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Milton R. Friedman

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THE NATURE OF A LEASE IN NEW YORK

MILTON R. FRIEDMAN

I. INTRODUCTION

It is becoming rather trite to repeat Holmes' dictum on leases but it is nevertheless true that

"the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."¹

In the law of contracts we find some rules that are elementary. If *B* breaks his contract with *A*, *A* must minimize his damages, or make an effort to minimize his damages, as a condition of recovering judgment against *B*. Or, if *X* goes into *Y*'s drug store for a tube of tooth paste and puts his money down on the counter, *X* is entitled to the tooth paste.^{1a} *Y* may not ring up *X*'s money and then turn to *X* and say: "I have no tooth paste. *Z* has it. But it is mine and you may take it from him."

But crossing over to the law of leases we find the comparable rules directly to the contrary. If a tenant, without due cause, refuses to take possession,² or moves out during the term,³ the landlord may nevertheless recover judgment for rent. And he need not try to relet for the purpose of minimizing his damages. Or if a tenant finds that his entry into possession is blocked by occupation of the premises by another party, the landlord need not lift a finger to help the tenant, but is nevertheless entitled to rent. There are some qualifications to this, to which subsequent reference will be made.⁴

Obviously then, in the law of leases, we are not dealing with familiar rules of contracts. In the law of contracts a substantial breach by one party will permit the wronged party to repudiate the contract and absolve himself from the obligation of further performance. But if a landlord has expressly agreed to make necessary repairs and supply heat and hot water he is entitled to

¹Gardiner v. Butler, 245 U. S. 603, 605, 38 Sup. Ct. 214 (1918).

^{1a}Distillers Factors Corp. v. Country Distillers Products, Inc., 189 Misc. 497, 71 N. Y. S. 2d 654 (Sup. Ct. 1947).

²See Gilhooley v. Washington, 4 N. Y. 217, 219 (1850); Coutts v. J. L. Kraft & Bros. Co., 119 Misc. 260, 261, 196 N. Y. Supp. 135, 136 (1922), *aff'd*, 206 App. Div. 625, 198 N. Y. Supp. 908 (2d Dep't 1923).

³See text at page 181.

⁴See text at pages 172-176.

his rent even though he fails to perform these covenants or any other covenants on his part to be performed—as long as there is no actual or constructive eviction of the tenant. The tenant may have rights based on the landlord's breach, but the right is not to end the lease. On the other hand, a tenant may be in default on every covenant on his part to be performed, but if the lease gives him a right to renew he may exercise his right of renewal, or he may recover, despite any defaults on his part, for any breach of the landlord's covenant of quiet enjoyment.⁵

With a lease, then, we are dealing very little with the law of contracts. The core of lease law is that a lease is primarily a *conveyance* and a rather ancient conveyance at that, based on a forgotten premise that a tenant is primarily interested in the use of the land, presumably for agricultural purposes. When a landlord executes a lease he is still deemed to have performed substantially all that is expected of him.

From the principle that a landlord had substantially performed by executing a conveyance, it followed that a landlord was under no implied duty to make repairs or keep the premises in rentable condition.⁶ In fact the buildings or other improvements on the premises might be destroyed by fire or the elements and the lease, and the tenant's liability for rent, continued nevertheless.⁷ During wartime the tenant may be interned as an enemy, but the English courts held during the last war that the tenant, nevertheless, had an estate from the landlord—though he could not enjoy it—and remained liable for rent.⁸ The New York Supreme Court recently held the same.⁹ Even though a tenant failed to pay his rent there was no common law right to remove the tenant.

Though a lease contains covenants, it is still held today that covenants in a lease are independent. The remedy for breach of covenant is on the covenant but the lease itself goes on.

These rules are not appropriate for a modern lease of part of a building, of a store for instance; they are certainly not appropriate for a lease of an apartment on the 15th floor. These rules continue today principally because they were developed long before the rules of contracts, and particularly the rule of dependent covenants, were developed. Some of these common law

⁵See text at pages 180-181.

⁶See text at page 167.

⁷*Kingsbury v. Westfall*, 61 N. Y. 356 (1875); Comment, 52 YALE L. J. 130-134 (1942). But cf. Note, *Landlord and Tenant—Liability for Rent upon Termination of War Contract*, 45 COL. L. REV. 782, 785 n. 11 (1945).

⁸*London & North Estates Co. v. Schlesinger* [1916] 1 K.B. 20.

⁹*Kollisman v. Detzel*, 184 Misc. 1048, 55 N. Y. S. 2d 491 (Sup. Ct. 1945).

rules have been changed by particular statutes and many of them are changed, and necessarily so, by the forms of leases commonly in use.

Until comparatively recently it was necessary for a landlord to include an express provision permitting him to terminate a lease for non-payment of rent. Otherwise, for non-payment he could recover judgment on the covenant while the tenant remained vested with a right of possession.¹⁰ This has been overruled in New York by a statute which permits summary proceedings for non-payment.¹¹ And another of the common law rules was overruled by a statute which now permits a tenant to end a lease when the premises are destroyed through no fault of the tenant.¹² A New York City ordinance now implies a duty on the landlord's part to furnish heat when control of the heating system is retained by the landlord;¹³ and a section of the Penal Law makes it a crime for a landlord to fail to comply with this obligation.¹⁴

Under *Witty v. Matthews*¹⁵ it is still true that a landlord is under no implied duty to repair. And when a landlord expressly agrees to repair he is generally under no tort liability for failure to carry out this covenant.¹⁶ He may be liable for breach of covenant, but this liability is generally less than liability in tort. In contract he may be liable only for the cost of repairs.

But the rule of *Witty v. Matthews* has been qualified by exceptions. Though the landlord is not obligated to repair wholly demised premises, an exception is made by the New York Multiple Dwelling Law requiring a landlord to keep a multiple dwelling in repair.¹⁷ Apart from multiple dwellings, common passageways, stairways and parts of a building, control of which is reserved to the landlord, must be repaired by the landlord. Premises leased with concealed defects or containing a nuisance expose a landlord to tort liability. Premises leased for the use of the general public or premises dangerous to passers-by or an adjoining owner also expose a landlord to tort liability.¹⁸

When we consider execution and delivery of a lease and the effect of the

¹⁰*DeLancey v. Ganong*, 9 N. Y. 9 (1853); *Michaels v. Fishel*, 169 N. Y. 381, 389, 62 N.E. 425, 427 (1902); RESTATEMENT, CONTRACTS § 290 (1932); 2 TIFFANY, LANDLORD & TENANT § 194, p. 1364 (1st ed. 1910).

¹¹N. Y. CIV. PRAC. ACT § 1410.

¹²N. Y. REAL PROP. LAW § 227.

¹³N. Y. CITY SANITARY CODE § 225.

¹⁴N. Y. PENAL LAW § 2040.

¹⁵52 N. Y. 612 (1873).

¹⁶See *Bruszczynaska v. Ruby*, 267 App. Div. 539, 541-542, 47 N. Y. S. 2d 788, 789-790 (1st Dep't 1944), *rev'd*, 294 N. Y. 22, 60 N. E. 2d 26 (1945).

¹⁷N. Y. MULTIPLE DWELLING LAW § 78.

¹⁸See *Bruszczynaska v. Ruby*, 267 App. Div. 539, 541-542, 47 N. Y. S. 2d 788, 789-790 (1st Dep't 1944), *rev'd*, 294 N. Y. 22, 60 N. E. 2d 26 (1945); Note, *Liability of Landlord to Visitors of Tenant Injured on Common Passageways*, 40 ILL. L. REV. 142 (1945).

parol evidence rule on leases, we find ordinary rules of contracts applicable. But generally speaking the main body of the law of leases is based on the principle that a lease is a conveyance, not a contract.

This point was made by Professor Williston¹⁹ and has been discussed generally in recent literature.²⁰ The purpose of this article is to consider the New York law of leases in the light of this analysis. For want of a better method, a typical lease will be considered in chronological order, beginning with execution and delivery.

II. EXECUTION AND DELIVERY

The execution and delivery of a lease does not ordinarily require the elaborate financial adjustments and involved closing normally attendant on a conveyance of real estate, and for this reason the execution and delivery of a lease is usually an informal event. It is common for the landlord's agent to give or mail a prospective tenant several copies of a printed lease, with blanks filled in, with the request that these be signed and returned by the tenant. The implication is that eventually one of these will be returned to the tenant signed by the landlord. It would be well for the tenant in these circumstances to annex to the leases signed by him a writing declaring that his execution is merely for convenience and of no effect unless the tenant receives a completely executed copy within, say, ten days. The average real estate agent receiving such a communication would probably regard the tenant as queer or legalistic. But whether or not this is prudent can be determined only after consideration of delivery.

It is generally assumed that a lease, like a deed,²¹ must be delivered before it can take effect, delivery being made to the tenant or a third party on the tenant's behalf. Tiffany writes:

"In order that a lease be effective to vest an interest in the lessee, it must be delivered, that is, there must be an expression on the part of the

¹⁹3 WILLISTON, CONTRACTS § 890 (Rev. ed. Williston and Thompson 1936).

²⁰Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 47 (1937); Woodruff, *Lessor and Lessee: Parties to a Contract or Landlord and Tenant?*, 8 KAN. CITY L. REV. 35 (1939); Note, *Landlord and Tenant—Liability for Rent upon Termination of War Contract*, 45 COL. L. REV. 782 (1945).

²¹Delivery of a deed to real property, symbolic of its transfer and analogous to livery of seizin (2 TIFFANY, REAL PROPERTY § 461 (2d ed. 1920)) is necessary to give it force. *Fisher v. Hall*, 41 N. Y. 416 (1869); 1 TAYLOR, LANDLORD & TENANT § 167 (9th ed. 1904). Manual transfer of the instrument is sufficient without acceptance. The grantee's retention of the deed for inspection by himself or counsel is no acceptance. *Bracket v. Barney*, 28 N. Y. 333 (1863). Delivery may be made to a third person for the grantee. See *Craine v. Hall*, 37 Hun 74 (N. Y. 1885), *aff'd*, 114 N. Y. 307 (1877) and *Fisher v. Hall*, *supra*, at 423.

lessor by word or act of his intention that the lease take effect. *The requisites of a valid delivery in the case of a lease are no doubt the same as in the case of any other conveyance.*" (Italics added.)²²

It is rather awkward to fit parol leases into this rule. Furthermore, it is a rare case in which physical delivery has had any effect on the validity of a lease. Apparently the only New York case in which delivery even may have had any importance is *DeRonde v. Olmsted*,²³ where the Court wrote:

"Charles Olmsted had no interest in the leasehold which could be made the subject of a lien until the delivery to and acceptance by him, on or about March 1, 1871, of the lease thereof from Silas Olmsted."

Few facts are given, but the case apparently holds that a valid mechanic's lien could not be predicated upon work and materials supplied to a tenant who had not received delivery of his lease. It is noteworthy that of the six cases cited by the opinion, five deal with deeds and one with a real property mortgage. Texts discussing the necessity of delivery of a lease are also apt to cite cases relating to deeds.

Other cases indicate that delivery of a lease is necessary, but on examination of these cases they indicate that "delivery," as used in lease cases, does not require physical transfer of an instrument, but has become a word of art with its own peculiar meaning.

In two cases leases were signed by landlord and tenant and then left with the landlord. In one²⁴ the execution was for the convenience of the landlord, who was about to go out of town, and with the understanding that the tenant would have an opportunity to show the lease to his attorney. The landlord's agent refused to give up the lease for this purpose unless a month's rent were paid. In an action for rent, judgment was given the tenant on the ground there was no delivery and acceptance of the lease. In another case,²⁵ substantially the same, judgment for the tenant was likewise predicated upon lack of delivery but also upon proof by the tenant of an oral agreement that the lease was not to take effect until completion of repairs by the landlord—a ground sufficient in itself to defeat the landlord.²⁶

Actual physical delivery of the document does not create an effective lease

²²1 TIFFANY, LANDLORD & TENANT § 31 (1st ed. 1910); 1 UNDERHILL, LANDLORD & TENANT § 241 (1909). See also 1 TAYLOR, LANDLORD & TENANT §§ 166, 167 (9th ed. 1904). *But cf.* 2 TIFFANY, REAL PROPERTY § 461 (2d ed. 1920).

²³47 How. Pr. 175 (N. Y. 1874).

²⁴Witthaus v. Starin, 12 Daly 226 (N. Y. 1883).

²⁵Flomerfelt v. Englander, 28 Misc. 655, 61 N. Y. Supp. 187 (App. T. 1899).

²⁶See text at page 177.

when the delivery has been made under some misapprehension²⁷ or in such circumstances as to negative a mutual intention that the parties be bound.²⁸ And retention of the instrument after knowledge of an initial impropriety does not necessarily conclude a party. Thus, where a tenant signed a lease and subsequently received a copy in which the name of a new landlord was substituted—and the lease executed by the new party—the tenant was held justified in refusing to take possession or pay rent.²⁹ In this case the objection occurred to the tenant coincidentally with the flooding of the premises.

Where both parties sign a lease and the tenant accepts possession of the premises, the necessity of delivery is obviated. If a tenant in these circumstances is sued for rent, a defense of lack of delivery meets short shrift. The tenant is usually bound regardless of delivery,³⁰ and delivery is presumed.³¹ In fact, delivery is presumed whenever it is beneficial to the party concerned.³² On the other hand, a landlord who accepts rent from a tenant in possession under a written lease with knowledge of the material facts is estopped to deny delivery. Thus a landlord seeking to nullify a lease, and thereby acquire title to valuable improvements erected by the tenant, was estopped from claiming that the original delivery of the lease was merely in escrow and therefore conditional.³³ But an owner is not invariably estopped from challenging the validity of a lease by accepting rent.³⁴ In spite of the language of the cases

²⁷In *Pharis v. Gere*, 26 Hun 670 (N. Y. 1882), the landlord delivered a lease to the president of the corporate tenant, on the mistaken assumption that the latter was a third party, with the intent that the delivery be in escrow to await performance of certain conditions. In *Adams v. Doelger*, 15 Misc. 140, 36 N. Y. Supp. 801 (Comm. Pl. 1895), part payment was made to the landlord and the lease was received by one of several tenants who made it clear that he would not sign unless the other prospective tenants also signed.

²⁸If a lease is to be signed by several tenants, its execution by some with the understanding that others are to sign, leaves the written document incomplete and unexecuted if the others fail to sign. *Whitford v. Laidler*, 94 N. Y. 145 (1883).

²⁹*Burns v. Crowley*, 236 App. Div. 66, 258 N. Y. Supp. 155 (1st Dep't 1932), *aff'd*, 261 N. Y. 610, 185 N.E. 760 (1933).

³⁰*Obendorfer v. Mecham*, 110 N. Y. Supp. 340 (App. T. 1908); *cf.* *Wharf & Lighter Co. v. Simpson*, 77 Cal. 286 (1888).

³¹*David Stevenson Brew. Co. v. Culbertson*, 18 Misc. 486, 41 N. Y. Supp. 1039 (App. T. 1896). *But cf.* *Israelson v. Wollenberg*, 63 Misc. 293, 116 N. Y. Supp. 626 (App. T. 1909).

³²*Camp v. Camp*, 5 Conn. 291, 299 (1824); 1 UNDERHILL, LANDLORD & TENANT § 242 (1909); *Church v. Gilman*, 15 Wend. 656 (N. Y. 1837) (release).

³³*Clark v. Hyatt*, 23 Jones & S. 98 (N. Y. 1887), *aff'd*, 118 N. Y. 563, 23 N. E. 891 (1890) (landlord's ignorance of tenant's initial delivery in escrow immaterial in landlord's action to cancel lease brought after tenant's installation of improvements).

³⁴In *Galewski v. Apfelbaum*, 32 Misc. 203, 65 N. Y. Supp. 694 (App. T. 1900), a grantee of real property sought to evict a tenant as a holdover. The tenant claimed occupancy under a 5 year lease executed by an agent of the grantor. The grantor had understood the lease was for one year, and no evidence was produced concerning the power of the party purporting to execute on behalf of the landlord. The written lease was held invalid and not ratified by the plaintiff's collection of rent.

—the language of conveyancing and the reference to “delivery” being of significance—it should be clear that delivery has no real effect on the decisions and the cases may be summarized more clearly, and correctly, in the language of contracts, that is, whenever there is the equivalent of offer and acceptance between landlord and tenant—a mutual intention that there be a lease—there is a lease. This should account for all the cases including parol leases, provided, of course, that the Statute of Frauds is given its due. A pair of comparatively recent cases show that delivery of a lease is entirely unnecessary. In *Corn v. Bergman*³⁵ defendant delivered a letter to plaintiff’s agent, offering to take a lease in premises in the course of construction by plaintiff, setting forth all the essentials of an offer and agreeing to sign a lease in plaintiff’s usual form. Plaintiff wrote “accepted” on defendant’s letter and subsequently tendered a lease in plaintiff’s usual form. Defendant refused to sign unless plaintiff would incorporate a new provision in the lease giving defendant \$250 for each day that delivery of possession might be delayed. It was held that plaintiff’s endorsement of “accepted” on defendant’s offering letter was sufficient without anything more in the way of delivery.³⁶

This view was followed in *176 West 87th St. Co. v. Fleischman*,³⁷ an action for rent under a renewal lease. Here defendant called at plaintiff’s office on March 30th and signed leases in duplicate. Plaintiff signed both copies and mailed one on March 31st which was received by the tenant on April 1st. In the rent action, defendant disclaimed liability for the amount of rent reserved in the renewal lease on the ground that on April 1st, the date he received his lease, the New York rent laws of 1920 became effective. The court held that the lease became an operative instrument the day it was signed

³⁵*Corn v. Bergman*, 138 App. Div. 260, 123 N. Y. Supp. 160 (1st Dep’t 1910); *accord*, *Steinfeld v. Wilcox*, 26 Misc. 401, 56 N. Y. Supp. 217 (App. T. 1899).

³⁶The mere exchange of a lease between a prospective landlord and tenant may be sufficient to constitute a lease where terms are essentially agreed on. *Leff v. Satuloff*, 198 N. Y. Supp. 22 (Sup. Ct. 1923). But a tenant accepting the advantage of a lease by taking possession is bound to his landlord despite failure of the latter to execute. *Zink v. Bohn*, 3 N. Y. Supp. 4 (Super. Ct. Gen. T. 1888) (in action by grantee for possession tenant estopped to deny his lessor’s signature to a three year lease; but not necessarily under the written lease). When the landlord fails to execute the lease the tenant may be bound by a tenancy from year to year. *Loughran v. Smith*,¹¹ Hun 311 (N. Y. 1877), *aff’d*, 75 N. Y. 205 (1878); *Hartnett v. Korscherak*, 59 Misc. 457, 110 N. Y. Supp. 986 (App. T. 1908); *Jewett v. Griesheimer*, 100 App. Div. 210, 91 N. Y. Supp. 654 (4th Dep’t 1905). Or he may be bound from month to month. *Israelson v. Wollenberg*, 63 Misc. 293, 116 N. Y. Supp. 626 (App. T. 1909). Where a landlord refused to sign a lease, which the tenant signed and returned after including an additional clause, the tenant was held liable for rent only through the month during which he vacated the premises. *Israelson v. Wollenberg*, *supra*.

³⁷*176 West 87 St. Co. v. Fleischman*, 202 App. Div. 187, 195 N. Y. Supp. 92 (1st Dep’t 1922).

and not the following day when it was received. If in this case the landlord had signed the leases and put both copies in his safe, it would be abundantly clear why the tenant signing leases in these circumstances should clarify his position by a writing of some kind.

There is ample reason for the distinction between delivery of a lease and delivery of a deed. The deed is usually of value only to the grantee and its maker has no further use for it. But possession of a lease by a landlord is different. He continues to have as much interest in it as the tenant and as much occasion for its possession.³⁸

When parol leases are involved, of course, no delivery is necessary. In New York a parol lease for not more than one year is valid.³⁹ An intent of the parties to reduce a lease to writing is deemed cogent evidence that the oral agreement was not intended to be binding.⁴⁰ But if the essential terms are agreed on, it is valid⁴¹ even though either of the parties fails⁴² or refuses⁴³ to sign a written agreement. And this is true even though a written agreement was actually in the contemplation of the parties.⁴⁴

One may conclude that whatever may be the tenor of the law of leases generally, the law of contracts is involved in their execution and delivery.

III. LANDLORD'S DUTY TO DELIVER POSSESSION TO TENANT

Under the English rule, applicable in some of our states, a landlord must give a tenant actual possession.⁴⁵ Under the New York or "American" rule, applicable in about half the American states, a landlord's duty is not to give a tenant possession at the beginning of a term, but only the *right* to possession. The usual covenant of quiet enjoyment is held to imply no more. Consequently, if the tenant finds the premises occupied by a party whose claim to possession is neither under the landlord nor of paramount title, the tenant

³⁸Oneto v. Restano, 89 Cal. 63, 67 (1891).

³⁹N. Y. REAL PROP. LAW § 259.

⁴⁰Sherry v. Proal, 131 App. Div. 774, 116 N. Y. Supp. 234 (1st Dep't 1909); see Sullivan v. Happy Hour Amusement Co., 177 App. Div. 232, 163 N. Y. Supp. 715 (3d Dep't 1917).

⁴¹Wilbur v. Collin, 4 App. Div. 417, 38 N. Y. Supp. 848 (3d Dep't 1896); Fiske v. Ernst, 62 N. Y. Supp. 429 (City Ct. N. Y. 1900).

⁴²Evans v. Conklin, 71 Hun 536, 24 N. Y. Supp. 1081 (4th Dep't 1893).

⁴³Wm. Wicke Co. v. Kaldenberg Mfg. Co., 21 Misc. 79, 46 N. Y. Supp. 937 (App. T. 1897).

⁴⁴Sullivan v. Happy Hour Amusement Co., 177 App. Div. 232, 163 N. Y. Supp. 715 (3d Dep't 1917).

⁴⁵The English rule is applicable in about half of the American jurisdictions. 1 McADAM, LANDLORD & TENANT § 107 (5th ed. 1934); CHAPLIN, LANDLORD & TENANT 590 (1899); 14 ANN. CAS. 399 (1909); 36 C.J. 52; Note, 17 VA. L. REV. 88 (1930); Note, 7 MINN. L. REV. 421 (1923).

has no right therefor against his landlord. This is an example of a lease as a conveyance, not a contract. The landlord has conveyed and that is all that is required of him. The landlord is entitled to rent regardless of the tenant's possession.

In the leading case of *Gardner v. Keteltas*,⁴⁶ the lease provided that the tenant would have "the sole and uninterrupted use and occupation" of the premises. A former tenant held over without right and was dispossessed by the landlord. The new tenant whose entry had been delayed six months thereby was held to have no claim against the landlord. The *Gardner* case has been followed by many lower New York courts and has been approved by the Court of Appeals although there is no direct holding to this effect in New York's highest court.⁴⁷

In the *Gardner* case the party blocking the new tenant was a former tenant, holding over without right. If the premises are occupied as of right the new tenant may recover damages against the landlord,⁴⁸ but as a condition of recovering damages the new tenant has the burden of proving the occupant holds as of right.⁴⁹ If this burden is sustained the new tenant need not accept possession later than the time agreed,⁵⁰ is not liable for rent,⁵¹ but may not recover rent paid in advance.⁵²

In *Goerl v. Damrauer*⁵³ the party in possession, preventing the entry of the new tenant, was merely a monthly tenant. The landlord, and thereby the new tenant, was entitled to possession if the landlord had given the old tenant the statutory notice to quit. But the notice had not been given, the monthly tenant could remain as of right, and therefore *Gardner v. Keteltas* was held inapplicable.

There has been some suggestion that *Gardner v. Keteltas* is inapplicable to

⁴⁶3 Hill 320 (N. Y. 1842).

⁴⁷See cases collected in *Teitelbaum v. Direct Realty Co.*, 172 Misc. 48, 13 N. Y. S. 2d 886 (Sup. Ct. 1939); 70 A.L.R. 151 (1931); Editorial Notes, N.Y.L.J. Oct. 19, 1943 p. 986; Oct. 20, 1943 p. 1002; Oct. 21, 1943 p. 1018.

Where a licensee or concession is involved rather than a lease, New York requires a delivery of actual possession. *Eastman v. Mayor*, 152 N. Y. 468, 46 N. E. 841 (1897); *Deliusse v. L.I.R.R. Co.*, 65 App. Div. 487, 72 N. Y. Supp. 988 (2d Dep't 1901), *aff'd*, 174 N. Y. 516, 66 N.E. 1106 (1903).

⁴⁸*Trull v. Granger*, 8 N. Y. 115 (1853).

⁴⁹*Podalsky v. Ireland*, 137 App. Div. 257, 121 N. Y. Supp. 950 (1st Dep't 1910); *Mirsky v. Horowitz*, 46 Misc. 257, 92 N.Y. Supp. 48 (App. T. 1905).

⁵⁰*Goerl v. Damrauer*, 27 Misc. 555, 58 N. Y. Supp. 297 (App. T. 1899).

⁵¹*Smith v. Barber*, 112 App. Div. 187, 98 N. Y. Supp. 365 (1st Dep't 1906).

⁵²*Fong Ling v. Nathans*, 204 App. Div. 265, 197 N. Y. Supp. 461 (2d Dep't 1922) (former tenant's continued possession authorized by emergency housing laws); *Harris v. Greenberger*, 50 App. Div. 439, 64 N. Y. Supp. 136 (2d Dep't 1900).

⁵³*Goerl v. Damrauer*, 27 Misc. 555, 58 N. Y. Supp. 297 (App. T. 1899).

a situation where a landlord has collected rent in advance; that this imports a covenant to put the new tenant into actual possession. This thought appears in several text books and is traceable to a single dictum, wholly gratuitous and without foundation.⁵⁴

A tenant accepting possession of part of the premises occupied otherwise under right, may vacate without liability, on the ground of failure of consideration, on concluding the remainder will be unavailable.⁵⁵ But if he remains in possession of part of the premises he may possibly have the rent apportioned, but until this is done he remains liable for the entire rent.⁵⁶

While a tenant whose possession is blocked by a party occupying without right has no enforceable claim thereby against his landlord, he has some, though unsatisfactory, rights against the occupant. He may elect to make the occupant a holdover and thus collect rent as landlord of his predecessor.⁵⁷ The new tenant is deemed an assignee of the landlord's reversion under a statute⁵⁸ transferring to a grantee the benefits and burdens of the landlord. This means that a tenant bargaining for possession as a tenant finds himself in the real estate business instead. The original landlord may dispossess the holdover despite the making of the new lease.⁵⁹ If the original landlord fails to dispossess the holdover it is said the new tenant's remedy is to remove him.⁶⁰ But it is generally found that summary proceedings are not available to the new tenant;⁶¹ and the proper remedy is held to be ejectment. In fact

⁵⁴These rely on the following statement in *Harris v. Greenberger*, 50 App. Div. 439, 440, 64 N. Y. Supp. 136, 137-138 (2d Dep't 1900):

"This lease provided for the payment of the rent 'before possession of said store is delivered to said tenant.' We think that this language imported an undertaking on the part of the landlords to deliver actual possession at the time when the tenant handed them his check for the rent. The evidence demonstrates their inability to do so, and their failure in this respect relieved the respondent from further liability upon the lease for any purpose."

The case involved summary proceedings against a new tenant who had never gone into possession because of occupancy by an earlier tenant. The landlord had instituted summary proceedings against the occupant but discontinued within a few days. The court was not impressed with the landlord's good faith and dismissed the summary proceedings against the new tenant. The latter gave the landlord \$25 in advance and a check for the balance on the day he was entitled to possession. He stopped the check when his entry was blocked. The matter of advance rent was no issue and the quoted language is entirely dictum. The decision is obscured generally for the reason that summary proceedings do not lie against one out of possession. See *Warren v. Haverty*, 149 App. Div. 564, 567, 133 N. Y. Supp. 959, 962 (1st Dep't 1912).

⁵⁵*Smith v. Barber*, 96 App. Div. 236, 89 N. Y. Supp. 317 (1st Dep't 1904); *Sullivan v. Schmidt*, 93 App. Div. 469, 87 N. Y. Supp. 714 (2d Dep't 1904).

⁵⁶*Forshaw v. Hathaway*, 112 Misc. 112, 182 N. Y. Supp. 646 (App. T. 1920).

⁵⁷*United M.R. & I. Co. v. Roth*, 193 N. Y. 570, 86 N.E. 544 (1908).

⁵⁸N. Y. REAL PROP. LAW § 223.

⁵⁹*Eels v. Morse*, 208 N. Y. 103, 101 N.E. 803 (1913).

⁶⁰*Dodd v. Hart*, 30 Misc. 459, 460, 62 N. Y. Supp. 484, 485 (App. T. 1900).

⁶¹See *Eels v. Morse*, 208 N. Y. 103, 106, 101 N.E. 803, 804 (1913); 137 E. 66th St.

the new tenant has been declared to have the sole right to maintain ejectment.⁶² Ejectment has been properly described as dilatory, expensive and fruitless,⁶³ and this must necessarily be so where the new lease is for a short period.⁶⁴

Summary proceedings may be maintained by a person with a right to both possession and the rent.⁶⁵ The new tenant is concededly vested with the right to possession, and he has been held entitled to the rent as an assignee of the reversion. It is difficult to see, therefore, why he may not maintain summary proceedings and obtain possession by the only expeditious method available. Inasmuch as the new tenant bargained for possession and not for the status of a landlord, the remedy available to him is somewhat less than half a loaf.

The American rule has been justified on the following grounds. No contract impliedly warrants a party thereto against torts or law suits with third persons. Both parties have presumed there will be no holdover; the right to possession and remedy therefor is in the new tenant. Any delay in possession will be the same whether the proceedings against the trespasser are brought by the landlord or new tenant. The English rule has been justified on the ground that the tenant bargained for actual possession, not a law suit; the landlord is more apt to know if the occupant will holdover and is more familiar with the latter's right to possession than a stranger (the new tenant). Even under the English rule the landlord is not liable for trespasses after the beginning of the term and against these the tenant must resort to his own remedies.⁶⁶

The suggestion, first appearing in *Gardner v. Keteltas*, that the new tenant has an effective remedy for possession, has not been carried out by the New York cases denying him the right to maintain summary proceedings. It is probably true in most cases that both parties expected a transfer of possession without difficulty. The two contrary rules are an example of the inflexibility in our law that makes the entire burden of a loss fall upon only one of two innocent parties. An equitable rule would postpone the inception of a lease where possession is blocked without right, and permit rescission when further

Inc. v. Lawrence, 118 Misc. 486, 497, 194 N. Y. Supp. 762, 771 (Sup. Ct. 1922). *Contra*: *Simon v. Herrman*, 129 N. Y. Supp. 1014 (Mun. Ct. 1911). See also *Russo v. Yuzolino*, 19 Misc. 28, 42 N. Y. Supp. 482 (App. T. 1896); *Gardner v. Keteltas*, 3 Hill 330, 332 (N. Y. 1842).

⁶²*Fong Ling v. Nathans*, 204 App. Div. 265, 266, 197 N. Y. Supp. 461 (2d Dep't 1922); *Gardner v. Keteltas*, 3 Hill 330, 332 (N. Y. 1842).

⁶³*Simon v. Herrman*, 129 N. Y. Supp. 1014, 1019 (Mun. Ct. 1911).

⁶⁴In *Portman v. Weeks*, 1 N. Y. City Ct. Rep. 185 (N. Y. Marine Ct. 1878), for instance, the lease was for one month.

⁶⁵*Goodnow v. Pope*, 31 Misc. 475, 64 N. Y. Supp. 394 (App. T. 1900).

⁶⁶See, generally, the authorities cited in notes 45 and 47 *supra*.

delay threatens substantial injury to the new tenant. At present, however, this can be accomplished only by express provisions to this effect in the lease.

IV. THE PAROL EVIDENCE RULE

It is doubtful if there is a form of legal instrument prepared so frequently by the uninitiate, and so replete with technicalities, as a lease. Large landlords often have their own printed forms, sometimes specially prepared for a particular building. Some community real estate boards print forms of leases by the thousand. Chain stores and other substantial tenants whose business requires many leases usually have their own form of printed leases. Anybody else bold enough to try his hand need only resort to a legal stationer. All these have the advantages and disadvantages of prepared forms. The majority of these are filled out by laymen with more or less practical real estate experience. It is not surprising then that often important terms agreed on orally are not incorporated in the written instruments and that at times the prepared forms contain provisions repugnant to the intention of the parties.

Judging by the number of reported cases, agreements by a landlord to repair or otherwise prepare the premises for occupancy are most likely to be mishandled. While a printed form is apt to include skillfully drawn clauses on difficult subjects—covering comparatively rarely occurring events such as fire, condemnation and the like—an express understanding that the landlord will paint the walls is apt to be drafted and added, if there is room on the form, by a building superintendent or left entirely on the basis of a parol understanding. The effect of the parol evidence rule on leases is, therefore, a frequently recurring practical problem.

Generally speaking, where the parties to an agreement state the terms of their agreement in the form of a completely written integration, the writing cannot be varied or contradicted by proof of antecedent negotiations or agreements. The rule has numerous exceptions and qualifications. One is that a party may show that a written agreement is subject to a parol condition precedent. If the condition precedent is not performed, the written agreement does not come into effect. It is said that this does not vary the written agreement, it destroys it. A party may also show that a written agreement integrated only part of an oral agreement and another part subsists as a collateral agreement. The collateral agreement is enforceable but it is often difficult to determine what is collateral.⁶⁷

⁶⁷See, generally, Corbin, *The Parol Evidence Rule*, 53 YALE L. J. 603 (1944); Zell v.

Suppose a landlord agrees orally to prepare the premises for occupancy before the beginning of the term but the written lease is silent on the point. The oral agreement may be a parol condition precedent to the legal inception of the lease.⁶⁸ There is some authority for the proposition that a tenant has a claim against the landlord for a breach of the oral agreement,⁶⁹ but what is the tenant to do on the day fixed for the beginning of the term, the day he planned to take possession, if no work has been done? That was the situation in *Davies v. Hotchkiss*,⁷⁰ an opinion describing the defendant-tenant as "a prominent member of the New York Bar." The defendant took possession under a summer lease but deducted \$200 from an instalment of rent on the ground of the landlord's failure to place the premises in the agreed condition prior to the term. The Court conceded defendant's right to refuse possession in the circumstances,⁷¹ but held the defendant was put to an election. He could have accepted or rejected possession but acceptance was a waiver of the landlord's breach. Other cases are to the same effect.⁷²

It is noteworthy that acceptance of possession as a waiver of the landlord's breach is limited almost exclusively to repair cases. In other situations acceptance of possession does not waive the tenant's claim against the landlord. In *Stearns v. Lichenstein*,⁷³ for instance, the plaintiff-tenant took possession of part of a building under a three year written lease. The tenant proved an oral agreement not to renew the lease of X who occupied another part of the building. The reason for this was that the hazardous nature of X's business would prevent plaintiff from obtaining sufficient fire insurance. Plaintiff took possession despite the landlord's failure to remove X. Later,

American Seating Co., 138 F. 2d 641 (C. C. A. 2d 1943), *rev'd*, 322 U. S. 709, 64 Sup. Ct. 1053 (1943); *Mitchell v. Lath*, 247 N. Y. 377, 160 N.E. 646 (1928); *Lese v. Lamprecht*, 196 N. Y. 32, 89 N.E. 365 (1909); *Thomas v. Scutt*, 127 N. Y. 133, 27 N.E. 961 (1891) a clause reading "the covenants and agreements . . . are binding on the parties hereto and their legal representatives" does not negate the existence of a parol condition precedent. *Hall v. Kaminsky*, 118 N. Y. L. J. 989 (N. Y. City Ct. Oct. 23, 1947). For the application of the parol evidence rule to leases see Notes, 25 A.L.R. 787 (1923); 88 A.L.R. 1380 (1934); 151 A.L.R. 279 (1944).

⁶⁸*Brown v. DeGraff*, 183 App. Div. 177, 170 N. Y. Supp. 445 (3d Dep't 1918); *cf.* *Corn v. Rosenthal*, 1 Misc. 168, 20 N. Y. Supp. 632, *aff'd*, 3 Misc. 639, 22 N. Y. Supp. 700 (C. Pleas 1892) (agreement that possession be given tenant before term).

⁶⁹*Carines v. Walter*, 7 Misc. 431, 27 N. Y. Supp. 973 (City Ct. N. Y. 1894); *Tobey v. Mattimore*, 54 Misc. 231, 104 N. Y. Supp. 393 (App. T. 1907). *But cf.* *Merly Realty Co. v. Wallack*, 134 Misc. 96, 234 N. Y. Supp. 491 (Mun. Ct. 1929) (obligation does not run with land and bind landlord's grantee).

⁷⁰112 N. Y. Supp. 233 (App. T. 1908).

⁷¹*Accord: Cartledge v. Crespo*, 5 Misc. 349, 25 N. Y. Supp. 515 (City Ct. N. Y. 1893); *cf.* *Hone v. Burr*, 91 Misc. 520, 155 N. Y. Supp. 377 (County Ct. 1915).

⁷²*VanDerhoeve v. Hartmann*, 63 App. Div. 419, 71 N. Y. Supp. 552 (2d Dep't 1901); *Well Financed Investing Co. v. Binder*, 181 N. Y. Supp. 737 (App. T. 1920); *Leeming v. Duryea*, 49 Misc. 240, 97 N. Y. Supp. 355 (App. T. 1906); *Moore v. Coughlin*, 127 App. Div. 810, 813, 111 N. Y. Supp. 856, 858 (4th Dep't 1908).

⁷³48 App. Div. 498, 62 N. Y. Supp. 949 (2d Dep't 1900).

plaintiff suffered a fire loss substantially uncompensated by insurance. Plaintiff was allowed recovery against his landlord. It was held that acceptance of possession was not inconsistent with a remedy on the covenant.

*Lewis v. Seabury*⁷⁴ is somewhat similar. There the plaintiff-tenant leased a bakery shop fitted with shelving and other fixtures. After execution of the lease an outgoing tenant removed the fixtures as his. The landlord orally agreed with the plaintiff to replace them and thereafter the plaintiff-tenant took possession. It was held that plaintiff had a valid claim for the landlord's failure to replace the fixtures. Here the oral agreement was regarded not as a condition precedent of the written lease but a distinct collateral agreement which was not merged with the written paper.

It is difficult to see why a landlord's oral agreement to repair is merged by acceptance of possession by a tenant, and other oral conditions precedent or collateral agreements are not. The cases have drawn such a distinction and rule that a covenant to repair "in the natural course of good and ordinary business should and would be put in a lease."⁷⁵ Of course, every written agreement should be a complete integration of the antecedent contract, but since exceptions are recognized in the case of parol conditions precedent and collateral agreements this seems an illogical limitation. It illustrates that New York is generally less ready than other jurisdictions to admit parol evidence in connection with written agreements.⁷⁶

Where parol conditions subsequent are sought to be proved it is clear that oral evidence is incompetent. In *Wilson v. Dean*,⁷⁷ a tenant sought to cancel a rooming house lease on the ground of the landlord's failure to carry out a promise, made on execution of the lease, to install additional furniture during the term. It should be noted that the promise was to install the furniture during and not before the term. The evidence was held incompetent. The same rule is applicable to a promise to repair during the term. These are generally held merged in the written lease.⁷⁸ Several cases may appear

⁷⁴74 N. Y. 409 (1878); cf. *Cleves v. Willoughby*, 7 Hill 83 (N. Y. 1845) (landlord's removal of cistern between execution of lease and beginning of term justified tenant's refusal to take possession).

⁷⁵*Church v. MacNamara*, 93 Misc. 465, 467, 158 N. Y. Supp. 317, 318 (County Ct. 1916); *Hone v. Burr*, 91 Misc. 520, 526, 155 N. Y. Supp. 377, 380 (County Ct. 1915).

⁷⁶See *Mitchell v. Lath*, 247 N. Y. 377, 380, 160 N.E. 646, 647 (1928).

⁷⁷74 N. Y. 531 (1878).

⁷⁸*Smith v. Smull*, 69 App. Div. 452, 74 N. Y. Supp. 1061 (2d Dep't 1902); *Lynch v. Harrer*, 263 N. Y. Supp. 640 (City Ct. 1933); *Distributors Realty Co. v. Levensohn*, 145 N. Y. Supp. 67 (App. T. 1914); *Mayor v. Mason*, 9 N. Y. St. Rep. 282 (1887); *Heintze v. Erlacher*, 1 N. Y. City Ct. Rep. 465 (N. Y. Marine Ct. 1882). An oral promise to repair is held merged, of course, where the lease requires the tenant to repair. *Hartford & N. Y. S. B. Co. v. Mayor*, 78 N. Y. 1 (1879); *Nicoll v. Burke*, 78 N. Y. 580 (1879);

to be *contra* but the written leases there involved were demonstrably incomplete or themselves gave some hint of a collateral oral agreement to repair.⁷⁹

There are other examples of parol conditions subsequent. A tenant tried to show a privilege to cancel if the landlord erected a building on his neighboring land and cut off the tenant's light and air.⁸⁰ Tenants have sought to prove an exclusive privilege of commercial solicitation of other tenants in the building.⁸¹ A hotel tenant claimed the landlord had promised that a store in the building would always be leased to a restaurant.⁸² An apartment tenant claimed a right to street floor facilities for a baby carriage.⁸³ Evidence of all these was ruled out.

Two exceptions or qualifications of the parol evidence rule have already been mentioned. There are many more. Attention may, therefore, be given to a method of avoiding these questions. The method is to include in the lease a clause expressly stating that it contains all the agreements of the parties. This clause is enforceable⁸⁴ but must be broad enough to cover the subject. In one case, for instance, a clause stated that no representations had been made, yet the tenant was permitted to amend his answer, in a rent action, to allege a parol warranty with respect to the strength of the floor.⁸⁵

Thomas v. Dingleman, 45 Misc. 379, 90 N. Y. Supp. 436 (App. T. 1904). This is also true where the lease is silent on repairs. Roseff v. Beals, 181 App. Div. 617, 168 N. Y. Supp. 1042 (2d Dep't 1918); Church v. MacNamara, 93 Misc. 465, 158 N. Y. Supp. 317 (County Ct. 1916); Cleves v. Willoughby, 7 Hill 83 (N. Y. 1845). A landlord's promise to repair, made after execution of the lease, is unenforceable for want of consideration. Eisert v. Adelson, 136 App. Div. 741, 121 N. Y. Supp. 446 (2d Dep't 1910); Church v. MacNamara, *supra*; Mayor v. Price, 5 Sandf. 542 (N. Y. 1852). (But since 1936 an agreement to modify a lease is not invalid because of the absence of consideration if in writing and signed by the party to be charged. N. Y. REAL PROP. LAW § 279.) Efforts to establish oral agreements to repair are usually based on the ground that they are collateral or that the written lease is incomplete. The difficulty with these is the judicial assumption that any such intent is "naturally" included (see note 75 *supra*) and that the lease is complete. See Daly v. Piza, 105 App. Div. 496, 497, 94 N. Y. Supp. 154, 155 (1st Dep't 1905); Lynch v. Harrer, *supra*, at 647; Hall v. Beston, 16 Misc. 528, 38 N. Y. Supp. 979 (Sup. Ct. 1896). The decisions also stem from the rule that a landlord is under no implied duty to repair. Witty v. Matthews, 52 N. Y. 512 (1873).

⁷⁹Mayer v. Rothstein, 167 N. Y. Supp. 503 (App. T. 1917); Sire v. Rumbold, 14 N. Y. Supp. 925 (Comm. Pl. 1891); Weil v. Kahn, 10 N. Y. Supp. 236 (Comm. Pl. 1890).

⁸⁰Johnson v. Oppenheim, 55 N. Y. 280 (1873).

⁸¹Halloran v. N. & C. Contracting Co., 249 N. Y. 381, 164 N. E. 324 (1928); Sardone v. Diamond Holding Co., 244 App. Div. 300, 279 N. Y. Supp. 659 (1st Dep't 1935); Stonemor Realty Co. v. Beyda, 206 App. Div. 476, 201 N. Y. Supp. 418 (1st Dep't 1923) (restriction against competing use).

⁸²See Henlun Holding Co. v. Ess Bros. Bldg. Co., 228 App. Div. 99, 239 N. Y. Supp. 257 (1st Dep't 1930).

⁸³Rakover v. Blum, 13 N. Y. S. 2d 464 (App. T. 1939).

⁸⁴See cases collected in Direct Realty Co. v. Fergang, 9 N. Y. S. 2d 776 (App. T. 1938) the clause does not bar evidence to explain a clause whose meaning is not self-evident. Boro Hall Corp. v. General Motors Corp., — F. 2d — (C. C. A. 2d 1947).

⁸⁵Madison Tire & Realty Co. v. Malcolm Tire Co., 123 Misc. 425, 204 N. Y. Supp. 355 (App. T. 1924).

A clause may be included in a lease sufficiently broad to exclude parol evidence but the clause itself may be set aside on the ground of fraud or mistake.⁸⁶

V. INDEPENDENCE OF LEASE COVENANTS

During the term of a lease, covenants by landlord and tenant are to be performed. Note has already been made of the general rule that—unlike principles of contract law—these covenants are independent.⁸⁷ This means that if either party fails to perform his covenant the other has a remedy on the covenant—by direct action or counterclaim—but no more.

For example, if the landlord fails to perform a particular covenant the tenant must still pay rent. If the tenant fails to pay rent the landlord may not *per se* end the lease or fail to perform a covenant on his part to be performed. This is based on the ancient principle that a lease is essentially a conveyance and any covenants added are incidental embroidery.⁸⁸ The parties may, of course, vary this by appropriate provisions in the lease and thereby make any one or more covenants dependent.

In addition to the examples already given a few more may be noted. A landlord's breach of covenant to repair gives the tenant neither a defense to an action for rent⁸⁹ nor an excuse to surrender the lease,⁹⁰ the tenant's remedy being to counterclaim or bring a separate action for damages.⁹¹ A tenant's right to renew the lease is not conditioned on his being in good standing under the lease,⁹² but this may be made an express condition precedent to a right to renew.⁹³ The same is true with respect to a tenant's right to recover for breach of covenant of quiet enjoyment.⁹⁴ A landlord's covenant to pay his tenant the cost of erecting a building is not excused by the tenant's default under the lease leading to eviction, on the ground that the two cove-

⁸⁶Corbin, *The Parol Evidence Rule*, 53 YALE L. J. 603, 618 (1944).

⁸⁷See text at page 166.

⁸⁸3 WILLISTON, CONTRACTS § 890 (Rev. ed. Williston and Thompson, 1936); and see text at page 167.

⁸⁹Thomson-Houston Elec. Co. v. Durant Land Improv't Co., 144 N. Y. 34, 43-44, 39 N. E. 7, 9 (1894).

⁹⁰Huber v. Ryan, 26 Misc. 428, 56 N. Y. Supp. 135 (Sup. Ct. 1899).

⁹¹Baitzel v. Rhineland, 179 App. Div. 735, 741, 167 N. Y. Supp. 343, 346 (1st Dep't 1917).

⁹²Tracy v. Albany Exchange Bank, 7 N. Y. 472 (1852); cf. Berry v. Stuyvesant, 245 App. Div. 516, 283 N. Y. Supp. 191 (1st Dep't 1935).

⁹³People's Bank v. Mitchell, 73 N. Y. 406 (1878).

⁹⁴Laveites v. Gottlieb, 115 Misc. 218, 187 N. Y. Supp. 452 (Sup. Ct. 1921); Baitzel v. Rhineland, 179 App. Div. 735, 167 N. Y. Supp. 343 (1st Dep't 1917); Meyer v. Schulte, 160 App. Div. 236, 144 N. Y. Supp. 1028 (1st Dep't 1913), *aff'd*, 213 N. Y. 675, 107 N. E. 1081 (1914).

nants are independent.⁹⁵ A landlord's mingling of lease security with his own funds—thereby violating an express requirement of the lease that the security is held in trust—was held to give the tenant no defense to an action for rent.⁹⁶ In another rent action a tenant was denied a defense based on a landlord's breach of covenant to keep an underlying lease in good standing, though the result would have undoubtedly been different if the landlord's breach had led to the tenant's ouster.⁹⁷

VI. RE-ENTRY, SURRENDER BY OPERATION OF LAW AND SURVIVAL OF TENANT'S LIABILITY

When a lease ends the tenant's liability for rent ends. There is nothing surprising in this where the lease runs itself out and expires by its terms. But it is also true that when a landlord takes advantage of an express conditional limitation in a lease and elects to cancel because of the tenant's default, the end of the lease terminates the tenant's liability for rent. The relationship of landlord-tenant is thereby annulled and, accordingly, no more rent accrues.⁹⁸ The result follows logically from the premise that a lease is a conveyance.

Express provisions may be included in a lease to make the tenant's liability survive termination of the lease. Such a claim creates a liability not for rent but for *damages*, and rules of *contract law* apply thereto.

If a tenant vacates the premises, the landlord need not relet and may continue to enforce payment of rent. The leading New York case is *Becar v. Flues* where after the tenant died the landlord sued the tenant's representatives for rent. A defense was interposed based on the landlord's refusal of an opportunity to relet. The Court of Appeals observed that it was a hard case but affirmed judgment for the landlord.⁹⁹ In *Sancourt R. Co. v. Dowling*, a case similar in result, Proskauer, J. wrote:

"The usual obligation to reduce damages has no application to a contract of leasing as the matter is governed by peculiar and different rules."¹⁰⁰

⁹⁵*Daniel Holding Co. v. 234 West 42nd St. Co.*, 255 App. Div. 8, 5 N. Y. S. 2d 391 (1st Dep't 1938).

⁹⁶*Turquoise Realty Co. v. Burke*, 168 Misc. 670, 6 N. Y. S. 2d 125 (Mun. Ct. 1938).

⁹⁷*165 West 46th St. Co. v. Radio-Keith Orpheum Vaudeville Exch. Inc.*, 157 Misc. 816, 285 N. Y. Supp. 373 (City Ct. 1935).

⁹⁸*McCready v. Lindenborn*, 172 N. Y. 400, 65 N.E. 208 (1902); *Cohen v. Carpenter*, 128 App. Div. 862, 113 N. Y. Supp. 168 (2d Dep't 1908); Friendly, *Some Comments on the Corporate Reorganizations Act*, 48 HARV. L. REV. 39, 65 n. 105 (1934). But cf. text at page 193.

⁹⁹*Becar v. Flues*, 64 N. Y. 518 (1876); and see cases in *Lynch v. Harrer*, 263 N. Y. Supp. 640, 646 (City Ct. 1933); 44 HARV. L. REV. 993 (1931); see Notes, 40 A. L. R. 190 (1926); 126 A. L. R. 1219 (1940); 36 C. J. 342.

¹⁰⁰220 App. Div. 660, 222 N. Y. Supp. 288, 289 (1st Dep't 1927).

This follows logically from the rule that a tenant's liability for rent is based on the landlord-tenant relation, regardless of the tenant's taking possession,¹⁰¹ and even if a tenant cannot get possession because of occupancy by another.¹⁰²

But landlords are justifiably reluctant to leave their property vacant and pass up opportunities to relet for the purpose of piling up possibly uncollectible judgments against a tenant who has walked out on a lease. It is not prudent to put so much faith in that type of tenant. Yet a landlord may not endeavor to minimize his damages by reletting without running the risk of completely losing the liability of his original tenant. In the leading case of *Gray v. Kaufman*¹⁰³ the tenant walked out, saying that he would not stay in a place where he could not earn the rent. The landlord relet and subsequently sued the original tenant for rent. The court held that making a second lease created an estate incompatible with the estate created by the original lease. If the first lease were in existence the landlord had no power to create a second; creation of the second lease implied a recognition by the landlord that the first was at an end. The first lease was held surrendered by operation of law. This follows logically from the premise that a lease is a conveyance. In the Connecticut case of *Miller v. Benton*¹⁰⁴ the facts were essentially the same but the landlord recovered on the ground that the landlord merely minimized his damages by reletting. The *Miller* case treats a lease not as a conveyance but as a contract, and applies a familiar rule of contracts to the tenant's breach.

Gray v. Kaufman was not decided without difficulty, for in the earlier case of *Underhill v. Collins*¹⁰⁵ the facts were similar and judgment was given the landlord. The distinction between the cases was based on the fact that in the *Underhill* case the landlord and the tenant had had some conversations from which the court found that a parol agreement had been made authorizing the landlord to relet for the tenant's account. The *Underhill* case held that despite the doctrine of surrender by operation of law, the parties may vary the rule and make the tenant's liability survive termination of the lease, and furthermore, that a parol agreement is sufficient for this purpose.

In *Gray v. Kaufman* the court found the landlord and tenant had had conversations but not of such nature as to ripen into an agreement. Furthermore the landlord wrote the tenant stating he would relet for the tenant's account.

¹⁰¹See text at page 165.

¹⁰²See text at page 172 *et seq.*

¹⁰³*Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N. Y. 388, 56 N. E. 903 (1900).

¹⁰⁴55 Conn. 529 (1888).

¹⁰⁵132 N. Y. 269, 30 N.E. 576 (1892).

The latter failed to reply. The court ruled no reply to an unsolicited communication was necessary—a proposition which in similar circumstances is not beyond doubt in New York¹⁰⁶—and that the unilateral statement by the landlord was short of the agreement mutually reached in *Underhill v. Collins*.

A year before *Gray v. Kaufman, Gaffney v. Paul*¹⁰⁷ was decided by the lower courts. Here the landlord threatened to sue the tenant but this was held short of the requirements of *Underhill v. Collins*.

The rule of *Gray v. Kaufman* is criticised generally by the writers but represents the majority rule.¹⁰⁸ An extreme example is *Pelton v. Place & Sheets*¹⁰⁹ where a lease of one day for a Fourth of July celebration was held a surrender by operation of law of an earlier lease. But most states apply the doctrine less strictly than New York and rule that a landlord's notification of a tenant of an intention to relet for the tenant's account is enough to retain the tenant's liability.¹¹⁰

Execution of a new lease is the common method of accepting surrender by operation of law. But the landlord's resumption of possession may effect this result without a new lease. Resumption of possession for the landlord's use is held an acceptance of surrender.¹¹¹ Entry for the purpose of offering the premises for rent and posting a "For Rent" sign is probably no acceptance.¹¹² The same is true where entry is to make repairs necessary for preservation.¹¹³ But little more than this in the way of repairs is necessary to constitute an acceptance of surrender.¹¹⁴ After a tenant abandons posses-

¹⁰⁶*Matter of Japan Cotton Trading Co. v. Farber*, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931); 1 WILLISTON, CONTRACTS § 90A (Rev. ed. Williston and Thompson 1936); and see *First Nat. Bank v. Sleeper*, 12 F. 2d 228, 230 (C. C. A. 8th 1926).

¹⁰⁷29 Misc. 642, 61 N. Y. Supp. 173 (App. T. 1899).

¹⁰⁸Schnebly, *Operative Facts in Surrenders*, 22 ILL. L. REV. 117 (1927); Updegraff, *The Element of Intent in Surrender by Operation of Law*, 38 HARV. L. REV. 64 (1924); McCormick, *Rights of Landlord upon Abandonment of Premises*, 23 MICH. L. REV. 211 (1924).

¹⁰⁹71 Vt. 430, 46 Atl. 63 (1899).

¹¹⁰Schnebly, *Operative Facts in Surrenders*, 22 ILL. L. REV. 117, 126-127 (1927).

¹¹¹*David Present Co. v. Tamasauskas*, 210 App. Div. 786, 206 N. Y. Supp. 594 (1st Dep't 1924).

¹¹²See *Levitt v. Zindler*, 136 App. Div. 695, 121 N. Y. Supp. 483 (2d Dep't 1910). But cf. *Flagelle v. Etna Import Co.*, 133 N. Y. Supp. 465 (App. T. 1912).

¹¹³*Haynes v. Aldrich*, 133 N. Y. 287, 31 N.E. 94 (1892); *Schwartz v. Brucato*, 57 App. Div. 202, 68 N. Y. Supp. 289 (2d Dep't 1901); *Sammis v. Day*, 48 Misc. 327, 96 N. Y. Supp. 777 (Sup. Ct. 1905), *aff'd*, 113 App. Div. 897, 99 N. Y. Supp. 1148 (2d Dep't 1906); *Ludington v. Seaton*, 32 Misc. 736, 66 N. Y. Supp. 497 (App. T. 1900) (repairs at tenant's request); *Markham v. Stevenson Brew. Co.*, 51 App. Div. 463, 64 N. Y. Supp. 617 (1st Dep't 1900), *aff'd*, 169 N. Y. 593, 62 N.E. 1097 (1901) (compliance with governmental requirements); *Coffin v. United Mfg. Trimming Co.*, 85 Misc. 402, 147 N. Y. Supp. 463 (App. T. 1914).

¹¹⁴*Hodgkiss v. Dayton—Brower Inc.*, 93 Misc. 109, 156 N. Y. Supp. 909 (App. T. 1915); *First Stamford Nat. Bank v. Pierce*, 161 Misc. 756, 293 N. Y. Supp. 75 (Mun. Ct.

sion the landlord may collect rent from sub-tenants without losing the liability of the main tenant by operation of law.¹¹⁵

When surrender by operation of law is effected the tenant is released not from the date of his abandonment but from the date of the reletting or other act constituting the acceptance of surrender.¹¹⁶

The rule of surrender by operation of law usually reacts against the landlord but it may also affect the tenant adversely. Renewal of a lease is deemed a surrender of the original lease and all rights accruing thereunder. A tenant, vested with an express right to remove fixtures, by the terms of his lease, loses this right by a renewal lease silent on the right of removal.¹¹⁷ Older cases hold a renewal lease, silent on the point, ends a tenant's right of estovers,¹¹⁸ a matter of infrequent practical importance today except insofar as it indicates the possibility of a tenant's loss of rights by a renewal lease.

As a result of these rules, landlords customarily include in leases a clause expressly permitting a landlord to relet in case of vacancy or other events.¹¹⁹ The clause often permits the landlord to relet "as agent" of the tenant, for the tenant's account, while retaining the liability of the original tenant for any deficit accruing until the end of the original term. This type of clause has been variously named, but the term "survival clause" seems most appropriate and will be hereafter used.

Any reletting by a landlord must be for the tenant's benefit in order to preserve the landlord's rights under the clause. A landlord's resumption of

1937); *MacKellar v. Sigler*, 47 How. Pr. 20 (N. Y. 1874). See generally, *Landlord's Repairs or Alterations to Premises After Abandonment by Tenant as Constituting Acceptance of Surrender*, N.Y.L.J. April 11, 1946 p. 1424.

¹¹⁵*Bond, Mortgage & Securities Co. v. Surplus Wholesale Co.*, 162 Misc. 586, 295 N. Y. Supp. 67 (Mun. Ct. 1937) so holds but relies on cases involving collection of rent from assignees, not subtenants; *accord*, *Schactor v. J. T. Tuggle Co.*, 8 Ga. App. 561, 70 S.E. 93 (1911); *Sanford v. McGinnis*, 215 Mo. App. 64, 238 S.W. 535 (1921); *Decker v. Hartshorn*, 60 N.J.L. 548, 38 Atl. 678 (1897); and *see*, *Thompson v. West. Casket Co.*, 219 Ill. App. 184 (1920). *Contra*: *Tex. Loan Agency v. Fleming*, 92 Tex. 458, 49 S.W. 1039 (1899). See also, *Lusk Operating Co. v. Gelardin*, 186 Misc. 817, 61 N. Y. S. 2d 714 (App. T. 1946) (enforcing lease clause permitting collection of rent from assignee or subtenant without waiving covenant against assignment).

¹¹⁶*Koblin v. Green*, 265 App. Div. 972, 38 N. Y. S. 2d 968 (2d Dep't 1942); *Dagett v. Champney*, 122 App. Div. 254, 106 N. Y. Supp. 892 (3d Dep't 1907); *Harding v. Austin*, 93 App. Div. 564, 87 N. Y. Supp. 887 (2d Dep't 1904).

¹¹⁷*Loughran v. Ross*, 45 N. Y. 792 (1871); see Note, 110 A.L.R. 480 (1937); 26 C.J. 708; and see generally, *Friedman, The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, 7 *FORN. L. REV.* 331, 338 n. 46 (1938).

¹¹⁸*Livingston v. Potts*, 16 Johns. 28 (N. Y. 1819); *Springstein v. Schermerhorn*, 12 Johns. 357 (N. Y. 1815). *But cf.* *McGregor v. Bd. of Education*, 107 N. Y. 511, 516, 14 N.E. 420, 422 (1887).

¹¹⁹Subject to the qualifications hereinafter discussed, the landlord and tenant may stipulate that the tenant's liability shall survive re-entry or reletting. *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576 (1892).

possession for his own use releases the tenant despite the existence of a survival clause.¹²⁰ The same result follows a landlord's reletting to a third person rent free—a result fair enough in view of the lack of benefit to the original tenant.¹²¹ Reletting with a rent concession does not release the original tenant but his liability is abated for the period covered by the concession.¹²²

Courts are frankly unfriendly to survival clauses, or they were originally. In *Michaels v. Fishel* the Court of Appeals wrote:

“ . . . a covenant to pay, with no right to enjoy, should be clear and unambiguous as to the event which calls it into action.”¹²³

Considering that a survival clause may be invoked only after a tenant's default, this attitude seems to be too close to that of some laymen who believe, on walking out on a lease, that the end of possession is the end of liability. The lease involved in the *Fishel* case provided that in the event of the landlord's re-entry, the landlord could relet and hold the tenant for the deficit. The court noted that this lease was full of technical expressions and was obviously drawn by a skilled draftsman. It ruled that “re-entry” technically means “ejectment.” Here, the lease had been terminated by summary proceedings and not ejectment. Hence, the event on which the landlord might predicate a claim under the survival clause had never come into existence. Judgment was given for the tenant on the ground that the survival clause was applicable only to ejectment. In *Anzolone v. Paskusz*¹²⁴ a survival clause was based on re-entry by “force or otherwise.” The addition of the quoted phrase was held to broaden the clause enough to include summary proceedings. In *Fleisher v. Friob*¹²⁵ the survival clause permitted the landlord to relet in the event of vacancy and hold the tenant for the deficit. The landlord had dispossessed the tenant. It was held that a survival clause based on vacancy

¹²⁰*Bedford Ice Palace, Inc. v. Bklyn Trust Co.*, 246 App. Div. 734, 283 N. Y. Supp. 864 (2d Dep't 1935); *Kugler v. Kerman Theatre Inc.*, 100 N.Y.L.J. 58 (N. Y. City Ct. June 7, 1938) a landlord's authority to relet as the tenant's “agent” was held not to permit the landlord to operate the premises as a rooming house. *Hamlin v. Vagnoni*, 117 N.Y.L.J. 2406 (Sup. Ct. June 6, 1947).

¹²¹*Schmidt v. Vahjen*, 143 App. Div. 479, 127 N. Y. Supp. 1038 (2d Dep't 1911).

¹²²*Mayflower Apts. Inc. v. Sheean*, 249 App. Div. 712, 291 N. Y. Supp. 424 (1936), *aff'd*, 275 N. Y. 498, 11 N. E. 2d 314 (1937); *Schwartz v. Brucato*, 57 App. Div. 202, 68 N. Y. Supp. 289 (2d Dep't 1901); *Lema Realty Co. v. Najarian*, 186 Misc. 752, 65 N. Y. S. 2d 323 (App. T. 1946); *Smyth v. Hanig*, 163 Misc. 59, 296 N. Y. Supp. 260 (App. T. 1937). A survival clause permitting a rent concession would probably be upheld. *Continental Bank & Trust Co. v. Goodner*, 49 N. Y. S. 2d 747 (App. T. 1944).

¹²³169 N. Y. 381, 390, 62 N.E. 425, 427 (1902).

¹²⁴96 App. Div. 188, 89 N. Y. Supp. 203 (1st Dep't 1904); *accord*, *Rosenfeld v. Aaron*, 248 N. Y. 437, 162 N.E. 478 (1928).

¹²⁵97 Misc. 343, 161 N. Y. Supp. 940 (Sup. Ct. 1890), *aff'd*, 177 App. Div. 921, 164 N. Y. Supp. 1092 (1st Dep't 1917).

did not include termination by summary proceedings. Again, the survival clause failed the landlord. Other cases are in accord.¹²⁶

In *Fleisher v. Friob*, Bijur, J. reviewed the cases beginning with *Michaels v. Fishel* and made the tart observation:

"As a result of that case there was an extensive and, in some cases, an intelligent revision of the forms of leases."¹²⁷

But despite the revision of survival clauses there are many cases where, for one reason or another, they fail to work when invoked. In one case, for instance, a survival clause provided only that the tenant would be liable for a deficit if the landlord should relet. The tenant had apparently been dispossessed, which ended the lease and any liability for rent. The landlord had not relet and therefore there was no liability under the survival clause in question.¹²⁸

A group of cases concerns the time when a landlord may relet. In *Fernschild v. Brown*¹²⁹ the landlord made the mistake of signing a new lease promptly upon learning of his tenant's intention of vacating, but before the actual vacation. It was held that the new lease was an acceptance of surrender despite a survival clause. In a case in accord it was said that reletting in these circumstances is inconsistent with a landlord-tenant relationship. But in *Astor Garage v. Rozell*¹³⁰ a landlord's claim on a survival clause was upheld despite his reletting prior to the tenant's surrender of possession. Here the reletting followed the issuance of a warrant in summary proceedings. The warrant ended the lease and left nothing to surrender. In another case the landlord relet while the original tenant was still in possession but for a term beginning with the expiration of the original lease. This was held no acceptance of surrender because there was nothing inconsistent with a second term beginning after the expiration of the first.¹³¹

Another group of cases concerns the length of the term a landlord may grant under a survival clause. In *Bonsignore v. Koondel*¹³² a survival clause

¹²⁶*Chaude v. Shepard*, 122 N. Y. 397, 25 N.E. 358 (1890); *Wolf v. Rudinsky*, 135 App. Div. 172, 119 N. Y. Supp. 1007 (1st Dep't 1909); *Klein v. Heistein*, 133 Misc. 704, 233 N. Y. Supp. 293 (App. T. 1929).

¹²⁷77 Misc. 343, 350, 161 N. Y. Supp. 940, 944 (App. T. 1916).

¹²⁸*Eljac Realty Co. v. Cannonito*, 89 N.Y.L.J. 611 (Sup. Ct. Jan. 31, 1933).

¹²⁹255 App. Div. 983, 8 N. Y. S. 2d 278 (2d Dep't 1938), *aff'd*, 280 N. Y. 782, 21 N.E. 2d 617 (1939); *In re Lear Shoe Co.*, 104 N.Y.L.J. 694 (Sup. Ct. Sept. 19, 1940); *Id.* at 1147 (Sup. Ct. Oct. 18, 1940) (reletting inconsistent with landlord-tenant relation).

¹³⁰111 N.Y.L.J. 741 (Sup. Ct. Feb. 25, 1944), *aff'd*, 268 App. Div. 855, 50 N. Y. S. 2d 776 (1st Dep't 1944), *aff'd*, 294 N. Y. 852, 62 N.E. 2d 398 (1945).

¹³¹*Bond, Mortgage & Securities Co. v. Surplus Wholesale Co.*, 162 Misc. 586, 295 N. Y. Supp. 67 (Mun. Ct. 1937).

¹³²134 Misc. 344, 235 N. Y. Supp. 453 (Mun. Ct. 1929).

permitted the landlord to relet for the balance of the term. The tenant abandoned at a time when seven months of the term remained. The landlord relet for a year. The court held that when a landlord goes beyond authority of the survival clause he is presumed to act not under the authority so given but for his own account. Other cases are in accord, one of which rules that the presumption is conclusive.¹³³ But a survival clause may expressly permit reletting for a period extending beyond the original term and giving the new tenant a rent concession as well.¹³⁴ And in the *Astor Garage* case, already mentioned, reletting beyond the original term was held not to release the original tenant in the absence of express authority to this effect, where the lease was made after issuance of a warrant in summary proceedings, the effect of which was to terminate the original lease.

Still another group of cases considers the amount of space a landlord may relet under a survival clause. In *Friedlander v. Citron*¹³⁵ the landlord and tenant had a dispute after fire had damaged the premises. The tenant refused to pay further rent and was dispossessed. The landlord then leased the demised premises and an adjoining floor for a period beyond the original term. In an action against the original tenant it was held that despite the existence of a survival clause in the first lease, the new lease, for a longer term and including additional space, created a conclusive presumption of surrender and acceptance.

In *Brill v. Friedhoff*¹³⁶ the landlord sued the tenant for rent. The tenant had vacated but, before so doing, had given the landlord a letter permitting the latter to relet to the end of the term for the purpose of reducing damages. The landlord recovered judgment after a trial but the Appellate Division found six reasons for reversal: The landlord had relet for a longer term. Defendant's lease contained a survival clause giving a surplus on reletting to the tenant; the second lease had a similar clause giving a surplus to the new tenant; these clauses were inconsistent. The new lease required the second tenant to make extensive alterations; no such obligation was included in the first lease. The new lease gave the second tenant some free rent. The new lease was subordinate to all mortgages. The new lease permitted the landlord to cancel on payment of a monetary consideration. It would seem

¹³³Matter of Goldberg, 148 Misc. 607, 266 N. Y. Supp. 106 (Surr. Ct. 1933); *Dasanat Realty Co. v. Murray*, 138 Misc. 305, 246 N. Y. Supp. 693 (Mun. Ct. 1930); *Smith v. Diddia*, 90 N.Y.L.J. 2179 (Sup. Ct. Dec. 9, 1933).

¹³⁴See *Continental Bank & Trust Co. v. Goodner*, 49 N.Y.S. 2d 747, 749 (App. T. 1944).

¹³⁵129 N. Y. Supp. 427 (App. T. 1911).

¹³⁶192 App. Div. 802, 183 N. Y. Supp. 463 (1st Dep't 1920); cf. *Dasanat Realty Co. v. Murray*, 138 Misc. 305, 246 N. Y. Supp. 693 (Mun. Ct. 1930).

probable that the first lease was prepared on a printed form; that the second lease was prepared on, or a later edition of, the same form, with a type-written rider adding a few additional clauses, and that the landlord's attorney used this form without tailoring it to fit the precise authority to relet embodied in the first lease. The Appellate Division sent the case back for retrial on the ground that surrender and acceptance was a question for the jury. What the jury did on a retrial is not hard to imagine.

In *Grigsby v. Ruland*¹³⁷ the landlord sued the tenant on a survival clause, contained in a lease of an unfurnished apartment, permitting the landlord to relet for the remainder of the term "at the best rent." The landlord installed furniture, relet the apartment as furnished, and for a while received a higher rent than that payable under the original lease. After allowing credit for the rent so collected the landlord sued for the deficit. The tenant claimed the installation of furniture was such a change in the circumstances as to act as a release. The jury's decision that no surrender and acceptance had occurred was held to be correct. The court pointed out that "no structural changes whatever were made in the rooms."

At this point we can conclude that a survival clause should cover any type of situation whereby the tenant leaves the premises after expiration of the original term—vacancy, dispossession or any other event, whether foreseeable or not. The clause should permit reletting for a lesser or greater term than that remaining of the original lease at the time of the reletting, as well as greater or lesser space. If more space is let the rent should be apportioned so that proper credit is given the original tenant. The *Grigsby* case suggests that the survival clause should permit the landlord to make a change in the character of the premises, structural or otherwise.

The cases, discussed above, construing survival clauses against landlords have not been overruled, but the strictness of this approach has been somewhat relaxed. There is currently a less unfriendly judicial attitude towards survival clauses, apparently reflecting a belief that if a tenant agrees to remain liable for a demised term this agreement should be given an effect corresponding with the expressed intention. *International Publications v. Matchabelli*¹³⁸ and *Schulte Leasing Co. v. Mayers*¹³⁹ involve leases with survival clauses whose draftsmanship was short of perfection. In the *Matchabelli*

¹³⁷210 App. Div. 640, 206 N. Y. Supp. 376 (1st Dep't 1924). Cf. the Hamlin case in note 120.

¹³⁸235 App. Div. 38, 256 N. Y. Supp. 66 (1st Dep't 1932), *rev'd*, 260 N. Y. 451, 184 N. E. 51 (1933).

¹³⁹238 App. Div. 403, 264 N. Y. Supp. 664 (1st Dep't 1933), *aff'd*, 263 N. Y. 554, 189 N. E. 694 (1933).

lease, clause 11 permitted the landlord to terminate on notice if the tenant defaulted, and to relet and hold the tenant for a deficiency, *i.e.*, this clause permitted termination on notice and the same provision contained a rather complete survival clause. Clause 12 provided merely that re-entry by force or otherwise would not release the tenant from liability. The landlord had dispossessed the tenant. The Appellate Division held the survival clause was applicable only to termination by notice and not to summary proceedings. The Court of Appeals, reversing, held clause 12, dealing with summary proceedings, was clear enough to hold the tenant for lost rentals. The *Schulte* case is substantially similar. In *Senz v. Hammer*¹⁴⁰ a tenant sued his former landlord to recover a security deposit made under the lease. The lease authorized the tenant to terminate on notice after default; and made the tenant's liability survive termination by legal proceedings. After a default by the tenant, the landlord elected to terminate and the tenant vacated. The Appellate Division gave judgment for the tenant on the ground the tenant's liability survived only termination by legal proceeding, not termination by notice. The Court of Appeals reversed, ruling that the survival clause was not free from obscurity, but inferred that the deposit was security for the tenant's full performance.

In *Henochstein v. Nachman*¹⁴¹ the survival clause was applicable to vacancy and summary proceedings. When the landlord began summary proceedings the tenant vacated promptly after being served with a precept. He claimed he had avoided the only situation in which the clause could come into effect. It was held that vacation after service of the precept was no release. Other cases are in accord.¹⁴²

While the usual lease requires payment of rent in instalments in advance, it does not follow that a deficiency is payable in instalments under a survival clause. The first well considered discussion of this was by Lehman, J. in *Darmstadt v. Knickerbocker*,¹⁴³ an action by a landlord against a tenant on a survival clause. The action was begun after the tenant had been dispossessed but before expiration of the original term. Judge Lehman held that the lease, in effect, contained two agreements—(1) to pay rent monthly, and

¹⁴⁰239 App. Div. 174, 267 N. Y. Supp. 113 (1st Dep't 1933), *rev'd*, 265 N. Y. 344, 193 N. E. 168 (1934).

¹⁴¹218 App. Div. 673, 219 N. Y. Supp. 199 (1st Dep't 1926).

¹⁴²45 E. 57th St. Co. v. Millar, 214 App. Div. 189, 212 N. Y. Supp. 95 (1st Dep't 1925); *Hampton v. Flessler*, 133 Misc. 705, 232 N. Y. Supp. 641 (App. T. 1929); *cf.* *Sno-White Inc. v. Gerald Operating Co.*, 271 App. Div. 314, 65 N. Y. S. 2d 9 (1st Dep't 1946).

¹⁴³104 Misc. 547, 172 N. Y. Supp. 148 (App. T. 1918), *rev'd*, 188 App. Div. 129, 176 N. Y. Supp. 588 (1st Dep't 1919).

(2) to pay a deficiency after the landlord's re-entry. But liability for the deficiency could arise only when ascertained, *i.e.*, at the end of the original term. Until then there was no liability. The landlord argued that he had already relet for the balance of the term and that the tenant's liability was thereby fixed. This argument was repudiated on the ground that the new lease might be cancelled and the premises re-rented for more rent and that, at any rate, the tenant's liability was only for such deficiency as might exist on the date fixed for termination of the lease, and the landlord could not change this by any act on his part. Lehman, J. was reversed by the Appellate Division which, in turn, was overruled by *Hermitage v. Levine*.¹⁴⁴ The *Hermitage* case reached Lehman's result, with a further explanation by Judge Cardozo. Dispossess ended the lease. What survived was a liability not for rent but for damages. After termination a landlord does not relet "as agent." The landlord relets what is his. "As agent" means only that the reletting is evidence of the landlord's damages. Professor Updegraff writes that reletting "as agent" is fiction, explaining that the new lease does not bind the original tenant as a landlord and that the tenant is not entitled by implication to any profit from the reletting.¹⁴⁵ Cardozo, J. reasoned that holding a tenant for a deficit in instalments charges him with payment in the lean periods without recoupment for the fat ones. He refused to read an obligation to this effect into the lease by inference. The *Hermitage* case was a hard one. A tenant under a 21 year lease had been dispossessed within a few months of its inception. The landlord's claim was postponed over twenty years—which underscored for the landlord the law's delays.

The converse of the *Hermitage* case arises when an evicted tenant seeks return on his security deposit. If the survival clause is broad enough to cover the landlord's damages and the deposit is made security for damages the tenant is not entitled to the security until expiration of the original term.¹⁴⁶

Judge Cardozo pointed out in the *Hermitage* case that a clause charging an evicted tenant with a deficiency in monthly instalments is enforceable. Today, well drawn leases expressly give this right to the landlord. Several cases uphold this right under leases whose draftsmanship was indifferent.

¹⁴⁴248 N. Y. 333, 162 N.E. 97 (1928); Comment, 48 YALE L. J. 1400, 1408 n. 54 (1939).

¹⁴⁵Updegraff, *The Element of Intent in Surrender by Operation of Law*, 38 HARV. L. REV. 64, 82 (1924).

¹⁴⁶*Rosenfeld v. Aaron*, 248 N. Y. 437, 162 N.E. 478 (1928); *Lenco v. Hirschfeld*, 247 N. Y. 44, 159 N.E. 718 (1928); *Ambler Garage v. People*, 235 App. Div. 548, 257 N. Y. Supp. 805 (1st Dep't 1932), *aff'd*, 261 N. Y. 531, 185 N.E. 725 (1933); *Halpern v. Manhattan Ave. Theatre Co.*, 173 App. Div. 610, 160 N. Y. Supp. 616 (1st Dep't 1916), *aff'd*, 220 N. Y. 655, 115 N.E. 718 (1917).

In one, the survival clause made the tenant liable for the "rent due by these presents." The landlord's claim was upheld on the ground the reference to "rent" implied monthly payments.¹⁴⁷ In another, a landlord sued a tenant, after eviction, for an instalment of taxes payable by the tenant. The taxes had been assessed before, but did not become payable until after, the dispossess proceedings. Judgment was given the landlord on the ground the taxes were payable before expiration of the lease.¹⁴⁸ The rationale seems doubtful because at the time fixed for payment by the tenant there was no lease in existence.

The same result was had in the oft-cited *Mann v. Munch Brewery Co.*¹⁴⁹ Here the landlord recovered against the tenant after dispossess and before the original expiration of the lease. The survival clause made the tenant liable for *rent* until expiration. The Court of Appeals opinion does not clearly state its holding that a provision in a survival clause for payment of rent infers an obligation to pay a deficiency in instalments as rent. But the record on appeal shows this point was passed on by the trial court and was briefed in the Court of Appeals.

In some of these cases the pleaders understandably confuse the landlord's claim for damages with rent, but in an early case this was held harmless error and disregarded.¹⁵⁰ The *Hermitage* and other cases are clear; after a lease has been terminated the landlord's claim under the survival clause is for damages, not rent. But a survival clause may be invoked though the lease has not been terminated, and this makes the distinction important because if the lease has not been terminated the tenant's liability is still for *rent*.

The question arises because survival clauses permit reletting where the premises are vacant, as well as after eviction. In *Kottler v. The Bargain House*,¹⁵¹ the survival clause permitted the landlord to relet "as agent" in the event of vacancy and apply the avails to expenses of reletting and the original tenant's rent. It was held that when the tenant vacated what had occurred was a surrender of the possession but not a surrender of the lease or of the tenant's estate. The parties had stipulated otherwise. The lease had not been broken but continued. The landlord had relet for the tenant's benefit and was permitted to recover the deficiency, *i.e.*, part of the rent, in instalments.

¹⁴⁷*Hines v. Bisgeier*, 244 App. Div. 354, 279 N. Y. Supp. 439 (1st Dep't 1935).

¹⁴⁸*Surprise Bldg. Co. v. Rosenblatt*, 240 App. Div. 424, 270 N. Y. Supp. 109 (1st Dep't 1934).

¹⁴⁹225 N. Y. 189, 121 N.E. 746 (1919).

¹⁵⁰*Hall v. Gould*, 13 N. Y. 127 (1855).

¹⁵¹242 N. Y. 28, 150 N.E. 591 (1926).

The distinction is also of importance in determining if the landlord's rights under a survival clause pass to a grantee by a conveyance of the premises. In one case the tenant abandoned the premises and the landlord relet. Both events occurred during the term of the lease. It was held that the landlord's rights against the tenant passed to a grantee.¹⁵² If the lease had been cancelled—by dispossess proceedings, for instance—and a claim only for damages had survived, this claim would undoubtedly not have been transferred by an ordinary deed. In *Seidlitz v. Auerbach*,¹⁵³ a landlord dispossessed a tenant and thereby became entitled to damages under the survival clause. The landlord then conveyed the premises by a deed reciting the conveyance to be "free from all encumbrances." In an action by the tenant for recovery of the lease security, it was held that the conveyance ended privity of estate between the landlord and tenant; that the landlord was entitled only to the damages which had accrued to the time of the conveyance and that the tenant was entitled to the balance of his deposit.

In another case a landlord sued a tenant under a survival clause after dispossess proceedings. The dispossess had cancelled the lease and the landlord's claim was for damages. The premises were subject to a pending mortgage foreclosure action in which a receiver had been appointed. It was held the landlord was entitled to damages accruing to the time of the appointment of the receiver.¹⁵⁴ The court remarked, *obiter*, that the right to damages did not pass to either the receiver or the purchaser at the foreclosure sale. The landlord was held not damaged after the appointment of the receiver because if the tenant had paid his rent this would have gone to the receiver. A deficiency judgment had been recovered in the foreclosure action but not against the landlord. If a deficiency judgment had been entered against the landlord the landlord might conceivably have been entitled to further damages against the tenant to reduce the liability on the judgment.

Some survival clauses, in an effort to be fair to the tenant, provide that any surplus realized on reletting shall be payable to the tenant. This provision has been held enforceable over a landlord's objections.¹⁵⁵ The landlord complained that inasmuch as the tenant had been in default he was in no position to reap the benefit of the surplus. The obvious answer to this is that a tenant

¹⁵²*Equitable Life Assurance Soc'y v. Rosenthal*, 100 N.Y.L.J. 56 (Sup. Ct. July 7, 1938); cf. *Kottler v. N. Y. Bargain House*, 242 N. Y. 28, 150 N.E. 591 (1926).

¹⁵³230 N. Y. 167, 129 N.E. 461 (1920).

¹⁵⁴*Dogwood Realty Co. v. Kraemer*, 92 N.Y.L.J. 1363 (Sup. Ct. Oct. 20, 1934).

¹⁵⁵*Sallah v. Myriad Investing Co.*, 150 Misc. 722, 269 N. Y. Supp. 63 (N. Y. City Ct. 1934).

is always in default before a survival clause may properly be invoked. In one case, a survival clause made the tenant liable for a deficit monthly but gave all surplus in reletting to the tenant. On analogy to the *Hermitage* case it was held that the surplus was not payable to the tenant until expiration of the original term—which happened to be 16 years away.¹⁵⁶

It has already been noted that if a tenant walks out during the term, the landlord need not relet. The rule is one of real property. If the lease has been terminated the landlord's claim is for damages. We now have a rule of contracts. The landlord must endeavor to relet and minimize his damages. The tenant has the burden of proof that the landlord lacked diligence.¹⁵⁷ Some cases indicate that a landlord's lack of diligence is some indication the landlord has taken the premises for himself and accepted a surrender.¹⁵⁸

Some survival clauses are, by their terms, applicable to any termination of a lease regardless of the manner of termination. In this regard they are more horrendous than horrible. For, by construction, the clause is invocable only when the tenant is at fault. In one case the plaintiff claimed he was a creditor of his former tenant by virtue of a survival clause and sought to set aside a transfer of the defendant's property. The survival clause covered abandonment by the tenant and cancellation and termination of the lease for any reason except condemnation.¹⁵⁹ The landlord had brought dispossess proceedings and obtained a final order following which the tenant vacated. On appeal the tenant obtained a reversal—but remained out of possession. The court ruled the precept in summary proceedings was an invitation to the tenant to vacate. When the tenant complied, the landlord-tenant relation was ended. After the reversal the tenant had a right to move back¹⁶⁰ but was not required to. Judgment was given the defendant on the ground the survival clause is for the landlord's benefit only if the landlord is not at fault.¹⁶¹ The

¹⁵⁶*Fields Holdg. Co. v. Chanbrook Realty Co.*, 146 Misc. 306, 262 N. Y. Supp. 119 (Sup. Ct. 1931); *cf. Myer v. Garlock*, 183 Misc. 547, 49 N. Y. S. 2d 437 (Sup. Ct. 1944).

¹⁵⁷*H.O.L.C. v. Baldwin*, 265 App. Div. 864, 37 N. Y. S. 2d 822 (2d Dep't 1942); see notes, 40 A.L.R. 190, 198 (1926); 115 A.L.R. 206 (1938); 126 A.L.R. 1219, 1223 (1940).

¹⁵⁸See *Lenco Inc. v. Hirschfeld*, 247 N. Y. 44, 50, 159 N.E. 718, 720 (1928); *Saracena v. Preisler*, 180 App. Div. 348, 353-354, 167 N. Y. Supp. 871, 874 (1st Dep't 1917).

¹⁵⁹If construed literally the clause would render the tenant liable for loss of rent following destruction of the premises by fire or other casualty.

¹⁶⁰*Compare*, for example, *Golde Clothes Shop, Inc. v. Loew's Buffalo Theatres, Inc.*, 236 N. Y. 465, 141 N.E. 917, 30 A.L.R. 931 (1923) where the landlord evicted tenant in summary proceedings and then erected a theatre over a large plot, a small part of which had been leased to the tenant. The tenant obtained a reversal of the order entered in the summary proceedings and was thereupon held entitled to regain possession.

¹⁶¹*Wolf-Kahn Realty Co. v. Sussman*, 240 App. Div. 422, 270 N. Y. Supp. 1, *aff'd*,

case illustrates a neat way of breaking a lease if the landlord makes the right lead.

Our survey indicates that most of the law of leases is based on a lease as a conveyance and the rest on a lease as a contract. Much of what has been written here is implicit in Holmes' statement that the law of leases "is a matter of history that has not forgotten Lord Coke."

265 N. Y. 572, 193 N.E. 325 (1934); and see cases collected in *In re Kantor's Delicatessen*, 34 F. Supp. 898, 902 (E.D.N.Y. 1940).