Crews v. Cortez, 102 Tex. 111, 113 S. W. 523, (1908). This action was brought by the cultivator "to recover damages to the extent of one-half the value of the crop planted and raised on the land of Cortez by Crews." Under an agreement by which the landowner was to furnish the necessary tools, teams, feed for teams, and seed, the plaintiff planted and cultivated a crop until forced to leave by threats of violence on the part of the landowner. The defendant (the landowner) then appropriated the crop and converted same to his own use. The question certified to the Supreme Court was:

Would the defendent in such a case be entitled to charge against the plaintiff any part of the reasonable cost and expenses of cultivating, gathering and marketing the crop after the time that the defendant wrongfully and illegally took possession and forced plaintiff to abandon the same?

In differentiating between the cases which the lower court considered to have been in conflict, the court said:

In *Rogers v. McGuffey (96 Tex. 565)* and in *Wagoner v. Moore and Stevens, 45 Tex. (C.A.) 308,* the contracts were broken before any crops had been brought into existence and therein they differ from *Fagon v. Voght, 357 (C.A. 528),* and *Tignor v. Toney (13 T.C.A. 518),* in which the decisions were based on the docket of wrongful and intentional conversion of personal property. * * * The damages which the plaintiff in this case is entitled to recover, on facts such as are found by the Jury and the Court of Appeals, are to be ascertained as indicated in *Rogers v. McGuffey,* by finding the value of the contract to him, or, in other words, of the pecuniary benefits which would have accrued to him had he been allowed to perform it fully. The claim asserted seems to be for the value of the stipulated share of the material, crops, and we shall assume that it would have constituted the entire compensation to plaintiff for fully performing the contract had it been received as a result of such performance.

The question arises, is he entitled to the value of all of it when he was relieved of part of the labor, and, perhaps, of other expenses that would have been necessary to further performance? As was said in *Rogers v. McGuffey,* such contracts sometimes are intended to furnish employment for the labor of the tenant or cropper. The profit to be realized out of the crops over and above the value of the labor and other outlays expended in the making of them is therefore not all that is contemplated in such contracts. Employment for the tenant or cropper when secured is valuable, whether a profit over and above such labor and other expenses is realized or not. And this may be true as to the labor of members of his family which he can control and utilize without extra expenses. * * * Such contracts so far partake of the nature of those for personal services as to make it just to take into consideration the purpose by which the damages for breaches of those contracts are ascertained, and, in cases where such results as we have just indicated have flowed from the breach, to deduct, not the entire value of the labor that was necessary to making of the crop, but only such sums as those thrown out of employment could, by reasonable diligence, have earned thereafter. But all other expenses, including those for hired labor, which the cropper would have incurred in performing his part of the contract should be deducted from the value of his share of such crops as he would have made, for the reason that he would have realized from the matured crop only the difference between the value of his share and the cost of their production. * * *

The plaintiff did not have the right to recover the entire value of the stipulated share of the crops he would have made, if, in order to make them, further expenditures, such as we have indicated, would have been necessary on his part, but he had only the right to recover the difference between such value and the amount of such further outlays added to the deductions to be made as for such earnings in other employment as are above indicated. Expenses incurred by the defendant for labor, and other things, in maturing and harvesting the crops are not to be deducted in estimating the plaintiff's damages. The plaintiff, if the facts be as found, is not charged with expenses incurred by the defendant.

A cropper might also bring action for breach of contract where the landowner has failed to carry out his part of the agreement.

In *Matthews v. Foster (C.A.) 238 S. W. 317 (1922),* the cultivator brought an action against the landowner for breach of contract to furnish him with a sufficient amount of money to make a crop, buy groceries, etc., plaintiff agreeing to cultivate the land and give defendant one-third of all crops produced and repay advances. On this appeal the court reversed a judgment rendered for the plaintiff because of improper considerations as to damages, saying:

There is not only no allegation as to the value of the crops that would have been produced, but also an utter failure to show what appellee earned after he leased the land of the appellant. The measure of damages in such cases is two-thirds of the value of the crops which would have been produced less further necessary expenditures, not including the labor necessary to mature and gather the crops, and less such sums as appellee may have earned in other employment.

VIRGINIA

(1) LANDLORD AND TENANT, WHEN

In a crop-sharing contract, if the effect of the arrangement is to give the cultivator the possession of the land—the exclusive possession, as it is frequently stated—a tenancy is created and the parties are landlord and tenant. If the possession is retained by the owner, there is no lease creating a tenancy, and it is merely a cropping contract. The basic distinction is that the tenant has an estate in the land and the "cropper" has none. [See (2) under chart.]

No set of words is necessary to constitute a lease, and in doubtful cases the nature and effect of the instrument must be determined in accordance with the intention of the parties as gathered by the whole instrument. *Upper Appomattox Company v. Hamilton, 83 Va. 319, 2 S. E. 195; Michie v. Lawrence, 3 Rand 571.*

(2) EMPLOYER AND CROPPER, WHEN

Where the relationship of master and servant exists, and the occupancy of the premises is because of this relationship, the occupant is generally considered merely as a servant and not as a tenant. *Va. Iron and C. Co. v. Dickenson, 143 Va. 250, 129 S. E. 228.*

With regard to the relationship of employer and cropper, Michie's Digest of Virginia Reports, vol. VI, p. 360 (1939), makes the following observation:

Cropper not a tenant.—Where a landowner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant but a mere employee, and the ownership of the entire crop is in the landowner. *Parrish v. Commonwealth, 81 Gratt. 1.* The relationship was held not to exist in *Lowe v. Miller, 3 Gratt. 205, 212, 213.* In *Rosen v. Sachs, 143 Va. 420, 130 S. E. 229,* the evidence was held not to show a lease, and that the relationship of landlord and tenant did not exist.

(A lease) is to be distinguished from a license—Very frequently it is a matter of great difficulty to determine whether the agreement under which the tenant holds is technically a lease or a mere license. The decisions on this subject are numerous and extremely difficult to reconcile. *Hanks v. Price, 32 Gratt. 107,110.*

In the matter of joint tenancy of the crops in a crop-sharing contract, Michie remarks:

Still greater difficulties often occur in deciding whether the agreement constitutes the tenant a lessee of the land, or a mere joint tenant of the crop. *Lowe v. Miller, 32 Gratt. 205,* is one of that class of cases in which this Court, after much deliberation, held that under the contract there was no lease but a mere joint tenancy in the crops raised on the land. *Hanks v. Price, 32 Gratt. 107, 110.*

A party in possession of land, but having no title thereto, was authorized by the owner to rent it on shares. This was not a lease as the reservation of a part of the crop was not incident to the reversion, and thus gave no right of distress. *Lowe v. Miller, ante.*

The leading case in Virginia for many years that distinguished between tenant and cropper (or employee) is *Parrish v. Commonwealth, 81 Gratt. 1 (1884).* In that case the landowner, Parrish, contracted with one Mitchell to grow a crop on his land for which he was to receive one-half of the crop, after paying all advances. Before the crop was divided, it became apparent that Mitchell's one-half interest would not pay the amount of Parrish's account for necessary advances by him to Mitchell. After the corn was gathered, Mitchell put 20 barrels in Parrish's corn house and put the remaining 10 barrels, over the protest of Parrish, in a tobacco house and kept the key. Parrish at once asserted his ownership of the corn in the tobacco house, and nailed up the door in Mitchell's presence. Mitchell attempted to remove the corn in the night, breaking the door with an ax, whereupon Parrish shot and killed him. The case arose from the appeal of Parrish from a verdict of the lower court finding him guilty of murder in the second degree. The ownership of the corn had a bearing on the result in the Supreme Court because it affected Parrish's right to defend his property within his curtilage. In reversing the lower court and declaring the case to be one of justifiable homicide, the Supreme Court said with regard to the ownership of the crop:

> The contract of February 3, 1882, between Mitchell and Parrish settles the status of Mitchell to have been that of a mere employee or cropper. Parrish had furnished Mitchell with a house and lot, free of charge, on a different place from that on which Mitchell cropped for Parrish, and nearly a mile away. Mitchell was entitled to nothing until Parrish had been fully reimbursed, out of Mitchell's share of the crops, for whatever Mitchell might owe him for supplies and otherwise. He was, therefore, no tenant. Parrish was to pay him for his services and the arrangement was only a mode of paying for Mitchell's labor. *2 Minor's Inst. 159.* * * * There had been no division of the crop. Mitchell, therefore, had no interest in the corn or other crops. *Taylor's Landlord and Tenant, p. 21, Note 6, and cases there cited.*

The Court, later in the opinion, continued:

> And all questions as to the employee, in cases of contracts similar to that between Mitchell and Parrish, being allowed to interpose a bill of "Claim of Right" as an immunity to criminal conduct, like Mitchell's, is expressly negatived by the decided cases. *State v. Jones, 2 dev. and Bat. 544; State v. Gay, 1 Hill 364.* In the case of *State v. Gay* it was held that "One who is entitled to a share of the crop for his services on plantation of another is not a joint tenant, or tenant in common with his employer in the crop produced. It is exclusively the property of the employer though he has made an executory contract to allow a certain portion of it to the cropper; and the latter may commit larceny in stealing a part of the gathered crop."

The Court then dismisses the discussion of the relationship between Parrish and Mitchell thus:

> The tobacco house was in Parrish's curtilage, and it had, therefore, all of the privileges and the protection of the capital or dwelling house. *Blackstone's Com. 225; Davis' Criminal Law, 150.*

This Parrish case is reported as being overruled in *Fortune v. Commonwealth, 133 Va. 669, 688 (1922),* where the Court said:

> Parrish's case, 81 Va. 1, is cited and relied on for the Commonwealth. In that case the Court was divided, there being a bare majority of one for the majority opinion. The holding of that opinion on the subject of the relationship of Parrish to the deceased cropper is in conflict with *Lowe v. Miller, 3 Gratt. (44 Va.) 205, 46 Am. Dec. 188 (1846),* not cited in the opinion, and is otherwise, as we think, unsound in its holding with respect to the principles of law applicable to the facts of that case, so that the Court as now constituted feels constrained to disapprove of such holding.

Continuing, in the Fortune case, the Court said further:

> However, of that case this should be said: "The decision was based both on the ground that the killing was done in order to prevent the aforesaid entry of the assailant into a building within the curtilage, by breaking and entering, and that, too, in the night time (which was held to have been a felony committed in the presence of the accused), and on the ground that the killing was in self-defense."

The Fortune case was stating the rule as it applied to an alleged criminal act, and as it affected the defense, and without regard to the relationship of the parties under the cropping contract.

All of the subsequent cases citing the Parrish case turned on a point of criminal law and evidence in a criminal case, and have nothing to do with the relationship of employers and croppers, or of landlords and tenants.

There is certainly room for doubt that the holding in the Parrish case *was* overruled by this decision which turned principally on the criminal features and not on the distinction between a cropper and a tenant. In the Lowe v. Miller case cited by the Court (decided in 1846), it was held (Syllabus):

> Lowe being in possession of the land to which he has no title, but which he was authorized to rent out for his own benefit, makes a written contract with A to let to him the land for a year upon the terms that Lowe shall find the tools to work the land, and the seed to sow it, and A shall board himself and family and work the crop, and when it is gathered, give one-half of it to Lowe. Held: this is not to be construed a lease rendering rent in kind, as the reservation of the one-half of the crop was not incident to the reversion and, consequently, gave no right of distress. But the contract constitutes the parties joint tenants of the crop raised.

It is difficult to see how this decision in the Fortune case, citing the Lowe case, does actually overrule the holding in the Parrish case as to the relationship of the parties, and the ownership of the crop.

In the Fortune case there was no question of any relationship of landlord and tenant, or employer and employee, between the parties, one of whom was shot in the chicken yard of the other in a controversy over a payment for eggs. After 38 years the Court seems to have gone out of its way to disapprove a decision on a collateral issue in the Parrish case as to the relationship of Parrish and Mitchell and the ownership of the crop, when there was no question of the relationship of the parties, or the ownership of any crop in the case being decided. The argument of the Court citing the ancient Lowe v. Miller decision (1846) was for the purpose of bolstering its decision on a question of criminal law. It is believed that the Parrish case is *not* overruled, and it certainly is still cited in this and other States as authority, and its holding as to the relationship of the parties is overwhelmingly sustained in other jurisdictions.

(3) TENANTS IN COMMON OF THE CROP, WHEN

Michie's Virginia Digest, vol. VI, p. 103, defines tenants in common as follows:

> A tenancy in common is where two or more hold the same land with interests accruing under different titles; or accruing under the same title but at different periods; or conferred by words of limitation importing that the grantees are to take any distinguished share. *Carneal v. Lynch, 91 Va. 114, 20 S. E. 959; Patton v. Hoge, 22 Gratt. 443.* They must hold by several titles, not by a joint title, and occupy the same land or tenements in common; from which circumstance they are called tenants in common, and their estate a tenancy in common. *Hodges v. Thornton, 138 Va. 112, 120 S. E. 865.* Unity of possession is a requisite. *Talley v. Drumheller, 135 Va. 186, 115 S. E. 517 (1923).*
>
> **Farming on shares:** An agreement between two persons for the raising of a crop on the land of a third, by his license and permission, and for a division of the crop between such two persons, constitutes them joint tenants of the crop, and neither can defeat the interest of the other by taking a conveyance of the land from the owner. *Lowe v. Miller, 3 Gratt. 205 (1846).*

In *Hodges v. Thornton, 136 Va. 112*, the court held that:

The criterion in a tenancy in common is that no one knoweth his own severalty; and hence the possession of the estate is necessarily in common until a legal partition is made.

The cases cited by Michie above have no bearing on crop-sharing contracts as such, with the exception of the case of Lowe v. Miller [*ante*, under this chart, (2).]

[See (3) this chart and this Memorandum, under Mississippi, pp. 18, 19.]

(4) TITLE TO CROP PRIOR TO DIVISION

No Virginia cases have been found defining the title to the crop in a crop-sharing contract prior to division, but the overwhelming authority in the other States is that where the relationship is landlord and tenant, title and possession of the crop is in the tenant prior to division, subject to the landlord's lien for rent and advances. It is believed that *Parrish v. Commonwealth, 81 Gratt. p. 1, is still authority*, and that where the relationship is employer and cropper, title and possession of the crop is in the landlord at all times. [See chart (2) and this Memorandum, pp. 34, 35.]

(5) LIEN OF THE PARTIES ON THE CROP

Sec. 6454, Va. Code, provides that any owner or occupier of land who contracts with any person to cultivate it, and makes advances to his tenant or laborer, has a lien on the crop for the advances in the year in which they are made, which lien has priority over all other liens on such crop or share thereof. He may enforce the lien by distress when the claim is due, or by attachment when it is not yet due, in the same manner as for the recovery of rent, under Sec. 5522 and 6416. (These sections provide for distress and attachment.)

Sec. 6454 reads:

Sec. 6454—Lien of landlords and farmers for advances to tenants and laborers, priority: If any owner or occupier of land contracts with any person to cultivate or raise livestock on such land as his tenant for rent, either in money or a share of the crop or livestock; or if any person engaged in the cultivation of land shall make any advances in money, or other things to such tenant or laborer, he shall have a lien to the extent of such advances on all the crops or livestock, or the share of such laborer in the crops or livestock that are made, or seeded, or raised, grown, or fed on the said land during the year in which the advances are made, which shall be prior to all other liens on such crop or livestock, or such portion thereof, or share thereof; and he shall have the same remedy for the enforcement of such lien by distress when the claim is due, or by attachment when the claim is not yet payable, as is given a landlord for the recovery of rent under Sec. 5522 and 6416 * * * .

(The remainder of the section provides for affidavit before a justice of the peace as to the amount of the claim, that it is due, and is for advances made under contract to a tenant; or if it be for attachment, then the time when the claim will become payable, and that the debtor intends to remove the crops or livestock from the land.)

When the crops or livestock are subject to a lien of *fiere facias* or attachment, whether a levy be actually made or not, it is the duty of the person claiming a lien under this section to render to the sheriff a complete and itemized statement under oath of the claim for advances. Failure to render the itemized statement bars the lien.

Any person, other than a landlord, making advances to another person who is engaged in the cultivation of the soil, has a lien on the crop raised during the year in and about the cultivation of which the advances were made, but only if there is an agreement in writing signed by both parties, specifying the amount advanced, or the limit beyond which advances may not go; and if such agreement is docketed in the clerk's office. (Sec. 6452, Va. Code.)

Sec. 6452 reads:

Sec. 6452—Lien on crops for advances to farmers, etc.—If any person other than a landlord makes advances either in money or supplies, or other things of value, to anyone who is engaged in the cultivation of the soil, the person so making said advances shall have a lien on the crop which may be made or seeded, and/or fruit or other crops maturing during the year upon the land in or about the cultivation of which the advances so made have been, or were intended to be expended, to the extent of such advances; but the person making such advances shall not have the benefit of the lien given in this Section unless there is an agreement in writing signed by both parties in which there is specified the amount advanced, or the limit to be fixed beyond which any advances made from time to time during the year shall not go, and the said agreement be docketed in the Office of the Clerk of the County in which * * * the land lies * * * . (The remainder of the section relates to docketing, priority, itemized statement of account.)

Sec. 6453 provides for the protection of such liens by injunction.

This section (6452) applies only to advances made by a person "other than a landlord," whether advances are made to a landlord or a tenant. It gives a lien on the crop but does not fix the order of priority of the lien. The order of priority is fixed by Sec. 6455. This section giving a lien on crops for advances made by persons other than the landlord, must be read in connection with Sec. 6454, *ante*, 1st col., and 6455. Reading the three sections together, it appears that liens given by this section for advances made by one other than the landlord are subordinate to prior deeds of trust which have been duly recorded in the absence of agreement to the contrary between the mortgagee and the party making the advances. *McCormick v. Terry, 147 Va. 448, 453; 137 S. E. 452.*

Sec. 6455 is as follows:

Sec. 6455—Lien of landlords and other recorded liens not affected by lien given by Section 6452, nor exemption to poor debtors: The lien provided for in Section 6452 shall not affect in any manner the rights of the landlord to his proper share of the rents or his lien for rents or advances, or his right of distress or attachment for the same, nor any lien existing at the time of making the agreement in said Section which is required by law to be recorded, nor shall it affect the right of the party to whom the advances have been made to claim such part of his crops as are exempt from levy or distress for rent. (Code 1887, Sec. 2497.)

(6) REMEDY, IF CROPPER VIOLATES AGREEMENT

Any person obtaining advances upon a written promise to deliver his crops or other property in payment therefor, and fraudulently refuses to perform such promise, is guilty of larceny under Sec. 4454, Va. Code. The section reads:

Sec. 4454—Failure to perform promise to deliver crop, deemed larceny: If any person obtain from another an advance of money, merchandise, or other thing upon a promise in writing that he will send or deliver to such other person his crop, or other property, and fraudulently fails or refuses to perform such promise, and also fails to make good such advances, he shall be deemed guilty of larceny of such money, merchandise, or other thing.

Sec. 4454-a makes the person entering into an oral or written contract for personal services in and about the cultivation of the soil, who obtains advances, with intent to injure his employer, and fraudulently refuses or fails to perform such service, or to refund the advances, guilty of a misdemeanor, provided prosecution is begun within 60 days after the breach.

Sec. 4454-a reads:

Sec. 4454-a: If any person enters into a contract of employment, oral or written, for the performance of personal service to be rendered within one year, in and about the cultivation of the soil, and, at any time during the pendency of such contract, thereby obtains from the landowner, or the person so engaged in the cultivation of the soil, advances of money or other thing of value under such contract, with intent to injure or defraud his employer, and fraudulently refuses or fails to perform such service, or to refund said money or other thing of value so obtained, he shall be guilty of a misdemeanor; provided, that prosecutions herein shall be commenced within 60 days after the breach of such contract. (1924, p. 635; 1928, p. 358.)

It is unlawful for a person renting the lands of another, either for a share of the crop or for a money consideration, to remove any part of the crop without the consent of the landlord until the rent and advances are satisfied. Such offense is a misdemeanor (Sec. 4455-a).

Sec. 4455-a is as follows:

Code of 1942, Sec. 4455-a—Removal of crop by tenant before rents and advances are satisfied, a misdemeanor: It shall be unlawful for any person renting the lands of another, either for a share of the crop or for money consideration, to remove therefrom without the consent of the landlord, any part of such crop until the rents and advances are satisfied.

Every such offense shall be deemed a misdemeanor, and shall be punishable by a fine or imprisonment. (1922, p. 491.)

Sec. 5429, Va. Code, provides that where rent is to be paid in a share of the crop or thing other than money, and goods are distrained for rent, the claimant of the rent may sue out an attachment and have the court, or a jury, if either party requires it, ascertain the money value of the rent, and the court will order the goods sold to satisfy such judgment.

Sec. 5429 is as follows:

Sec. 5429—Remedy when rent is to be paid in other thing than money: Where goods are distrained or attached for rent reserved in a share of the crop, or in any thing other than money, the claimant of the rent having given the tenant 10 days' notice, or, if he be out of the county, having set up the notice in some conspicuous place on the premises, may apply to the Court to which the attachment is returnable * * * to ascertain the value in money of the rent reserved, and to order a sale of the goods distrained or attached. The Court will ascertain * * * by its own judgment, of, if either party require it, by the verdict of a jury, the extent of the liability of the tenant and the value in money of such rent and * * * other judgments.

(The court also orders the goods distrained or attached, or so much thereof as may be necessary, to be sold to pay the amount of the judgment.)

Distress for rent will not lie unless the relationship of landlord and tenant exists between the parties. The right is not only incident to that relation, but is dependent upon it. *(Church v. Goshen Iron Co., 112 Va. 694, 72 S. E. 685.)*

(7) REMEDY, IF LANDLORD VIOLATES AGREEMENT

There is no statute giving a cropper a special lien on the crop but, being a laborer, he would have a laborer's lien on the part on which his labor was expended. He might also sue for breach of contract if the circumstances warranted. No Virginia cases have been reported in which the cropper attempted to assert his rights.