement of conditions through voluntary action to be taken by landlords. The act declares that its purpose is to establish a closer working relationship between landlord and tenant; to encourage long-term tenancies; and to encourage improvement of farms. In order to accomplish these objectives, the act created the "Oklahoma Farm and Landlord and Tenant Relationship Department," whose duty it is to create a closer relationship between farm landlords and tenants through making a careful study of the landlord and tenant situation and to (a) prepare equitable rental contracts between landlords and tenants; (b) inaugurate an educational program concerning the advantages of long-term contracts; (c) conduct meetings of landlords and tenants in order that a better understanding may be ob-

<sup>42</sup> *Id.* §67-532.

<sup>43</sup> Okla. Laws 1937, S. B. 272. See also note 28, *supra*.



tained between them; (d) assist landlords and tenants in taking advantage of existing farm organizations, associations and cooperatives; and (e) work out a basis for arbitration of differences arising between landlords and tenants.<sup>44</sup>

Perhaps the most important of the points in the above program are the plans to prepare equitable rental contracts and the plans to work out a basis for arbitration of differences between landlords and tenants. It may well be that the provisions of the equitable leases, first worked out as models to be followed voluntarily, will be so widely accepted that they may furnish the basis for later legislation making certain of their provisions compulsory. While the constitutional possibility of certain compulsory regulations of the terms of leases is here discussed as if the problem were one of immediate importance, it must be remembered that there is no chance for the actual passage of such legislation unless the people of the state are reasonably familiar with the effect of such provisions in actual operation. Consequently, an educational program which serves to familiarize them with such provisions, leads the more progressive landlords to adopt them voluntarily, and allows the people generally to observe whether their result is beneficial, is a necessary preliminary to the adoption of legislation compelling the use of such lease provisions. The Oklahoma act seems admirably adapted to the inauguration of this preliminary stage. It is also entirely possible that this stage will alone suffice to remedy many abuses growing out of agricultural leases. If model leases are generally enough adopted by landlords voluntarily and if they prove beneficial to both parties to the lease, it may well be that the minority of landlords not using such leases will be so small that legislation will be deemed unnecessary or that their opposition to it will be ineffectual.

The investigation of arbitration as a means for the settlement of landlord-tenant disputes is also one which offers great possibilities. The existing legal system is generally inadequate for the settlement of such minor disputes. Often they go unsettled, and it appears clear that the existence of such minor disputes is one of the major reasons for the frequent moving of farm tenants.<sup>45</sup> Expenses of law suits are greater than most disputes between landlord and tenant would warrant incurring. Both parties are likely to hesitate to submit technical questions of farm management to a jury, and one party or the other may feel that a jury, or indeed the Justice of the Peace, may be prejudiced in a dispute between a landlord and tenant because of their own positions as either landlords or tenants. Frequently, a money judgment for the landlord is meaningless, since the tenant has no money to pay. As will be subsequently pointed out, the legal obligation upon the tenant to maintain leased agricultural premises is a strict one and the more rapid rate of deterioration, both in buildings and soil, on rented farms<sup>46</sup> is explained, not by laxity in the law, but by

<sup>44</sup> *Id.* §4.

<sup>45</sup> Harris, *supra* note 25, at 18-22.

<sup>46</sup> Schickele and Himmel, *Problems of Land Tenure in Relation to Land-Use Adjustment, RESETTLEMENT ADM'N, LAND-USE PLANNING PUBL. No. 9* (1936); Schickele, Himmel, and Hurd, *Economic Phases of Erosion Control in Southern Iowa and Northern Missouri, IOWA AGR. EXPT. STA. BULL. 354* (1937); *FARM TENANCY REPORT*, 50-53; Harris, *supra* note 25, at 11-14.

economic conditions which make it impossible for the tenant to live up to his legal obligation and by the difficulty any landlord would have in proving to a jury just how much of the total deterioration of the farm was due to the actions of any one tenant in any one year. A system of arbitration, with provisions that decisions may be reached on questions of farm management before farming operations are begun, offers the best solution of the problem.

In many respects, the Oklahoma act can be recommended as the best method by which a state can begin a program for the reform of landlord-tenant relationships, since it provides a sound basis through the study of local conditions for working out a program that should prove reasonably acceptable to both landlords and tenants.

#### THE LAW OF REMOVAL OF FIXTURES

One of the major grievances of tenants and greatest defects in the tenancy system is the rule of law existing in many states that improvements made by a tenant become part of the real estate and cannot be removed at the end of his tenancy.<sup>47</sup> Where the prevailing tenancy is from year to year, the tenant hesitates to invest largely in such improvements, even though he would be willing to do so if he were sure he could retain them because they would tend to make operation of the farm more profitable. In addition, merchants and others hesitate to sell such fixtures on credit where the validity of conditional sales agreements or chattel mortgages may be doubtful because of uncertainty as to the respective rights of the seller and the landlord where the fixtures sold will be affixed to the real estate.<sup>48</sup>

The urban tradesman, of course, is given this privilege of removing his trade fixtures when his tenancy at his place of business expires. The reason for this discrimination against the farmer tenant is historical and dates from the decision in the English case of *Elwes v. Maw*<sup>49</sup> in 1802. In that case the exemption of tradesmen generally from the rule that property attached to the realty becomes a part of it and cannot be removed by the tenant who placed it there, was placed upon the grounds of a public policy to encourage trade and industry. 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 the improvements which he had erected and removed. This case came to be the accepted common law rule, but not without judicial dissent, and in some states where it was adopted it has been changed by statute.

<sup>47</sup> Harris, *supra* note 25, at 67-71, and see cases cited *infra*, this section.

<sup>48</sup> There is a split of authority as to priority of rights, and many factors must be considered. See Fears v. Watson, 124 Ark. 341, 187 S. W. 178 (1916) (pumps and fences held subject to chattel mortgage); First State & Sav. Bank v. Oliver, 101 Ore. 42, 198 Pac. 920 (1921) (irrigation pump held part of realty and not subject to chattel mortgage); Beatrice Creamery v. Sylvester, 65 Colo. 569, 179 Pac. 154, 13 A. L. R. 441 (1918) (silo held subject to conditional sales agreement); Gerlach Co. v. Noyes, 251 Mass. 558, 147 N. E. 24, 45 A. L. R. 961 (1925); National Bank v. Wells-Jackson Corp., 358 Ill. 356, 193 N. E. 215, 98 A. L. R. 618 (1934), and cases cited in A. L. R. notes.

<sup>49</sup> 3 East 38 (1802). A previous decision, Penton v. Robart, 2 East 88 (1801), which had granted nurserymen and gardeners the right to remove fixtures, was distinguished on the ground that they were engaged in "trade and industry."

The American courts early displayed a hostility to the rule and many of them refused to follow it. Thus, in New York in 1822, in the case of *Holmes v. Temper*,<sup>50</sup> the court condemned the rule, saying that there was no reason, justice, or equity in not permitting agricultural tenants to remove improvements which they erected themselves. In 1828 the Supreme Court of the United States condemned the distinction between agricultural tenants and other tenants and permitted a dairyman in the District of Columbia to remove his fixtures.<sup>51</sup> Pennsylvania, similarly, recognized three classes of fixtures—trade, agricultural, and domestic—which were removable.<sup>52</sup>

The judicial movement away from the rule of *Elwes v. Maw* has been hampered by the statutory adoption of the common law rules of real property in some states. Thus, Oklahoma,<sup>53</sup> North Dakota,<sup>54</sup> South Dakota,<sup>55</sup> Montana,<sup>56</sup> California,<sup>57</sup> and other states have, by statute, provided that fixtures affixed for purposes of "trade, manufacture, ornament, or domestic use" may be removed, without making any mention of agricultural fixtures. This statute early constrained the Oklahoma court to indicate that the common law rule was law in that state, although the court criticized the rule in refusing to extend its operation to homestead settlers on government lands, limiting it strictly to landlords and tenants.<sup>58</sup> As a result of this ruling, Oklahoma farmers today cannot remove fences, windmills, lightning rods, or guttering,<sup>59</sup> all fixtures necessary to the successful carrying on of farming operations. Illustrative of decisions under this rule which handicap farming operations by tenants is a North Dakota decision<sup>60</sup> that a Delco electric-light plant cannot be removed from a farm, nor a hay carrier system from a barn, nor water tanks, nor fences, although as to fences a contrary rule obtains in South Dakota under an identical statute.<sup>61</sup> In Nebraska, no statute being applicable, it has been held that corn cribs, cattle, and hog sheds were not fixtures which an agricultural tenant could remove.<sup>62</sup> Such decisions especially restrict the activities of a tenant who desires to engage in livestock

<sup>50</sup> 20 Johns. 29 (N. Y. 1822); cf. *DuBois v. Kelly*, 10 Barb. 496 (N. Y. 1851).

<sup>51</sup> *Van Ness v. Pacard*, 2 Pet. (27 U. S.) 137 (1828). Similarly, in *Harkness v. Sears*, 26 Ala. 493 (1855), the court said that the interests of the owner of the soil, as well as public policy, required that agricultural tenants be protected as tenants in trade were.

<sup>52</sup> Pennsylvania first held that a life tenant could not remove a barn, corn crib, and wagon shed, *McCullough v. Irvine*, 13 Pa. St. 438 (1850), but later limited this case to life tenants only. *Carver v. Gough*, 153 Pa. St. 225, 25 Atl. 1124 (1893). Now agricultural fixtures are recognized as removable. *In re Shelar*, 21 F. (2d) 136 (W. D. Pa. 1927).

<sup>53</sup> OKLA. STAT. ANN. (1921) §8555.

<sup>54</sup> S. D. COMP. LAWS (1929) §497.

<sup>55</sup> N. D. COMP. LAWS (1913) §5472.

<sup>56</sup> MONT. REV. CODE (1935) §§6819, 6825.

<sup>57</sup> CAL. CIVIL CODE (Deering, 1933) §1019. The Georgia Code (Harrison, 1933) §§61-109, 61-110, recognizes only "trade fixtures" as removable, and the cases indicate that it will be narrowly construed. *Wright v. DuBignon*, 114 Ga. 765, 40 S. E. 747 (1902); *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484 (1907).

<sup>58</sup> *Winans v. Beidler*, 6 Okla. 603, 52 Pac. 405 (1898).

<sup>59</sup> *Kilgore v. Lyle*, 30 Okla. 596, 120 Pac. 626 (1912).

<sup>60</sup> *Klocke v. Troske*, 57 N. D. 404, 222 N. W. 262 (1928).

<sup>61</sup> *Warner v. Intlehouse*, 60 N. D. 542, 235 N. W. 638 (1931) (fences not removable); *Joslin v. Linder*, 26 S. D. 420, 128 N. W. 500 (1910) (fences removable).

<sup>62</sup> *Roden v. Williams*, 100 Neb. 46, 158 N. W. 360 (1916).

farming, to improve the farm home, and to hold crops for a favorable market, to diversify his farming activities—in short, the tenant who is most likely to be successful.<sup>63</sup> The tenant in states where the right to remove fixtures is recognized as a part of the common law is in a much better position. Thus, in Pennsylvania a tenant has been permitted to move a silo,<sup>64</sup> and in North Carolina it has been held that a provision in a lease giving the tenant the right to remove poultry-houses and fences merely affirmed his common law rights.<sup>65</sup> Some states have already attempted a modification of the common-law rule by statute,<sup>66</sup> while in other states, such as Illinois,<sup>67</sup> the removal statute extends to agricultural fixtures.

The English themselves abandoned the rule of *Elwes v. Maw*, giving by statute in 1851 the same rights to remove fixtures to farm tenants as are enjoyed by other tenants.<sup>68</sup> Indeed, they have gone much further and have also provided a scheme<sup>69</sup> for compensating tenants for the unexhausted value of the improvements made by them, which will be discussed hereafter.

The question of the removal of fixtures is of importance only where tenants have a certain amount of capital which they could invest in fixtures, if given the assurance that they would be able to remove them. Such a reform would not touch the southern sharecropper who does not even own the necessary removable equipment for use in his farming operations. It would, however, assume considerable importance in many sections, particularly the Middle West, where the tenant owns his own farm equipment and livestock and from time to time has capital available for the purchase of fixtures of value in his farming operations or adding to the comfort of the farm family.<sup>70</sup>

The easiest first step in the adjustment of the tenant's position, aside from purely research and educational activity, is the statutory extension by the states of the doctrine that agricultural fixtures are removable. This is apparent because: (1) there is

<sup>63</sup> In addition, it should be noted that where the tenant has a right to removal as against his own landlord by agreement, he loses that right as against third parties who have no notice of it. *Pabst v. Ferch*, 126 Minn. 58, 147 N. W. 714 (1914); *cf. Roden v. Williams*, *supra* note 62. Where the purchaser knows or should know of the agreement, the tenant retains the right to removal. *Jones v. Cooley*, 106 Iowa 165, 76 N. W. 652 (1898) (fence); *Esther v. Burke*, 139 Mo. App. 267, 123 S. W. 72 (1909) (fence).

<sup>64</sup> *In re Shelar*, *supra* note 52. Mississippi has also been liberal to tenants. *Waldauer v. Parks*, 141 Miss. 617, 106 So. 881 (1926). Wisconsin has held that a garage, although not a "trade fixture," could be removed, *Hanson v. Ryan*, 185 Wis. 566, 201 N. W. 749 (1925) relying on *Holmes v. Tremper*, *supra* note 50, and would apparently permit the removal of agricultural fixtures also.

<sup>65</sup> *Causey v. Orton*, 171 N. C. 375, 88 S. E. 513 (1906). In North Carolina it has even been held that manure may be removed as an agricultural fixture, *Smithwick v. Ellison*, 24 N. C. 326 (1842), but in other states the removal of manure needed to maintain the fertility of the soil is regarded as a violation of the rules of good husbandry, discussed hereafter.

<sup>66</sup> The Kansas legislation, already discussed, meets the problem with regard to the large landlords to whom it is applicable. Other states, such as North Dakota, Laws 1929, c. 129, have exempted certain types of farm equipment from the operation of the rule, and permit tenants to remove any granary, bin, or other building placed upon the farm for the purposes of storing grain.

<sup>67</sup> ILL. REV. STAT. (Smith-Hurd, 1936) c. 80, §34.

<sup>68</sup> Landlord and Tenant Act, 1851, 14 & 15 VICT., c. 25.

<sup>69</sup> Agricultural Holdings Act, 1923, 13 & 14 GEO. V, c. 9.

<sup>70</sup> FARM TENANCY REPORT, 55-58.

no doubt as to the constitutionality of such a statute, if properly drawn, because of the well-established rule that no deprivation of property is involved in the mere change of a rule of law before rights are vested;<sup>71</sup> (2) this situation already exists, wholly or in part, in a number of states, as common law doctrine or by statute; (3) for over a century American courts have questioned the wisdom of the old rule, even when they felt constrained to follow it; (4) to adopt such a rule would accord the farmer the same rights granted earlier to businessmen (including nurserymen and gardeners); (5) its adoption furnishes a degree of protection to farmers in their investment in improvements and encourages them to make them; and (6) since no cash outlay is required of the landlord who, under the share system, will share in the profits from increased productivity caused by certain improvements, there is little chance of vigorous opposition to the proposed change.

It should be noted, however, that this easy reform is not a panacea. There are many improvements desirable to make but physically impossible to remove. Others are economically impossible or undesirable to remove. If the tenant, for example, is moving to a farm which already has the fixtures he has installed, he may choose to abandon them if there is no ready market for them. Consequently, other measures are necessary, such as provision for compensation, for a complete solution of the problem.

#### THE TENANT'S OBLIGATION TO PRESERVE THE PREMISES

From the point of view of the general public, one of the most serious consequences of the widespread prevalence of farm tenancy is the rapid deterioration in tenant-operated farms.<sup>72</sup> This tendency has already become a serious menace to the nation's soil resources, and while many farm owners have adopted extremely bad land-use practices, naturally landowners who will receive the resulting benefits will be more likely to cooperate in future programs of soil conservation than tenants who must do the work but will not stay on the farm to receive the benefits.

The law has always recognized and attempted to curb the natural desire of a tenant to get as much out of a farm during his occupancy as possible. Thus, in the early common law, waste, such as the cutting of trees or the destruction of buildings, was prohibited, and these prohibitions were strengthened by thirteenth century statutes.<sup>73</sup> Punitive damages were allowed, and there was also a remedy by injunction.

In addition to the old common law action for waste, at a later period it was held that a covenant to cultivate the land according to the rules of good husbandry was an implied term of all agricultural leases.<sup>74</sup> The difference between the two rules of law, both designed to meet the same evil, is well illustrated by two Delaware

<sup>71</sup> O'Neil v. Northern Colorado Irrig. Co., 242 U. S. 20 (1916).

<sup>72</sup> See note 46, *supra*.

<sup>73</sup> Stat. of Marlborough, 52 Hen. III, c. 23, §2 (1267); Stat. of Gloucester, 6 Edw. I, c. 5 (1278).

<sup>74</sup> Lewis v. Jones, 17 Pa. St. 262 (1851); Walker v. Tucker, 70 Ill. 527 (1873); Prysí v. Kinsey, 38 Ohio App. 92, 175 N. E. 707 (1930).

cases. In the first,<sup>75</sup> an action for damages for waste was denied where a field had been planted in corn for three years in succession on the ground that mere ill husbandry was not waste. In the second,<sup>76</sup> an injunction against planting land in corn for two years in succession was granted, the court saying that any abuse of the land by the tenant which tends to its injury ought to be restrained. In establishing these doctrines the courts clearly recognized the temptations to tenants to overcrop, to neglect repairs and to adopt bad farming practices, and the difficulties landowners would have in ascertaining the amount of damage and collecting it from their tenants.<sup>77</sup> Similarly, in asserting the now well-established rule that manure must be used as fertilizer on the farm on which it is produced, the Pennsylvania court recognized that tenants for short or uncertain terms would feel no interest in preserving the fertility of the soil, and that, if permitted to exhaust it, the results would be ruinous to both landlords and tenants and injurious to the public interest.<sup>78</sup>

Now that it seems that the results feared by the early courts of New York and Pennsylvania have arrived, more than an implied covenant in a lease to farm according to the rules of good husbandry is required. Placing a legal burden upon a tenant is not enough if his economic condition is such that he can neither fulfill his legal obligations nor pay damages for failure to do so. The practical failure of the American law requiring that the premises be preserved may in part be accounted for by the fact that the tenant could claim no compensation from the landlord where he adopted farming practices which were beneficial to the land. Apparently only one American tenant has been so audacious as to claim such a right. In the case of *Bullitt v. Musgrave*,<sup>79</sup> where the tenant was sued for waste in that he cut wood from the farm, he counterclaimed that his method of cultivating the farm benefited the landlord, since he used more manure on the farm than was produced there. The court ruled, however, that this was immaterial. Nevertheless, this solution of allowing the landlord compensation for deterioration to the farm and the tenant compensation for improvements to it is the one adopted in England.<sup>80</sup> In addition to its successful operation there, the reciprocal advantages of allowing compensation to both parties appear when it is remembered that to prevent real deterioration in a farm, improvements must be made both in the soil and in the buildings, the value of which is not exhausted within a single year. As a practical matter, a tenant is bound to leave a farm in either better or worse condition than that in which he found it.

<sup>75</sup> *Richards v. Torbert*, 3 *Houst.* (8 *Del.*) 172 (1865).

<sup>76</sup> *Wilds v. Layton*, 1 *Del. Ch.* 226 (1822).

<sup>77</sup> *Sarles v. Sarles*, 3 *Sandf. Ch.* 601 (N. Y. 1846).

<sup>78</sup> *Lewis v. Jones*, *supra* note 74. Other cases establishing the same obligation with regard to manure, for similar reasons, are *Whitesell v. Collison*, 94 *N. J. Eq.* 44, 118 *Atl.* 277 (1922); *Lassell v. Reed*, 6 *Me.* 222 (1829); *Perry v. Carr*, 44 *N. H.* 118 (1862); *Elting v. Palen*, 60 *Hun* 306, 14 *N. Y. S.* 607 (1891); *Brigham v. Overstreet*, *supra* note 57.

<sup>79</sup> 3 *Gill.* (Md.) 31 (1845). *Cf.* *Auginbaugh v. Copenhaffer*, 55 *Pa. St.* 347 (1867); *Tollefson v. Tollefson*, 171 *Wis.* 149, 176 *N. W.* 879 (1920).

<sup>80</sup> See note 69, *supra*.

The deterioration of tenant farms may also be in part explained by the fact that American farmers generally have adopted methods of cultivation which exhausted the soil, and that, in so doing, tenants have only done what the owners themselves would have done. This American custom resulted in a relaxation of the English law of waste with regard to the cutting of trees because of the supposedly unlimited supply of timber,<sup>81</sup> the relaxation of the rule against the plowing up of sod land,<sup>82</sup> and the adoption of the rule that what constitutes good husbandry is a question of fact for the jury.<sup>83</sup> This latter rule, coupled with the rule that the practice in the community was evidential of what was good husbandry, led in North Carolina at least to sanctioning the rule that tenants could deliberately follow a policy of completely exhausting the land and then moving onto new land.<sup>84</sup> While the North Carolina law represents an extreme instance, nevertheless, it illustrates the point that the law of waste and the implied covenant to cultivate the land according to the rules of good husbandry have afforded inadequate protection to American farms.

In drafting a statute defining what constitutes good husbandry, either to define the duty of the tenant or to give the landlord a set-off against a tenant's claim to compensation for improvements under a statute, the things already held by the courts to constitute waste or ill husbandry furnish a valuable guide. Among these condemned practices are failure to rotate crops,<sup>85</sup> overgrazing,<sup>86</sup> plowing up all sod land,<sup>87</sup> destruction of wood lots,<sup>88</sup> allowing weeds to grow,<sup>89</sup> failure to spread manure produced on the premises,<sup>90</sup> failure to feed grasses produced on the farm to livestock there,<sup>91</sup> over-tillage of fields,<sup>92</sup> injury to orchard trees,<sup>93</sup> grazing on wet land,<sup>94</sup> and permitting hogs to root up meadow land.<sup>95</sup>

The deterioration of buildings, fences, roads, and bridges, is also a serious problem on tenant-operated farms. Generally, a tenant is not bound to make substantial, lasting, or general repairs, but only such ordinary repairs as are necessary to prevent

<sup>81</sup> *Davis v. Gilliam*, 40 N. C. 308 (1848); *Owen v. Hyde*, 6 Yerg. (14 Tenn.) 334 (1834); *Keeler v. Eastman*, 11 Vt. 293 (1839).

<sup>82</sup> *Proffitt v. Henderson*, 29 Mo. 325 (1860); *Mize v. Burnett*, 162 Mo. App. 441, 145 S. W. 150 (1912); *Keeler v. Eastman*, *supra* note 81; *Hubble v. Cole*, 85 Va. 87, 7 S. E. 242 (1888).

<sup>83</sup> *Clemence v. Steere*, 1 R. I. 272 (1850); *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304 (1846); *King v. Miller*, 99 N. C. 583, 6 S. E. 660 (1888); *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488 (1896); *Wing v. Gray*, 36 Vt. 261 (1863).

<sup>84</sup> *King v. Miller*, *supra* note 83; *cf. Darden v. Cooper*, 52 N. C. 210 (1859). The attitude of the Virginia court in the same year, in *Hubble v. Cole*, *supra* note 82, contrasts strongly with the attitude of the North Carolina court.

<sup>85</sup> See note 76, *supra*.

<sup>86</sup> *Marshall v. Rugg*, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486 (1896); *Gorman v. Brazelon*, 168 S. W. 434 (Tex. Civ. App. 1914).

<sup>87</sup> *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874 (1886).

<sup>88</sup> *Sarles v. Sarles*, *supra* note 77; *Clemence v. Steere*, *supra* note 83.

<sup>89</sup> *Lee v. Werda*, 124 Wash. 168, 213 Pac. 919 (1923); *Pierce v. Burroughs*, 58 N. H. 302 (1878), and see weed statutes *infra* note 106.

<sup>90</sup> See note 78, *supra*.

<sup>91</sup> *Sarles v. Sarles*, *supra* note 77. <sup>92</sup> *Ibid.*

<sup>93</sup> *Thompson v. Cummings*, 39 Mo. App. 537 (1890); *Silva v. Garcia*, 65 Cal. 591, 4 Pac. 628 (1854).

<sup>94</sup> *Friemel v. Coker*, 218 S. W. 1105 (Tex. Civ. App. 1920).

<sup>95</sup> *Bellows v. McGinnis*, 17 Ind. 64 (1861).

waste and deterioration.<sup>96</sup> This obligation has been described as an implied covenant to so use the premises as to avoid the necessity for repairs as far as possible.<sup>97</sup> Where the tenants change annually, no tenant can leave the premises just as he found them. After a series of tenants have subjected the premises to normal wear and tear, the final tenant is faced with the choice of making extensive repairs which his uncertain tenure does not justify financially, or of using the premises while they are in such a state of disrepair that his farming operations are considerably handicapped.

One solution of this problem is to place the burden of repairs primarily upon the landlord and hold the tenant responsible only for the careful use of the property. This solution, found in the Roman Civil Law, has been adopted in some states, both for urban and rural property.<sup>98</sup> Thus, in Georgia<sup>99</sup> the duty to make the repairs is upon the landlord after notification by the tenant. If the landlord fails to act after a reasonable opportunity, the tenant may make the repairs himself and either look to the landlord for reimbursement or occupy the premises without repair and hold the landlord responsible for damages by action or by recoupment to an action for rent.<sup>100</sup> Similar legislation with regard to dwelling-houses exists in such states as Montana,<sup>101</sup> North Dakota,<sup>102</sup> South Dakota,<sup>103</sup> and Oklahoma,<sup>104</sup> and there is no reason why it could not be adopted by other states or extended to cover all buildings on leased farms.

Practically all states, by statute, have enacted legislation under the police power regulating the subject of fencing,<sup>105</sup> and placing the duty of maintaining them variously upon the owner, the occupier, or both. Similar statutes have been enacted, practically universally, providing for the eradication of noxious weeds,<sup>106</sup> or for the

<sup>96</sup> 1 TIFFANY, REAL PROPERTY (1898) §44; 2 THOMPSON, REAL PROPERTY (1924) §1525.

<sup>97</sup> U. S. v. Bostwick, 94 U. S. 53 (1876).

<sup>98</sup> Viterbo v. Friedlander, 120 U. S. 707 (1886) (discussing civil law origins of Louisiana provisions); Smithfield Improvement Co. v. Coley-Bardin, 156 N. C. 255, 72 S. E. 312 (1911) (discussing difference between civil law and common law rules). Statutes adopting the civil law rule are: GA. CODE (Harrison, 1933) §61-111; LA. CIVIL CODE (Dart, 1932) §§2692-2700. The Louisiana provisions are adopted from the Code Napoleon, Deehan v. Youree, 161 La. 806, 109 So. 498 (1926). Some states, such as California, have imposed an obligation upon landlords to repair all dwelling houses. CAL. CIVIL CODE (Deering, 1933) §§1941-1942, and state statutes cited, *infra* notes 101-104, while others have imposed the obligation only upon landlords in certain classes of cities, IOWA CODE (1935) §§6327, 6392, or on owners of certain types of dwellings. Tenement House Law, N. Y. Cons. Laws (Cahill, 1930) c. 62, §102.

<sup>99</sup> By another provision of the Georgia Code, in the tenancy for years, a usual type of farm tenancy, the obligation to repair is upon the tenant. GA. CODE (Harrison, 1933) §85-805.

<sup>100</sup> Dougherty v. Taylor & Norton, 5 Ga. App. 773, 63 S. E. 928 (1909); Rhodes v. Jackson, 161 La. 505, 109 So. 46 (1926). That repairs are also some improvement is immaterial. Dougherty v. Taylor & Norton, *supra*.

<sup>101</sup> MONT. REV. CODE (1935) §§7741-7742.

<sup>102</sup> N. D. COMP. LAWS (1913) §§6090-6091.

<sup>103</sup> S. D. COMP. LAW (1929) §§1057-1058. And see Armstrong v. Thompson, 62 S. D. 567, 255 N. W. 561 (1934).

<sup>104</sup> OKLA. STAT. ANN. (1921) §§7370-7371.

<sup>105</sup> See note 22, *supra*. At common law it is sufficient if the tenant keeps the fences in as good repair as he finds them. Hoyleman v. Kanawa & O. Ry. Co., 33 W. Va. 489, 10 S. E. 816 (1890).

<sup>106</sup> There is no obligation to kill noxious weeds for the protection of adjoining landowners at common law, Langer v. Goode, 21 N. D. 462, 131 N. W. 258 (1911), although tenants are required to keep down filth, such as elders and briars, for the benefit of landlords. Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776 (1897). Statutes may impose this burden upon landowners and include provisions for the



spreading of poison to kill pests.<sup>107</sup> In the case of operations which must be repeated from year to year, such as weed eradication and killing pests, there seems to be no great objection to placing the burden on the tenant who can do the work most conveniently. But as to farm boundary fences, a great burden is placed upon the tenant if he is forced either to build them initially or to make extensive repairs. This problem has been solved in Montana<sup>108</sup> by requiring the owner to build initially and the occupant to repair. The Nebraska crop pest statute<sup>100</sup> requires the owner to buy the poisons and the tenant to spread them. The Wisconsin weed eradication statute<sup>110</sup> places the burden upon both the owner and the occupier and it has been held that, under a contract for compensation for improvements, the tenant could not recover expenses of weed removal because he was merely performing a statutory duty.<sup>111</sup>

Where the state is acting under its police power in requiring the maintenance of premises, as it is under the statutes considered in this section, the state is free to place the burden of complying with the regulation upon either the owner or the occupier or both. There is a tendency to place such burdens upon the actual occupant of the land to better insure observance of the regulation, since this is the state's primary objective. However, where capital expenditure is required, permanently benefiting the property, it would appear better practice to impose the burden, at least in part, upon the landowner. The tenant can often ill afford the expenditure from which the landowner and succeeding tenants may be the principal beneficiaries. Similar reasons indicate the desirability of placing the primary burden for making repairs upon the landowner.

#### THE BRITISH LEGISLATION

The English Parliament had previously been faced with problems of farm tenancy in England, Scotland, and Ireland, essentially similar to those now facing America. As in America, although to a greater extent, the ownership of land was in the hands of absentee landlords, and the relationships between landlord and tenant were governed, in England and Ireland at least, by the same principles of the English common law as prevail in American states where modifying statutes have not been adopted. For these reasons the British experiences offer useful lessons for consideration in adjusting landlord-tenant relationships in this country.

With regard to Ireland, the solution chosen was a program of converting tenants into landowners through purchase of the absentee landlords' holdings and resale to

collection of costs of doing the work from them. *Wedemeyer v. Crouch*, 68 Wash. 14, 122 Pac. 366 (1912); *State v. Boehm*, 92 Minn. 374, 100 N. W. 95 (1904); *Metropolitan Life Ins. Co. v. Twin Falls Co.*, 56 Idaho 93, 50 P. (2d) 7 (1935); *Gray v. Thone*, 196 Iowa 532, 194 N. W. 961 (1923); *State v. Dawson*, 38 Ind. App. 483, 78 N. E. 352 (1906) (imposing criminal penalties against owner or occupant for allowing weeds to grow). Cf. *People ex rel. Van Slotten v. Cook Co.*, 221 Ill. 493, 77 N. E. 914 (1906), holding certain collection procedures invalid in a weed eradication statute and the present statute.

ILL. STAT. ANN. (Jones, 1936) §2.124-2.134.

<sup>108</sup> MONT. REV. CODE (1935) §§6777-6778.

<sup>107</sup> See note 23, *supra*.

<sup>100</sup> Note 23, *supra*.

<sup>110</sup> WIS. STAT. (1935) §§94.20-94.25. A similar statute exists in Oklahoma, OKLA. STAT. (1931) §§8880-8889.

<sup>111</sup> *Tollefson v. Tollefson*, *supra* note 79.

tenants under a program very similar to that about to be inaugurated by the Farm Security Administration.<sup>111\*</sup> In England, however, the landlord was felt to have a permanent place in the agricultural system and efforts were directed toward improvement of landlord-tenant relationships through regulatory legislation.<sup>112</sup> In Scotland the two approaches were combined, with primary emphasis upon the improvement of landlord-tenant relationships by methods similar to those used in England.<sup>113</sup>

Space does not permit a recital of the gradual advances which were made in England from the passage of the Landlord and Tenant Act, 1851,<sup>114</sup> giving tenants the right to remove agricultural fixtures, until the Agricultural Holdings Act, 1923,<sup>115</sup> now regulating landlord-tenant relationships. The major provisions of the latter act, however, will be briefly summarized since they may furnish a model for American legislation, and, even if rejected as unsuited to American conditions, suggest subjects upon which legislative reform should be considered.

The central aim of the English act is to encourage the tenant to adopt improved farming practices and to make farm improvements by assuring him of compensation for the resulting increase in value of the farm, to assure him security of tenure or to compensate him for moving expenses where his removal is forced without cause, and to penalize the tenant if he permits deterioration. To achieve this result, the act classifies improvements into three classes. The first class, compensable only if they are made with the landlord's consent, includes such major permanent improvements as planting of permanent crops or orchards, clearing of land, the construction of buildings, works of irrigation or flood control, and permanent improvements such as dams, roads, bridges, and fences. In the second class, compensable only if the landlord is notified, but for which his consent is not required, is placed drainage work only. In the third class, compensable without notice to the owner or his consent, are listed certain operations designed to increase soil fertility, the value of which is exhausted in a comparatively short time but not within one crop year, and the laying down of temporary pasture. In addition, it is provided that the tenant may claim compensation for repairs, if the landlord is notified of their need and given an opportunity to make them.

The value of an improvement for determining the amount of compensation payable is defined as its value to an incoming tenant, so that the question of whether the outgoing tenant made the improvement as economically as possible and calculation of depreciation are avoided. These values are determined by an arbiter agreed upon by the parties or, in default of such an agreement, by the Minister of Agriculture and

<sup>111\*</sup> FARM TENANCY REPORT, 75-77.

<sup>112</sup> FARM TENANCY REPORT, 72-74, Harris, *Agricultural Landlord-Tenant Relations in England and Wales*, RESETTLEMENT ADM'N, LAND USE PLANNING PUBL. NO. 4 (reprinted in LAND USE PLANNING PUBL. NO. 4a) (1936).

<sup>113</sup> FARM TENANCY REPORT, 74-75, Harris and Schepmos, *Scotland's Activity in Improving Farm Tenancy*, in LAND POLICY CIRCULAR (Feb. 1936), (reprinted in RESETTLEMENT ADM'N LAND USE PLANNING PUBL. NO. 4a (1936)).

<sup>114</sup> See note 68, *supra*.

<sup>115</sup> See note 69, *supra*.

Fisheries from a panel appointed by the Lord Chief Justice. The arbiter's determination, in most instances, is final, so that there is no necessity for court procedure. The arbiter is authorized to award additional compensation if the tenant has followed a system of farming superior to that required by his lease, thereby adding value to the property.

In addition, continuous tenure is encouraged by requiring the landlord to pay compensation to the tenant for disturbance, even though the lease has terminated and due notice given. The tenant, however, may not claim compensation under this provision if he is not cultivating the holding according to the rules of good husbandry, if he has violated the provisions of the lease, failed to pay his rent, refused to submit to arbitration the question of the rent to be paid or to enter into a written lease, or if he is bankrupt. The act authorizes the landlord to apply to the local agricultural committee for a certificate that the tenant is violating the rules of good husbandry. This section also requires the landlord to pay compensation for disturbance if he refuses to submit to arbitration the rent to be paid for the next term. The measure of compensation for disturbance is placed at the expenses incurred by the tenant in moving, with a provision that it shall be deemed to be equal to one year's rent, unless it is shown that the actual expenses are greater, but in no event shall it exceed two years' rent.

On the other hand, the act provides that the landlord may claim compensation from the tenant where the value of the holding has deteriorated because of the tenant's failure to cultivate the land according to the rules of good husbandry or the terms of the lease. The amount of compensation payable to landlord or to tenant is determined by the arbiter.

In addition to the question of the adaptability of the English statute to American conditions, the question whether such a statute would be constitutional under American constitutions necessarily arises. Theoretically, the state legislatures have basically the same powers as the English Parliament,<sup>116</sup> in the absence of express limitations in the state and federal constitutions, the most important of which is the "due process" clause. Although no court has the power to declare an act of Parliament unconstitutional, the British lawmakers are guided by an unwritten constitution composed of such historic documents as Magna Carta and of traditions which should prevent the same type of unfair and unreasonable action that in America is prevented by court action under the "due process" clause. "Due process of law" has often been defined as meaning the same thing as the phrase "the law of the land," as used in Magna Carta as a guarantee to the citizens against arbitrary governmental action.<sup>117</sup>

<sup>116</sup> The analogy to the powers of Parliament apparently was first used in *Thorpe v. Rutland R. Co.*, 27 Vt. 140 (1854), in upholding a statute requiring railroads to erect fences and cattle guards, and has since been extensively quoted. COOLEY, *CONSTITUTIONAL LIMITATIONS* (7th ed. 1903) 128; *Mitchell v. Winnek*, 117 Cal. 520, 49 Pac. 579 (1897).

<sup>117</sup> It has been held that procedure which was valid in England prior to the adoption of the American Constitution, is valid under the due process clause, *Murray v. Hoboken Land etc. Co.*, 59 U. S. 276 (1856), and on procedural matters, while the door is not closed to progress, serious consideration must be given to what has always been considered fair practice. *Twining v. New Jersey*, 211 U. S. 78

While it is unsafe to assume that American courts will agree with the English Parliament on the "constitutionality" of such legislation, nevertheless, the objective of the English legislation is to benefit the general public through the existence of an improved tenancy system, and not to favor the tenants. It is reasoned that the public in general is benefited by long-range farm planning, by the conservation of national soil resources, by improvements on tenant-operated farms, and by the stability of tenure which the compensation statute encourages. An American court which recognized that agriculture was an industry affected with a public interest to the same extent that the English Parliament has so considered it, might well uphold a statute modeled after the English Agricultural Holdings Act, 1923. Traditionally, in America, however, agriculture has been an industry over which the state has exercised little control under the police power, except where production was threatened by pests, and there are many cases in which agriculture has been used as an illustration of those things which the state could not regulate.<sup>118</sup> Since debate might go on endlessly as to whether or not comprehensive regulation of landlord-tenant relationships is constitutional in this country in view of the general doctrine of liberty of contract,<sup>119</sup> it is more profitable to consider separately the constitutionality of each regulation that has been proposed.

#### THE PRESIDENT'S COMMITTEE'S RECOMMENDATIONS

As has already been noted, the President's Committee on Farm Tenancy, besides its recommendations for a federal program to aid tenants to become owners, recommended<sup>120</sup> that the states consider specific suggestions for the improvement of lease contracts and landlord-tenant relationships discussed below, with regard both to problems which may be encountered in drafting legislation to effect them and to the major arguments for or against their constitutionality. The proposals are as follows:

(1908). The identity of the concepts of "due process" and of the "law of the land," however, is not confined to procedural matters, and has been referred to by the United States Supreme Court in considering and upholding the substantive validity of a statute. *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512, 519 (1885) (upholding statute requiring railroads to erect fences). In any event, it seems clear that the American "due process" is a development of the English "law of the land" and that the English themselves have not limited the concept to procedural matters. *MOTT, DUE PROCESS OF LAW* (1926) 83-86.

<sup>118</sup> *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993 (1923); *New State Ice Co. v. Liebman*, 285 U. S. 262, 277 (1932) (dictum refers to business of dairyman as "essentially private"); *Wolff Co. v. Industrial Court*, 262 U. S. 522 (1923).

<sup>119</sup> The doctrine of liberty of contract has most generally been applied in the field of employer-employee relations, and the cases admit that it is merely a general rule to which exceptions may be made in proper instances. Exceptions to the doctrine are listed in the dissenting opinion of Chief Justice Hughes in *Morehead v. People ex rel. Tipaldo*, 298 U. S. 587, 628 (1936). It has long been recognized that the class of contracts which may be regulated may be expanded by changing conditions and that unequal bargaining power may furnish an adequate basis for regulation. *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914).

<sup>120</sup> The recommendations of the President's Committee are (1) for federal action in various fields, *FARM TENANCY REPORT*, 11-17, (2) for state action in improvement of lease contracts and landlord-tenant relationships, *id.* at 17-18, (3) for differential taxation of farm lands by the states, *id.* at 18-19, (4) for safeguarding civil liberties, *id.* at 19, and (5) for cooperative state and federal programs, *id.* at 18-19. This paper is concerned only with point 2.

“(a) *Agricultural leases shall be written*”;

Provisions of the Statute of Frauds that leases for a term of more than one year, or, in some states, for more than three years, must be in writing, afford ample precedent to sustain the constitutionality of this type of legislation.<sup>121</sup> The reason for the proposal is the well-founded belief that many minor disputes between landlords and tenants will be eliminated if the matters are considered and a definite written understanding reached at the time the property is rented.

A mere statutory declaration that agricultural leases must be written, however, is not sufficient to solve the problem. The custom among most landlords and tenants to enter into oral contracts will not be easily ended. Furthermore, it will be easy for the landlord to secure printed forms, intentionally drafted to favor the landlords perhaps even more than do most existing contracts, so that while there will be some gain for the tenant in knowing definitely what his obligations are, he risks finding his new definite obligations greater than his previous indefinite ones.

If the model of the Statute of Frauds is followed or the existing Statute is amended, doctrines developed under the Statute of Frauds which give certain effectiveness to leases that are invalid, because oral, would probably be applied to protect the tenant who entered a farm and started to make a crop without securing a written lease.<sup>122</sup> Although this may lead to a general disregard of the statutory requirement, nevertheless, it protects the tenant who inadvertently neglects to insist upon a written lease or whose landlord refuses to grant one. It would be undesirable to declare oral leases absolutely void, for the tenant who had expended labor and capital in starting a crop would find that he had no rights in the land or in his growing crop. The effect of disregard of the statute should be included in its terms.<sup>123</sup>

A statute which provided that all leases should be written, however, could be so drafted as to afford an opportunity for at least a partial reform of the tenancy system

<sup>121</sup> The constitutionality of the Statute of Frauds has never been seriously challenged, and it has been cited as illustrative of a constitutional type of regulation of the right to contract. *Republic Iron etc. Co. v. State*, 160 Ind. 379, 66 N. E. 1005 (1903); *Adinolfi v. Hazlett*, 242 Pa. St. 25, 88 Atl. 869 (1913). One state at least has extended its scope in a manner similar to that here proposed by requiring that all contracts of insurance be in writing. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330 (1906)

<sup>122</sup> The original English Statute of Frauds, *supra* note 22, provided that leases invalidated by it take effect as estates at will, and this provision is copied in some states. In others the lease may take effect as an estate at will or as a lease from month to month or from year to year, depending upon statutory presumption, or the period by which rent is paid. Cases are collected in Note (1913) 42 L. R. A. (N. S.) 648. The doctrine of part performance, by which a lease is taken out of the Statute, is also applied, but there are varying rules as to what will be considered sufficient part performance. The cases are collected in Note (1924) 33 A. L. R. 1489-1543. See generally on the effect of the Statute of Frauds on leases, 2 THOMPSON, *op. cit. supra* note 96, at 238-257.

<sup>123</sup> It should be noted that three questions are presented, all of which, in view of the varying rules of the cases, should be settled in the proposed statute: (1) Under what circumstances shall the oral lease be held to be valid and enforced according to its terms? (2) If the oral lease is not to be enforced according to its terms, what terms shall be implied by law when the tenant has entered possession or has begun the production of a crop? (3) Under what circumstances should certain provisions of the oral lease, *e. g.*, the amount of rent, be enforced and others not enforced, and provisions implied by law, *e. g.*, the duration of the tenancy, substituted.

by providing that, in the absence of different provisions in a written lease, certain provisions should be presumed to be a part of all agricultural leases. The practical effectiveness of this procedure would depend upon the extent to which landlords adopted form leases with provisions contrary to those of the statute, but, in any event, such a statute would serve to bring the contents of model provisions to the attention of the parties and strengthen the tenant's argument for their inclusion in the lease. If this suggestion were adopted, the statute might well provide that provisions for the reforms to be discussed below should be presumed part of the lease if these reforms were not embodied in other compulsory legislation.

Legislation in this form would present no constitutional problems, since the parties would be given the right to protect all their interests through making a specific written provision contrary to the statutory presumptions.

*"(b) All improvements made by the tenant and capable of removal shall be removable by him at the termination of the lease";*

The desirability and constitutionality of this reform, already law in a number of states, has been discussed previously under the heading "The Law of Removal of Fixtures."

*"(c) The landlord shall compensate the tenant for specified unexhausted improvements which he does not remove at the time of quitting the holding, provided that for certain types of improvements the prior consent of the landlord is obtained";*

This recommendation, in effect, is for the adoption of legislation similar to the provisions for compensation for improvements in the British Agricultural Holdings Act, 1923, already discussed. The most important deviation from the British model is the lack of provision for the fixing of rental through arbitration. As the discussion of the unsuccessful attempt to regulate agricultural rentals in Texas has indicated, there is a grave possibility that American courts would hold this to amount to a deprivation of the landlord's property without due process of law. The situation is slightly different, however, where the amount of rent is left to the free bargaining of the parties and the owner who believes the compensation provisions of the statute to be burdensome is given the opportunity to recoup his prospective losses by charging a higher rental. With regard to the improvements for which the landlord's consent is required, no constitutional problem appears, since the landlord is given ample protection through his right to refuse his consent.

Constitutional questions arise, however, when it is proposed to make the landlord pay compensation for improvements made without his consent or notice to him. Many of the improvements which would be included in this class, however, are improvements which result in preserving the fertility of the soil, the value of which is not exhausted during an annual tenancy but which the tenant must make if he is to bring the farm to full productivity during his tenancy.

It remains merely to demonstrate that a compensation statute is appropriate

action to safeguard the state's interest in its agricultural and soil resources. Compensation has been recognized in at least two states as an appropriate means to secure justice for tenants as a substitute for the common law right of emblements, where they are forced to move before they have harvested their crops.<sup>124</sup> Progressive landlords have voluntarily incorporated provisions for compensation in their leases in limited instances to encourage improvements beneficial to themselves also.<sup>125</sup> The courts have specifically indicated that the problems of tenancy may appropriately be met by legislative action, in discussing and upholding statutes designed to aid tenants in becoming owners and to prevent owners from losing their farms.<sup>126</sup> It is conceivable that the general interest of the state in maintaining agricultural production and the welfare of the farm population<sup>127</sup> would justify the state in absolutely requiring landowners to maintain the fertility of their soil. If this extreme measure might be justified in theory, then the comparatively mild step of requiring landowners to bear part of expenses incurred by tenants who voluntarily take steps to preserve the fertility of the soil would be justified. There appears to be abundant scientific evidence that soil preservation requires operations, the value of which is not exhausted during any one annual tenancy. The statistics showing the more rapid deterioration of tenant farms would afford justification for a classification

<sup>124</sup> Virginia, VA. CODE (Michie, 1936) §5542, and North Carolina, N. C. CODE (Michie 1935) §2347, authorize a tenant entitled to emblements to receive compensation for his work in preparing the ground for crops which he does not harvest, because his tenancy is terminated. The North Carolina statute was held constitutional in *King v. Foscue*, 91 N. C. 116 (1884). The common law right of emblements is the right of a tenant who had planted crops, reasonably expecting to remain on the land long enough to harvest them, to return to the land and harvest, if his tenancy is unexpectedly terminated, and exists because of the public policy to give justice to tenants. *Stedman v. McIntosh*, 26 N. C. 291 (1844).

<sup>125</sup> Lease forms in actual use, which contain some provision for compensation, are collected in Harris, *Compensation as a Means of Improving the Farm Tenancy System*, *supra* note 25, App. A, pp. 100-104, and discussed, pp. 27-30.

<sup>126</sup> Statutes authorizing state aid to tenants to become owners through loans and land settlement projects, have been upheld in decisions recognizing the undesirable features of tenancy. *Wheelon v. S. D. Land Settlement Board*, 43 S. D. 551, 181 N. W. 359 (1921); *State ex rel. State Reclamation Board v. Clausen*, 110 Wash. 525, 188 Pac. 538 (1920); *Veterans' Welfare Board v. Jordan*, 189 Cal. 124, 208 Pac. 284 (1922); *Green v. Frazier*, 253 U. S. 233 (1920), *aff'g* 44 N. D. 395, 176 N. W. 11 (1920). Similar encouragement of home ownership under urban conditions has been held unconstitutional. *In re Opinion of the Justices*, 211 Mass. 624, 98 N. E. 611 (1912). Loans to farmers who own farms have been justified as a means of preventing the increase of tenancy. *Cobb v. Parnell*, 183 Ark. 429, 36 S. W. (2d) 388 (1931); *Hill v. Rae*, 52 Mont. 378, 158 Pac. 826 (1916). Similarly, the seriousness of the tenancy problem has been recognized by the courts in passing on federal farm loan programs. *Federal Land Bank v. Gaines*, 290 U. S. 247 (1933) (noting "national demand" for system). The increase in tenancy which would otherwise result has also been relied upon in holding mortgage moratoria statutes valid. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 420-425 (1934), *aff'g* 189 Minn. 422, 249 N. W. 334 (1933).

<sup>127</sup> Expenditures for farm aid are justified generally on this theory, including aid to agricultural societies. *Blume v. Crawford Co. Farm Bureau*, 217 Iowa 545, 250 N. W. 733, 92 A. L. R. 757 (1934). Similarly, the Federal Agricultural Marketing Act has been justified. *North Dakota-Montana Wheat Growers Ass'n v. U. S.*, 66 F. (2d) 573, 92 A. L. R. 1484 (C. C. A. 8th 1934). Activities as diverse as the killing of weeds, *State v. Boehm*, 92 Minn. 374, 100 N. W. 95 (1904), the dipping of cattle, *State v. Hodges*, 180 N. C. 751, 105 S. E. 417 (1920), establishing a state banking and business system, *Green v. Frazier*, *supra* note 126, a state warehouse, *State ex rel. Lyon v. McCown*, 92 S. C. 81, 75 S. E. 392 (1912), and loans to farmers, *Hill v. Rae*, *supra* note 126, have been justified on the ground that they contribute to the welfare of a basic industry of the state.

singling out such farms for the first, and perhaps the only, attempt to meet the problem through legislation.<sup>128</sup>

Fundamental objections to such a compensation statute may be raised upon the grounds that the landowner has a right to use his property as he wills and to contract concerning it as he desires. Certainly a compensation statute does modify these rights. Under proper circumstances, however, the rights of property owners have been repeatedly limited, and the doctrine of freedom of contract admits of exceptions in the public interest.<sup>129</sup> Within comparatively recent years, the right of the state to rather completely regulate the use of property through urban zoning ordinances has been established,<sup>130</sup> and the legislatures of some states have assumed that the zoning principle could be extended to rural conditions.<sup>131</sup> In England it has been recognized that the right of the state to regulate property and contractual relationships extends both into the field of employer-employee relationships and landlord-tenant relationships, for similar reasons, and this change, because of the public benefits, has been acceptable to the landlords themselves.<sup>132</sup>

Yet a statute providing for compensation to tenants for improvements is admittedly an advance step and it is by no means certain to be upheld by all courts. It is practically the unanimous opinion of agricultural economists that this step should be taken, and they can furnish facts which should demonstrate to a court that the step is a reasonable one.<sup>133</sup> In addition, comparable provisions for compensation, adopted in many foreign countries where conditions are essentially similar to those in this country, are apparently working successfully.<sup>134</sup> In the face of this situation, it will be for the judges to determine whether the present state of American law must be preserved because of constitutional necessity or whether the field is one where a departure from existing law is justified by the public benefits to be derived from this method of encouraging tenants to maintain the fertility of their landlords' farms.

The other class of improvements for which compensation may be proposed, even though they are made without the landlord's consent, are improvements relating to the repair and maintenance of farm buildings or other structures. As has already been seen in the discussion of the law with regard to the maintenance of the premises, the entire burden of making repairs could be placed upon the landlord. Hence, he is being deprived of no constitutional rights if he is merely made to share it.

<sup>128</sup> Note 46, *supra*. It should be noted that all the improvements for which compensation can be claimed under the British act, *supra* note 69, without notice to the landlord or his consent, relate to soil preservation. It is not suggested here that it would be advisable or constitutional to go further than the British statute does.

<sup>129</sup> See note 119, *supra*.

<sup>130</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

<sup>131</sup> Wis. STAT. (1935) §59.97; Mich. Laws 1935, act 44, p. 70; Pa. Laws 1937, act 435 (rural counties), and Laws 1937, act 504 (rural townships).

<sup>132</sup> See REPORT OF LAND ENQUIRY COMMITTEE (Hodder and Stoughton, London, 1913) 362, quoted in Harris, *supra* note 112, at 15, 21.

<sup>133</sup> Harris, *supra* note 25, at 1-3, 10-22, 24-26; Harris, *supra* note 112, at 1-2.

<sup>134</sup> Harris, *supra* notes 112, 113; Harris, *supra* note 25, at 34-39; FARM TENANCY REPORT, 70-86.



It should be noted that a constitutional justification for a compensation statute under the theory here advanced exists only where the compensation, in the absence of consent by the landlord to the improvement, is for an improvement beneficial to the general public and where it is conceivable that the state could require the landlord to make the improvement at his own expense. A statute so drafted that it appeared that an effort was being made to favor the tenant as against his landlord with no public benefit being served, would be held invalid.

*"(d) The tenant shall compensate the landlord for any deterioration or damage due to factors over which the tenant has control, and the landlord shall be empowered to prevent continuation of serious wastage";*

The object of this recommendation is the same as the objectives of the existing law relating to good husbandry and waste, and since it is merely proposed to prevent the tenant from damaging the property of his landlord, no constitutional problems are presented by this recommendation. The weaknesses of the present law have already been considered, but if this compensation for deterioration is allowed as a set-off against claims for compensation for improvements and if the duties of the tenant are clearly defined by statute and an adequate injunctive remedy given the landlord, it may be that these weaknesses can be remedied.

*"(e) Adequate records shall be kept of outlays for which either party will claim compensation";*

This recommendation, which is self-explanatory, relates merely to an administrative provision which should be included in the compensation statutes and presents no problems either of constitutionality or of drafting.

*"(f) Agricultural leases shall be terminable by either party only after due notice given at least six months in advance";*

This recommendation would restore the rule of the common law<sup>185</sup> with regard to notice necessary to terminate the most usual type of agricultural tenancy, the tenancy from year to year, and extend its application to other types of agricultural tenancies. This requirement has now generally been reduced by statute to shorter periods.<sup>186</sup> There is no more doubt as to the constitutionality of a restoration of the

<sup>185</sup> The reasons for the common law rule are closely similar to those influencing the Committee. The rule's history and its basis in the public policy of encouraging the proper cultivation of the soil, and the complementary rule that agricultural tenancies should generally be construed as tenancies from year to year, are outlined in *Stedman v. McIntosh*, 26 N. C. 291 (1844), 42 Am. Dec. 122 and note.

<sup>186</sup> The present situation with regard to the various types of tenancy under which agricultural lands are usually held is, briefly, as follows:

Tenancy for term of years or for one year (with definite ending date): No notice is necessary to terminate at common law. *Stedman v. McIntosh*, *supra* note 135. Some statutes have codified this common law rule, as in Kansas, GEN. STAT. (1935) §67-509, applied to agricultural land in *Tredick v. Birrer*, 109 Kans. 488, 200 Pac. 272 (1921). Where notice is required, however, under KANS. GEN. STAT. (1935) §67-506, for agricultural lands, it must provide for termination on March 1. Notice, however, is required by some statutes before the statutory remedy for the landlord to take possession may be resorted to. MD. CODE (Bagby 1924) art. 53, §§1-8; *Smith v. Pritchett*, 168 Md. 347, 178 Atl. 113 (1935).

old rule than there is of the changes. Primarily, the pressure for shorter periods of notice comes from urban conditions, where the modern mobility of the population would make a six months' period for notice extremely inconvenient, but there is no reason why the rule should be uniform for both urban and rural tenancies. Since farming operations must be planned on an annual basis, it would seem desirable to require the parties to make their plans well in advance, and to allow ample time to make arrangements for the coming year if the tenant is to move. Such a provision might also tend to stabilize tenancy by obviating the threat of termination in minor disputes toward the end of the tenancy, as in the case of disputes over the division of the crop. Even without other reforms, this change would be beneficial since the tenant would know for the last half of his tenancy if he were to remain another year and, if remaining, be inclined to conserve the soil and make minor improvements on the farm.

*"(g) After the first year payment shall be made for inconvenience or loss sustained by the other party by reason of the termination of the lease without due cause";*

The effect of this proposal is to abolish the present right of landlords or tenants to end a tenancy at its termination, for any reason or for no reason, by the mere giving of the notice required by statute. The adoption of this principle of the sections of the British Agricultural Holdings Act providing for compensation for disturbance, will end the prevalence of annual tenure and eliminate the frequent moving of tenants.<sup>137</sup> This would, indeed, be a sweeping change in the present tenancy system and a direct attack on the many problems arising from the fact that American tenants move too frequently.

For a constitutional justification for this proposal, the peculiar power of the state to regulate the forms of land tenure must be relied upon. It must be remembered that once already in the history of this country a sweeping change has been made in the existing tenancy system because the change was thought socially desirable, although then it was felt that the prevailing leases were for too long rather than too short a period. The state's power to regulate agricultural leases was first used in New York in 1846, where the Constitutional Convention adopted a provision prohibiting the leasing of agricultural land for more than 12 years.<sup>138</sup> The courts recognized that the purpose of the provision was to benefit agriculture and approved

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Tenancy from year to year: Notice of six months required by common law, shortened by statute in some states. Some of the cases involving such leases are: *Hauer v. Harkreader*, 221 S. W. 813 (Mo. App. 1920); *Tredick v. Birrer*, *supra*; *Peel v. Lane*, 148 Ark. 79, 229 S. W. 20 (1921).

Tenancy at will: The common law required no notice in this type of tenancy, and hence the courts tend not to construe agricultural tenancies to be of this type, see note 135, *supra*. Statutes, however, require notice in some states, e. g., in Georgia, where tenancies are presumed to be for the calendar year, though the parties may make express exceptions in this rule. In the case of a tenancy at will, two months' notice must be given by the landlord and one month's notice by the tenant, and the tenant's rights to emblements are secured. GA. CODE (Harrison, 1933) §§61-104-61-106.

<sup>137</sup> FARM TENANCY REPORT, 6-8, 49-50, 58-61, Table VII; Harris, *supra* note 25, at 18-22, and *supra* note 112, at 30-34.

<sup>138</sup> N. Y. CONST., ART. I, §13.

it. Thus, in *Stephens v. Reynolds*,<sup>139</sup> it was noted that the provision had been adopted to break up the existing large estates, because it was felt that tenants, having no assurance of permanent tenure or of compensation for their improvements, would not adopt the best mode of cultivation, and hence that the existing system was prejudicial to the interests of the state as a question of political economy. Statutes and constitutional provisions similar to the New York provisions were subsequently adopted in a number of other states, especially those western states which framed their constitutions after the New York Constitution was adopted. The validity of such regulations has seldom been doubted and where the question has arisen, the courts have contented themselves with citing the historical origin of the provision or relying upon the early New York cases.<sup>140</sup>

A similar statute prohibiting leases for a period of more than 20 years was also enacted in Alabama, and the Alabama court upheld the legislation upon the power of the state to regulate estates in land.<sup>141</sup> Maryland has adopted the system of permitting tenants to redeem leases for over 15 years by making certain cash payments to the landlord, although not prohibiting long leases absolutely.<sup>142</sup> This legislation was upheld shortly after its passage in *Stewart v. Gorter*,<sup>143</sup> and again attacked in the recent case of *Marburg v. Mercantile Building Co.*,<sup>144</sup> as violative of the Fourteenth Amendment to the Federal Constitution. While conceding that there were no United States Supreme Court decisions directly in point, the Maryland court upheld the legislation, despite its admitted interference with the natural right of the individual to contract concerning his own property, relying upon the general powers of the legislature to change or limit the character of estates and tenures and the widespread prevalence of such legislation.

In view of these decisions, it seems clear that the legislature has full power to regulate agricultural leases, both with regard to their duration and to other provisions in the interest of improving agriculture both from the standpoint of social conditions and from the standpoint of conserving soil resources.

While the remedy adopted in the situation discussed in these cases is completely different from that here proposed, it is noteworthy that the evil feared, neglect of farms by tenants, is the same that the proposal for compensation for disturbance is designed to meet and that the courts assert a sweeping power in the state to regulate the land tenure system to meet this evil. Under this doctrine not only compensation for disturbance, but compensation for improvements, is justified. While it was felt in 1846 that, if long tenures could be broken up, the land would be sold and pass to owner-operators, the result of the reform was merely to encourage short tenancies which accentuated the evil the statutes intended to prevent. Since this remedy has

<sup>139</sup> 6 N. Y. 454 (1852).

<sup>140</sup> *Mass. National Bank v. Shinn*, 163 N. Y. 360, 57 N. E. 611 (1900); *Lerch v. Missoula Mercantile Co.*, 45 Mont. 314, 123 Pac. 25 (1912).

<sup>141</sup> *Robertson v. Hayes*, 83 Ala. 290, 3 So. 674 (1888).

<sup>142</sup> Md. Acts 1888, c. 395.

<sup>143</sup> 70 Md. 242, 16 Atl. 644 (1889).

<sup>144</sup> 154 Md. 438, 140 Atl. 836 (1928).

so signally failed, it would appear that these cases justify the state legislatures in adopting a new remedy which seems to have a reasonable chance of success of correcting the same evil.

*"(h) The landlord's lien shall be limited during emergencies such as a serious crop failure or sudden fall of prices where rental payments are not based upon a sliding scale";*

The object of this suggestion is to meet the same situation, in the case of the cash renter, that is automatically met by the system of renting on shares prevalent throughout the country. Where a landlord has a lien for a certain sum of money, in case of crop failure or sudden decline of prices, he may have to take all, or practically all, of the crop to secure his cash rent. For this reason, largely, tenants prefer the share system which makes the landlord share these risks. The effectiveness and constitutionality of the device of limiting the landlord's lien to satisfactory types of contracts has already been discussed in connection with existing Texas legislation.

*"(i) Renting a farm on which the dwelling does not meet certain minimum housing and sanitary standards shall be a misdemeanor, though such requirements should be extremely moderate and limited to things primarily connected with health and sanitation, such as sanitary outside toilets, screens, tight roofs, and other reasonable stipulations";*

Ample precedent for this reform may be found in statutes providing minimum standards for urban housing which have uniformly been upheld under the police power as measures designed to promote public health. While these urban statutes contain many provisions not applicable to rural conditions, many of them relating to the matters listed above are applicable. Since the constitutional test of legislation of this type is the relationship of the housing standard set up to the public health, the hardship or expense imposed upon the landlord is—in legal theory—immaterial.<sup>145</sup>

There are many progressive steps in rural housing, however, which, though they should be encouraged, are not sufficiently related to health to come within the precedent afforded by the urban housing legislation. For example, no one questions the desirability of rural electrification, but it would be difficult, if not impossible, to show that it is so related to health that landlords could be compelled to furnish electricity to farm tenants. As a practical matter, it would seem that no effort should be made to improve rural tenant housing by compulsory methods above the level of housing used by owner-operators generally in the locality. The assurance of permanence of tenure which other points of a program for reform of tenancy relationships

<sup>145</sup> *Tenement House Dept. v. Moeschel*, 179 N. Y. 325, 72 N. E. 231 (1904). A successful constitutional attack on such a statute would be based upon the contention that the requirement was not reasonably related to the public health, and particular regulations, upheld because of crowded urban conditions, might be unconstitutional if held unnecessary in uncrowded rural areas. In addition to the approach suggested above by the President's Committee, in drafting a statute it would be advisable to include provisions, such as those already discussed in existing legislation, requiring the landlord to furnish a habitable dwelling and allowing the tenant to make repairs and deduct their cost from his rent.

should include will enable tenants to make improvements in their homes above the standard necessary for good health.

*"(j) Landlord and tenant differences shall be settled by local boards of arbitration composed of reasonable representatives of both landlords and tenants whose decisions shall be subject to court review where considerable sums of money or problems of legal interpretation are involved."*

For many reasons the existing court procedure is unsatisfactory as a means of settling minor differences of landlords and tenants. The natural desire to stay out of court is often enough to prevent the use of court procedure to settle these. But the reforms proposed, if adopted, will cause disputes over valuations, even where the parties' rights are clear, and a simple method of settling them should be provided. Indeed, many of these matters should not be fought over but compromised or agreed upon. For this reason, the British act has provided the method for settling disputes by arbitration already discussed, and a group of expert arbiters competent to set agricultural valuations has grown up to administer this feature of the law.<sup>146</sup>

Subject to constitutional limitations to be discussed below on compulsory arbitration, the English system could be adopted by many states in this country. The Scottish system differs from the English in that a special Land Court has been established as part of the judicial system of the country.<sup>147</sup> Resort to such a system of specialized courts for landlord-tenant problems, following in many respects a procedure resembling arbitration, would be impossible here without amendments to state constitutions which usually specify the various courts and their jurisdiction.

No constitutional difficulties are presented by this 'proposal if the arbitration procedure is made a voluntary one to be entered by agreement. A judgment awarded in a voluntary arbitration may be enforced in court, and objections that this procedure ousts the courts of their jurisdiction, deprives a party of property without due process of law or infringes the constitutional right to a jury trial have been overruled under other arbitration statutes.<sup>148</sup> The Oklahoma legislation<sup>149</sup> already considered contains provisions for arbitration of this type.

Where the provision for arbitration is a compulsory one, however, the courts have agreed in holding it to be unconstitutional.<sup>150</sup> Consequently, it appears that the arbitration method must win its way because it affords a superior method of settling disputes. Where the right to appeal to the courts is preserved, however, and the arbitration procedure aids the courts by disposing of litigation but does not close the courts to litigants, the statutes are regarded as valid. The provisions for arbitration or administrative determination of claims in workmen's compensation

<sup>146</sup> Harris, *supra* note 112, at 43-47.

<sup>147</sup> Harris and Schepmos, *supra* note 113.

<sup>148</sup> *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 129 N. E. 753 (1921); *Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288 (1921); *Ezell v. Rocky Mtn. Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925).

<sup>149</sup> *Supra* note 43.

<sup>150</sup> Compulsory arbitration of rates of wages has been held invalid in *Wolff Co. v. Industrial Court*, *supra* note 133; *Dorcy v. Kansas*, 264 U. S. 286 (1924); and *In re Compulsory Arbitration*, 9 Colo. 629, 21 Pac. 474 (1886); *cf. St. Louis I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883 (1887).

acts are based on this theory.<sup>151</sup> A tenant's compensation statute establishing new rights for tenants might well follow the procedure of the state workmen's compensation act, both in its provisions for initial administrative procedure for determining the amount due, and as to the scope of the constitutionally necessary judicial review. The local boards of arbitration could be given powers similar to those of the workmen's compensation commission and their decisions on questions of fact could be made equally conclusive.

Finally, if the state has the power to enact statutory forms of contracts, the provisions of which must be followed, as it has with regard to insurance policies, a clause providing for arbitration may be included in the compulsory provisions of the statutory contract where only the amount of loss is arbitrated and the legal question of liability under the law and contract is left to the courts.<sup>152</sup> If the device of statutory lease provisions is adopted, a provision for arbitration of this type could be included in the required provisions.

#### THE POSITION OF THE SHARE-CROPPER

There are large numbers of persons often loosely referred to as "tenants," especially in the southern states, who are not touched at all by the program outlined above because their legal status is that of the share-cropper; it is held that they are employees, not tenants; that they have no possession of the land but merely a right to enter the land to work on the crop, and statutes relating to tenants do not apply to them.<sup>153</sup> While the same individual may be a tenant one year and a share-cropper the next and never realize his change of status and while it is often difficult to determine just what is the status of any individual under the customary vague oral contract, nevertheless the legal difference in the positions of the cropper and the tenant is so great that it does not appear that the power of the state to regulate land tenure relationships justifies action with regard to the problems of the share-cropper. The only recommendation of the President's Committee for state action with regard to share-croppers is for action to safeguard their civil liberties,<sup>154</sup> although they are eligible for aid under the Bankhead-Jones Act.<sup>155</sup>

The state, however, does have certain limited powers to regulate employer-employee relationships, and the approach to the solution of the problems of the share-cropper must be made through this field of law. Present statutes relating to labor in general exclude agricultural labor,<sup>156</sup> but the decisions upholding such discriminations indicate that the distinction, though a reasonable one, is not a necessary one which the legislature must make for constitutional reasons or that the

<sup>151</sup> *Deiberkis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211 (1914). The court here also relied on the fact that provisions of the workmen's compensation acts are elective.

<sup>152</sup> *Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 Atl. 1037 (1908); *Glidden Co. v. Retail Hardware Mutual Fire Ins. Co.*, 181 Minn. 518, 233 N. W. 310, 77 A. L. R. 616 (1930), *aff'd* 284 U. S. 151 (1931).

<sup>153</sup> Book, *A Note on the Legal Status of Share-tenants and Share-croppers in the South*, *infra*, at p. 543.

<sup>154</sup> FARM TENANCY REPORT, 19.

<sup>155</sup> *Supra* note 6.

<sup>156</sup> Ham, *The Status of Agricultural Labor*, *infra*, at p. 568.

peculiar problems of agricultural labor, including croppers, may not be met by appropriate legislation.

Any attempt, however, to improve the status of the farm tenant might be circumvented by landlords who adopted the policy of working their land by employing croppers rather than by leasing to tenants. This temptation would probably be strongest in the South, where the cropping system is well-established, but even in the states where it is now practically unknown, the courts have generally recognized it is possible to make such a contract if the parties intend to do so, and clearly express their intention. Consequently, any legislation designed to improve the status of tenants should contain provisions that no contract should be construed as a cropping contract but should be construed as a contract of tenancy and subject to the act, except in the situation where the cropping contract should properly exist, *i.e.*, where the person who works the farm supplies only his own labor and where the landlord supplies all machinery, fertilizer, and seed, and directs the farming operations.<sup>157</sup> While many landlords will cooperate with a program for improved tenancy relations and, indeed, many have already voluntarily adopted reforms such as those suggested here, it must be remembered that there are also landlords who will bitterly oppose any program for improving their tenants' condition and search for loopholes in tenancy laws through which they may evade these laws if their opposition to their enactment is unsuccessful.

<sup>157</sup> That the legal abolition of the status of landlord and cropper, as in Alabama, CODE (Michie, 1928) §8807, will not necessarily affect their economic and social status, see Book, *supra* note 153, at p. 542.