Court of Errors and Appeals.

JOHN OPDYKE, Pl'ff. in Error, *v.* ABRAHAM GUEST, Deft. in Error.	In Error to Morris Circuit Court.

This was an action of Trover for a quantity of grain, partly in the sheaf and partly threshed, taken while upon the premises of the plaintiff in error, under a distress warrant, and sold by him for rent due to him from Gulick and Bodine, his lessees.

The cause was tried at the Morris Circuit Court, and a verdict rendered for the plaintiff below, the Court reserving and certifying certain questions of law to the Supreme 2
Court for its advisory opinion.

The Supreme Court advised the Circuit Court to render judgment on the verdict, and final judgment was entered in the Circuit Court at the Term of January, A.D., 1864.

The writ of error was returnable to the March Term, 1864.

The declaration was the Common Count in Trover for the conversion "by defendant to his own use of" 4,000 bundles of rye, 1,000 bundles of wheat; 200 bushels of rye in the grain, and 50 bushels of wheat in the grain.

The plea was the general issue.

3 At the trial the following bills of exceptions were sealed:

MORRIS CIRCUIT COURT.

ABRAHAM GUEST, *v.* JOHN OPDYKE.	In Trover.

This cause came on to be tried on the thirteenth day of May, in the year of our Lord, one thousand eight hundred and sixty three, before Hon. Daniel Haines, Judge of the said Circuit Court, held at Morristown, in and for the said
4 County of Morris, on the issue joined between the parties above named, and a jury duly impannelled and sworn to try the said issue (*pro ut* the pleadings in said cause) and thereupon the said plaintiff, in support of the issue joined as aforesaid, offered as a witness the said plaintiff—

Abraham Guest, who testified as follows: in the summer of 1860, I lived on defendant's farm; I farmed it for Peter Gulick and Charles Bodine, on shares; I was to have one-
5 half of the grain; the grain was to be divided after it was threshed; I was to thresh the grain; I raised corn and oats, potatoes, wheat, and rye; the summer crops were divided; I gathered the wheat and rye, in the summer of 1861, into shocks; I think there were 2,630 sheaves of rye, and about 600 sheaves of wheat; I did not thresh the wheat and rye, but had a machine in the barn for that purpose; started at threshing and threshed a few bushels; the defendant saw me working on the farm in the summer of
6 1860, and did not forbid it; the defendant stopped me from threshing the wheat and rye; he came first with a notice, and shortly after Tunison came; Tunison served a writ on me to stop threshing the grain; the next day he stacked it; It remained in stack till it was sold by Tunison; I think the defendant was at the sale; the grain was all sold and removed; William T. Melick bought it all; the rye was very good; I never got any part of the wheat or rye, and have not been paid for it in any way; Tunison sold all the wheat and rye I raised, including what I had threshed

all the other crops that I raised were divided when gathered the preceding season; there was nothing undivided but the winter crops; wheat was worth one dollar and a quarter a bushel, and rye sold at fifty-eight, sixty, sixty-two and seventy cents; I had agreed to sell this grain at Newark; I had made a market for it there; I was a huckster; the rye weighed fifty-six pounds to the bushel; there was a rise in the price of grain shortly after this grain was taken; I had household furniture, was a married man, and a householder, and had a family living in Somerset; I had a horse, harness, part of a wagon, &c. 7 8

(Plaintiff here offered to prove the value of his personal property, and that it did not amount in all, including his share of the grain, to $200 in value, to which the defendant objected, and the Court ruled it out.)

Being *cross-examined*, he testified as follows: I furnished the team to do the farming; I was to have one half of the grain for farming; I furnished the seed; the grain was to be divided after it was threshed; the straw was to be left on the place; I knew, when I went there to work, that defendant owned the farm; Mr. Rhinehart farmed the place the year before; I made my bargain with Bodine & Gulick along in the winter; the agreement was a verbal one; Opdyke served a written notice on me before the distress; The one read to me sounds like the one he served on me. 9

Peter Gulick, a witness called by the plaintiff, testified: Guest worked the farm for Bodine and me on shares; Bodine and I rented the place of Opdyke; afterward Bodine bought a farm, and I found I could not work it and let it to Guest; he was to live on the place, and work it, and give Bodine and me one half the grain; he was to gather and thresh the grain, and it was to be divided in the bushel; Bodine consented to this; I lived on the place also, occupied part of the house and kept a team on the place; Tunison sold the grain, and Melick purchased it; Tunison acted under the direction of Opdyke; he purchased the whole crop; I was present when it was threshed, and carted it away; I saw the rye weighed; Think there were 199 bush- 10

els of rye, and 40 bushels of wheat; rye was very nice, and the wheat also; Wheat was worth at that time, from $1.20 to $1.25 a bushel, and rye from 55 to 60c.; Opdyke threshed twenty-nine bushels and twenty-nine pounds of the rye, including what Guest had threshed; Opdyke wanted this for seed.

Being *cross-examined*, he said: I did not give Opdyke permission to thresh any part, but after it was threshed I sold him twenty-nine bushels; Bodine, my co-tenant, gave me permission to sell it; I received the benefit of the sale; Bodine and I had not paid our rent to Opdyke at the time of the sale; there was something over $200 unpaid in arrear; it was due the first of April 1861; I carted the grain to Durling's mill.

Andrew Rarick, a witness for plaintiff, testified as follows: I am a farmer; I saw the crop of rye on Opdyke's farm in 1861; the grain was very good; I sold my rye for sixty, sixty-five, and seventy-five cents a bushel within two months after that; about the middle of September I sold for seventy-five cents at Leddel's; that's all I know about the price; wheat was worth from $1.15 to $1.25; I did not see the wheat after it was threshed; I saw it in the stack; It was worth $1.25 a bushel.

Being *cross-examined*, he said: I sold one load of rye latter part of August; could take three or four loads a day to Leddel's mill at Ralstontown; thirty-five bushels of rye to a load; team would be worth $2.00 a day; worth seven or eight cents a bushel to thresh it; about eight.

Charles Bodine, a witness for plaintiff testified as follows: Guest worked the farm for the half; I had my share of the summer crops; rye got up as high as seventy-five cents during the fall; I was at the sale; I suppose Tunison acted under Opdyke's authority; I don't know as Opdyke had any thing to say at the sale; Gulick and I rented the farm of Opdyke; the rent had not all been paid then; it has been paid since.

Being *cross-examined*, he said: William T. Melick bought the grain for me; I sold it to Durling; I did not get the market price for it; he was to give me what they paid at Ralstontown, but did not do it; at the time of the sale by Tunison, there was upwards of $200 rent due to Opdyke; I mean the balance has been paid, after deducting what was realized from the sale of the grain.

Chambers D. Tunison, a witness produced by the plaintiff, testified as follows: I sold the grain by direction of Op- 16
dyke; I sold all the grain; sold it in stacks; I did not undertake to sell one half, I sold the whole, and paid the proceeds of sale to Opdyke.

Being *cross-examined*, he said: I acted as a constable under a distress-warrant for rent due Opdyke from Bodine & Gulick; I had the grain inventoried and appraised according to law; I notified the parties, and advertised and sold according to law. [Being shown the distress-warrant and appraisement (*pro ut* the same) he said:] this is the war- 17
rant and this is the appraisement. I employed Guest to gather and stack the grain; I paid him for it $15 or $16.

On re-examination by plaintiff, he said: I set off no exemption to Guest under the distress warrant; I took no steps toward doing so; the sale was in the latter part of July or first of August; it was some days after the distress, but can't say how many; I adjourned the sale a week or two.

The plaintiff having rested, the defendant by his counsel 18
moved the said Court to nonsuit the plaintiff. Which motion was overruled, and the defendant prayed a bill of exception and that it might be sealed, and it is done accordingly.

D. Haines. [seal.]

The defendant, by his counsel, then opened his cause to the Court and jury, and offered and read in evidence the distress warrant, bearing date the 17th July, 1861, and also the appraisement, the same having been identified and proved by Mr. Tunison (*pro ut* the same.)

19 The defendant also read in evidence the lease between John Opdyke, and Bodine and Gulick, (*pro ut* the same.)

John Opdyke, the defendant, testified as follows: I served the notice now shown me, on Abraham Guest on the 17th July 1861, before the distress warrant was served, (*pro ut* said notice.) Guest was engaged in threshing the grain at the time I served the notice; there was over $200 due me for rent from Bodine and Gulick; market price for old rye at that time, was fifty-six cents; I sold for that at Ral-
20 stontown, and wheat $1.20; Later in the season, rye was worth sixty to sixty-five cents.

William T. Melick, a witness for defendant, testified: I bought the property at the sale; bought it in the stack; I employed Amos Apgar to thresh the grain and paid nine cents a bushel for threshing; it was carted to Durling's mill, two miles off, and sold for fifty-two cents; think I sold it about a week or ten days after I bought it; The market price was from fifty-two to fifty-four cents, I acted as agent
21 for Bodine; he preferred taking fifty two cents at Durling's to fifty-four at Leddel's; it was worth $2 to $2.50 to cart the grain; grain was a little lower at that time than it was immediately after harvest; it was worth as much again to cart it to Leddel's, as to Durling's.

Being *cross-examined*, he said: I paid the money for the grain; Bodine furnished it; think rye was worth fifty-six cents at Leddel's when it was sold by the constable, and fifty-four when I sold it; if I was ready to thresh I would
22 not want to pay anyone to do it for me; it was the 8th or 10th of August when I bought it; I bought the whole crop; grain got up higher late in the fall.

Amos Apgar testified: I threshed this grain, was paid nine cents a bushel; that was the usual price; Gulick and Melick found two hands at six shillings a day each; the board of the men and horses was worth three dollars; if I had my machine and hands all ready to thresh a job of grain, and had nothing else to do, I would not be willing to pay anybody else anything to do the job for me.

23

CHARGE.

The evidence being closed, the counsel of the defendant asked the Court to charge the jury that under the evidence in the cause, the defendant had a legal right to distrain and sell the grain in controversy, and that said grain was not exempted from distress, that if the plaintiff had any right of action it must be by special action on the case, and that he could not recover his damages for being deprived of his right of exemption by an action of Trover; 24
and that if the plaintiff was entitled to recover in this form of action, the measure of his damages was the value of the property at the time of the conversion, with interest thereon. But the Court declined so to charge, and did charge and instruct the said jury that the plaintiff was entitled to claim said grain as exempt from distress by the defendant and that such distress was unlawful; that the plaintiff was entitled to recover his damages for being deprived of his right of exemption in an action of Trover;
and that they should allow the plaintiff, as damages, what- 25
ever amount they were satisfied by the evidence the plaintiff could have made out of the grain in a reasonable time after it was taken by the defendant, with interest thereon; to which charge in its several parts, as well as to the refusal of the Court to charge as requested by him, the defendant, by his counsel, excepted, and prayed that this, his bill of exceptions might be sealed; and it is sealed accordingly.

D. HAINES. [SEAL]

26

COPY OF NOTICE.

To ABRAHAM GUEST:

Sir: You are hereby notified that there was dne to me from Charles Bodine and Peter Gulick for rent (for the farm leased to them by me last year) on the first day of April last, the sum of two hundred and sixteen dollars, which is still unpaid. And which sum I demand of you as under-tenant

of said Bodine and Gulick. And you are forbidden to remove any grain from said farm until said rent is paid.
July 17, 1861.

Yours &c.,

JOHN OPDYKE.

COPY OF DISTRESS WARRANT.

Know all men by these presents, that I do hereby empower C. D. Tunison to distrain the goods and chattels and grain, whether threshed or unthreshed, lying or being in or upon the farm owned by me, and now in my possession, in the township of Bedminister, in the County of Somerset, and which was occupied last year by Abraham Guest as under-tenant to Charles Bodine and Peter Gulick, for two hundred and sixteen dollars, balance of rent due to me on the first of April last, from said Charles Bodine and Peter Gulick.

Witness my hand and seal, this seventeenth day of July, A. D. 1861.

JOHN OPDYKE. [L. S.]

Witness present—

THEO. LITTLE.

COPY OF LEASE.

This indenture, made the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and fifty-nine, between John Opdyke, of the township of Chester, county of Morris, and State of New Jersey, of the first part, and Charles Bodine and Peter Gulick, of the township of Bedminister, county of Somerset, and State aforesaid, of the second part, Witnesseth: That the said John Opdyke doth demise, grant, and to farm let, unto the said Charles Bodine and Peter Gulick, his executors, administrators, and assigns, all the farm, situate, lying, and being of the township of Bedminister: Containing one hundred and fifty-three acres, more or less, now occupied by Martin

Rhinehart and H. C. Hoffman, and lately conveyed by sale 30
to said John Opdyke, all, and singular, the appurtenances, excepting thereout, the timber, trees, and wood-land, and also the winter grain, now growing upon the said farm, with the right of said John Opdyke and his agents to gather the same, and for that purpose to have free access undisturbed by said Charles Bodine, Peter Gulick and their assigns, with hands, team or teams. Also the privilege of storing and threshing said grain in the barn on the premises; also the said Opdyke reserves for himself and his assigns, the right of drawing with his team, over and across 31
the said farm, the said grain; also timber, wood, or anything else; to have and to hold the said premises, with the exceptions and reservations above mentioned, for the term of one year from the first day of April next ensuing, paying therefor the rent as follows: Four hundred and twenty-five dollars in cash; one hundred dollars of the same to be paid on the first day of October, 1860; and also to furnish and spread on said farm, eight hundred bushels of good burnt lime. Within the limits of the term mentioned, the said Opdyke is to furnish a sufficient quantity of wood standing, 32
to burn said lime; also a kiln in which to burn said lime. And the party of the second part is to pay all taxes on said farm, and also to sow one ton of plaster on the young clover. The party of the second part are to cultivate the farm as follows: The corn-stubble field along the road, to be sowed with oats; the field next to the woods, to be sowed with oats, and a sufficient quantity of good clean clover and timothy seed. Also the corn-stubble field east of the woods, with oats, and clover, and timothy seed; also the field of winter grain adjoining, with clean clover and tim- 33
othy seed, the seed to be sowed on the winter grain field, before or by the first day of April next, the new ground north of the lane, next the woods, to be sowed with buckwheat; one half of the field adjoining J. C. Linabury, with the two old clover lots next to the same, to be planted with corn; also the field between the buckwheat-stubble and young clover in front of the barn, or the field southwest of the same, to be planted with corn, at the option of the second party; further, the party of the second part is not to keep more than fifteen sheep, and the increase of the

same; twelve head of cattle; six head of horses; at any time, on said farm. And the party of the first part is to furnish fire-wood standing, for one family, and to show them the timber to be cut for said fire-wood. The party of the second part are not to use the front rooms on the south side of the house as a kitchen or kitchens; further, the party of the second part, doth bind themselves, or their assigns, not to carry off, or suffer to be carried off from the demised premises, any hay, straw, stalks, dung, soil, compost, wood or timber, nor grain in the sheaf; except that which they bring on, under penalty of twenty dollars per load, so carried off the premises, and to yield up said premises without notice at the expiration of the said term ending April 1st, 1861, in a good husband-like manner, all things in as good and sufficient repair as they find them, fences included, except their natural wear and accidents by fire unto the said John Opdyke or assigns.

In witness whereof the parties to these presents have interchangeably set their hands and seals, the day and year first above written.

JOHN OPDYKE. [SEAL.]
CHARLES BODINE. [SEAL.]
PETER GULICK. [SEAL.]

"The day and year first written" interlined before signed, sealed and delivered in presence of—

H. H. KENNEDY.

NEW JERSEY SUPREME COURT, 37

NOVEMBER TERM, 1863.

ABRAHAM GUEST, *vs.* JOHN OPDYKE.	*In Trover.* Case certified from Morris Circuit.

This cause having been certified from the Morris County Circuit for the advisory opinion of this Court upon certain questions involved therein, and the Court having inspected the state of the case, heard counsel, and advised thereon; 38 and being of opinion that under the case as agreed upon by the parties and submitted to the Court, and the evidence in the cause on the trial thereof, the plaintiff is entitled to recover against the defendant in an action on the case for trover and conversion: Therefore, it is ordered, that the said Circuit Court be advised to render judgment on the verdict for the plaintiff in this cause, and that the clerk of this Court do certify accordingly.

On motion of
A. C. PITNEY,
Atty of Plff.

Filed January 19th, 1861.

The certified case was argued before Justices Ogden, 39 Vredenburgh, and Van Dyke. Justice Ogden delivered orally the opinion of the majority of the Court, advising the Circuit Court to render judgment on the verdict.

Justice Vredenburgh delivered the following dissenting opinion:

VREDENBURGH, J:—This was an action of trover, brought by the plaintiff against the defendant in the Morris Circuit, to recover damages for a quantity of wheat and rye, in the sheaf, taken by the defendant under a distress warrant. On the 29th of December, 1859, the defendant leased, in writing under seal to Bodine & Gulick, his farm for the

term of one year from the 1st of April, 1860, for $425. Under this lease the lessees went into possession, and in the winter of 1859 made a verbal agreement with the plaintiff by which the plaintiff was to occupy one part of the house and Gulick the other. The plaintiff was to work the farm on shares. He was to furnish the seed and team, and gather and thresh the grain, and was to have one-half of the grain, to be divided in the bushel. The straw was to be left on the place. The wheat and rye raised by the plaintiff under this agreement was cut in the sheaf, in July, 1861, and in the act of being threshed, when the defendant, on the 17th of July, 1861, served a notice in writing on the plaintiff that Bodine & Gulick owed him $216, due for rent on the 1st of April, 1861, and demanded the same of him as under-tenant of Gulick & Bodine, and forbid the removal of any grain until said rent was paid, and immediately after levied a distress warrant for the rent so due. Under this warrant the constable seized the grain in the sheaf and sold it. The plaintiff thereupon brought this suit to recover one-half the value of the grain. The jury, under the direction of the Court, found a verdict for the plaintiff for $109 25, and the Court certified the following questions to this Court:

First.—Whether the goods distrained were, at the time of their conversion, liable for said arrears of rent?

Second.—Whether the plaintiff was entitled to the exemption of property reserved to a debtor having a family?

Thirdly.—Whether trover would lie in this case?

First.—Were the goods distrained, at the time of the conversion liable to distress for arrears of rent due the original landlord?

It will be perceived by this distress warrant, that these proceedings under the landlord's warrant were against the original lessees, and not against the plaintiff as an under-tenant. Consequently, the 2d section of the act of 1848, Nix. Dig. 204, giving rights and prescribing remedies to the landlord against under-tenants, has nothing to do with

the case; whatever rights that section may give, the land- 44
lord, under this warrant; was not pursuing them. He was enforcing his rights against his original lessees and not against their under-tenant. It is true the landlord had given the plaintiff notice that he intended to hold him responsible under this 2d section, but he did not thereby forfeit any of his existing rights against his original leessees, and he saw fit to pursue his right against them and not against the under tenant. The object of the act of 1848 was to give additional remedies to the landlord, and not to take any away. It left him his remedies against the original 45
lessees untouched, and gave him additional ones against the under tenant. Before the act of 1848, as between the landlord and under tenant of the original lessees, there was neither privity of estate or of contract. (Taylor's Landlord and Tenant, section 448.) The landlord could not, consequently, either sue the under tenant for the rent, or distress his property as such. It results from this that if the under tenant could remove his property before the landlord could distrein it, he could not distrein it at all, or follow it under any of the provisions of the act concerning distresses, 46
and it was to give them special remedies against the under-tenant that the act of 1848 was passed. The act of 1848 could not have been passed to enable the landlord to seize the property of any under tenant found on the premises, for that has existed and been of every day practice for time immemorial. By the common law, the landlord could only seize, as against his tenants, the property found on the premises. But various acts in England, and the act of 1795 in this State, had given the landlord the power, for a certain period, to follow the goods of his tenants off of the prem- 47
ises, but had not given him this power as to under-tenants, and the act of 1848 was to remove that evil: but was not intended, and does not by its terms interfere in any respect with the existing rights between the landlord and the original lessees, and it was in pursuance of these rights, as is manifest from the warrant itself, that these proceedings were had. They were to collect from the goods on the premises the whole of the rent due from the original lessees, and not what the under tenant might be liable for under the Statute of 1848. It is true he gave notice to the under-

48 tenant that he meant to hold him liable under that section, but as the under tenant did not remove the goods, he did not find it necessary, but concluded to pursue his more perfect remedies against the original lessees. The question here, therfore, is not whether defendant, as landlord, has justified his seizing the grain by virtue of any rights under the statute of 1848, against the plaintiff as under tenant, but whether he was justified in seizing this grain by virtue of his rights against his original lessees.

Was the defendant, then, as landlord, justified in seizing
49 this grain by virtue of his rights against his original lessees?

No question is raised before us under the 17th section of the act of 1795, Nix. Dig. 203, or under the common law as it existed before that section was passed, either as to the determination of the lease or as to the tenant's removal from the premises. We are to presume, then, that the distress is all regular in these regards. Nor is there any dispute but that if this grain, at the time of the distress and sale belonged in the whole to the original lessees, but that the defendant was justified in seizing it under his distress
50 warrant. Nor is there any pretence as between the landlord and the original lessees, that they, the lessees, were entitled to any exemption of $200 worth of property under the act of 1851, Nix. Dig. 204, for it does not appear by the case that either of them had families residing in this State. Nor if they had, could the plaintiff set that up. The question therefore remains still, was the defendant as landlord, justified in seizing and selling this grain by virtue of his rights against his original lessees? The general principle of the common law is that the landlord can seize for
51 arrears of rent, all goods and chattels found on the property, to whomsoever belonging, the defendant was therefore justified in seizing this grain, unless the plaintiff can bring it within some lawful exception. It is true that grain in the sheaf was excepted at common law from the things that the landlord could seize for arrears of rent, because a thing distrained being then regarded as a pledge, grain in the sheaf could not be returned in its entirety, because of the waste. But this exception to the general rule was removed by the statute of 2 William and Mary. Ch. 5, represented by the 7th section of our act of 1795, Nix.

201; and grain in the sheaf found on the demised premi- 52
ses, to whomsoever belonging, was subjected to the general rule of the common law, that all property found on the premises, to whomsoever belonging, was liable to seizure for rent by virtue of the landlord's rights against the original lessees. So also grain in the ground was an exception to the general rule that all property found on the premises was liable to seizure, because it partook of the realty. But this exception was also removed afterwards by the statute of 11th George the 2nd, Ch. 19, section 8; incorporated in the 8th section of our statute of 1795, Nix. Dig., 200, and 53
by this statute of 1795, all grain growing or being on the premises, in whatever condition, and to whomsoever belonging, was also subject to the general rule of the common law that all property found on the demised premises, to whomsoever belonging, was liable to seizure for arrears of rent by virtue of the landlord's rights against the original lessee. So that, by virtue of this 8th section of our act of 1795, Nix. 200, all wheat and rye, grain, or other produce whatsoever, growing or being on the premises may be taken and seized and sold for arrears of rent. By 54
the very terms of this 8th section, all or any wheat, rye, or produce, whatsoever, being on the premises, may be seized and sold for arrears of rent. This statute, in its very terms includes this grain in question. The terms are, all or any wheat and rye whatsoever. Not the wheat and rye of the tenant only, but all whatever, without relation to ownership. But the plaintiff contends here, that the rights which the landlord here has against his original lessees, do not justify him in seizing this grain, he says that by the contract between himself and the lessees, he, the plaintiff, was 55
tenant of nobody, but he was a mere cropper and no tenant or under-tenant, and that by force of his contract, he was tenant in common, not of the land, but of this grain, with the original lessees, and that neither the landlord nor the lessees had a right to seize his half of this grain, and that the defendant, having done so, is liable to him for half its value in trover. I think the plaintiff is right in saying that as between himself and the lessees he was no tenant, and that half of the grain belonged to him as tenant in common thereof with the lessees. But supposing this to be

56 true, I think, nevertheless, that his share was liable to this distress warrant. It would have been so undoubtedly at common law, and under the statute of 11th George 2nd. But the plaintiff contends that the 8th section of our act, Nix. Dig., 218 has altered the rule in this respect. This section provides that every landlord may seize any goods or chattels of his tenant and not of any other person found on the premises. The plaintiff contends that this clause and not of any other person, frees these goods from seizure. He says that one half of this grain was his and not the
57 property of the lessees, and therefore exempted by this 8th section. But it is apparent, as well from the conditions of the common law at the time this section was passed, as from the language of this section itself, that by the phrase "any of goods and chattels," the legislature did not intend to embrace any produce raised upon the demised premises. This phrase in our 8th section is peculiar to New Jersey. I find no similar phrase either in the statute laws of England or of any of our sister States. It was first and only enacted, so far as I can discover, in this 8th section of
58 our act, passed originally in 1795, and again re-enacted in 1846. Our act of 1795 was a kind of epitome of the history of England. Its framer collected in its first seven sections the various Acts of Parliament which had been passed from the time of Henry the 7th up to the 11th of George 2d, and adopted them without material alteration, although the change in the habits and modes of thought between such distant eras had made perhaps the first five sections unnecessary. The penman of the 8th section of our act then came, in his progress downward to our own time, to
59 the 8th section of the 11th George 2nd, ch. 5. The object and effect of the 8th section of the 11th of George the 2nd, was to enable the landlord to seize horses, cattle, &c., feeding upon the common lands appendant and appurtenant to the demised premises, and upon produce growing upon the leased premises, and left the common law in other respects as it was. It did not alter the principle of the common law, that all property found on the demised premises, to whomsoever belonging, was liable to the landlord's rent. By the common law, as it then existed, all property, even of a stranger, found on

the premises, was liable for rent, with certain exceptions. 60
These exceptions were quite numerous at the common law; as for instance, all goods of a stranger which happened to be upon the premises in the way of trade, as cloth in a tailor's shop. But these exceptions, notwithstanding, left many things of strangers on the premises liable to seizure, and so, often worked great hardships. As for instance, cattle trespassing by default of their owner were liable to be seized by the landlord for rent in arrear; and many other cases of analogous hardship might and did occur. 61
When the framer of our act of 1795 came to the 8th section of the act 11, George the II., it occurred to him as affording a convenient ground-work upon which to remedy this hardship of the common law, that the goods or cattle of a stranger coming accidentally upon the demised premises should be seized by the landlord. He therefore, using the 2d section of 11th George II. as his ground-work, framed our 8th section of the act of 1795 upon it. But the goods and chattels named in it, which were in his mind's eye, were not goods and chattels generally, as in their 62
broadest signification, but those goods and chattels which were liable to get upon the premises accidentally; but he did not mean to except or include such goods and chattels as were the produce of the demised premises. That this was so, is apparent in the first place from general considerations; and, secondly, from the peculiar language of the statute. In the first place, he who raises a crop of grain upon demised premises, whether we call him assignee, under tenant, or cropper, is a stranger to the landlord. He is in situation *quasi* tenant, and it is not at all probable that the fra- 63
mer of the act of 1795 intended to except the produce of the land, to whomsoever belonging, from liability to distress. The produce of the land was not within the evil the framer of this change of the 8th section of the act of 11 George II. intended to remedy. If anything should be liable to distress for rent, it is the produce of the property, and any amendment of the law giving the tenant the power, by such a contract as this, to put the produce of the land beyond the power of the distress would be creating against the landlord as great a hardship as that against a stranger which the alteration in the section was intended to remedy.

64 These general considerations are recognized by this Court in the case of Hoskins and al., *vs.* Paul, 4 Hals. R., 110, and in 4th Zab. R., 443. But I think the language of the section itself shows that the goods and chattels named therein only referred to those goods and chattels of strangers which get upon the property, not those which were grown there. If bythe phrase in the first clause of section 8th in our act of 1795, Nix. 219, "any goods and chattels" were meant "all goods and chattels," and not only those of strangers brought upon the property, why repeat in the
65 next clause, and "also any hogs, horses, &c., feeding on the premises." Hogs and cattle are goods and chattels in their broadest meaning. Does it not show that when goods and chattels were named in the first clause, they are used in some restricted meaning—some meaning which, in the eye of the Legislature, did not include hogs and cattle. But that the Legislature did not use the terms goods and chattels in the first clause in so broad a sense as to include produce raised on the land, I think is perfectly manifest from the third clause in the section, which is, "and also, to
66 take all or any grain or produce whatsoever growing or being on the premises." In the first clause the language is, "any goods or chattels of his tenant, and not of any other person," but in this third clause it is "and also all wheat, rye, and produce," not as before of his tenant, and not of any other person, but "all wheat, rye, and other produce whatsoever, growing or being on the premises." Why is not the third clause like the first or second? Why does it not read "and also all and any wheat, rye," &c., of the tenant, and not of any other person? Why, unless wheat,
67 rye, of other persons on the premises were not among the goods and chattels intended to be exempted by the first and second clauses? Does it not show that by the terms goods and chattels in the first clause the Legislature had in their mind's eye only such goods and chattels of strangers as came, as it were, accidentally on the property, and which yet, were by the strict rules of common law, liable to distress for rent. But again, even if the terms, goods and chattels, in the first clause of this section, were intended to include all goods and chattels, yet the third clause, by its very terms, makes these goods and chattels, viz., grain

being on the premises, liable to distress, and if the two 68
clauses cannot be reconciled, the last enactment must prevail. Assuming, therefore, the plaintiff's contention to be true, that he was no tenant and only a cropper, and that he owned half or the whole of the grain in question, yet the same was liable under the general principle of the common law, and so far from being within any exception, is made liable in terms by the very section under which its exemption from distress is claimed. The plaintiff next contends that if these goods—this wheat and rye—were liable to distress, that he was a married man, having a family re- 69
siding in this State, and that before this property could be distreined $200 worth of property should have been set off to him. He claims this under the first section of the act of 1851, Nix. Dig., 204. This provides that the goods and chattels mentioned in the eighth section of the act of 1846, Nix., 200, as by law privileged from distress shall hereafter be deemed and taken to be all such goods and chattels as now are, or hereafter may be by law, reserved to any debtor. But by reference to said eighth section it will be observed that the goods therein excepted are only those of a tenant. 70
The plaintiff has shown, by his evidence and authorities, very satisfactorily that he is no tenant, but only a cropper, and liable for rent to nobody. He is not, therefore, within the provisions of the act of 1851. No one can claim that exemption but the tenant. Here, the plaintiff is not even assignee or under tenant. Not assignee, for the assignment must be in writing—of which there is none here; not under tenant, for his interests, if any he have, cannot be less than the whole term. He is simply, as he has described himself, a mere cropper, liable, as at the common law, to 71
have any crops he may have raised seized by the landlord for rent. Nor even if he were assignee or under tenant could he claim the $200 exemption, for they are not tenants within the meaning of the act of 1851; and if they could be within the meaning of the Art. of 1851, they could not claim the exemption in this case, for the proceedings here are under rights of and against the original lessees. It follows, from what we have said, that all the questions propounded to us should be answered in favor of the defendant, and that the Court should be advised accordingly.

72 ERRORS ASSIGNED.

1. Because the said Court, on the trial of said cause, refused to grant the motion to nonsuit the plaintiff when he rested his cause.

2. Because the Court, upon the trial of said cause, instructed the jury that the goods and chattels in the plaintiff's declaration mentioned, were exempt from distress for rent, and not liable to be seized or taken by the defendant
73 under his said distress warrant.

3. Because the Court also further instructed the jury, and decided in the said cause that the plaintiff could under the evidence in the cause, recover his damages for being deprived of his right of exemption in an action of trover and conversion.

4. Because the Court further instructed the jury that the plaintiff could recover as damages whatever amount they
74 were satisfied by the evidence the plaintiff could have made out of the grain in a reasonable time after it was taken by the defendant, with interest thereon, and refused to charge that the measure of damages was the value of the grain at the time of the conversion with interest.

LITTLE & GAGE,
Attys.