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Notice Required to Terminate Monthly or Month to Month Tenancies Outside the City of New York

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This amendment shows removal of feudal theories. The protection of the landowner was one of the greatest interests in the feudal law. But in the modern use of the word "landlord" is found no meaning such as "lord of the land." That it has taken more than a century to overcome the error of the 1828 legislature is unfortunate. However, this is not the only example of the slow metamorphosis of the law from the engulfing cocoon of feudalism. The criticism of continuation of the seal as evidence of consideration seems appropriate, but the failure to remedy Section 259 exemplifies the slow growth of the law. It is only due to modern business methods and the painstaking care of today's lawyers that more confusion has not arisen. Indeed New York's Statute of Frauds in reference to land contracts was more feudal than the English Statute of Frauds enacted in 1677.

This amendment, then, has brought a most important phase of the law back to a logical basis. But feudalism dies hard, if at all, and we must await judicial construction of the statute as amended before it can be said how far this recent step has gone. The basic policy of a constitutional democracy should have the liberty, equality, and rights of man, as its prime consideration with the feudal rights of property owners secondary to those great inalienable rights.

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NOTICE REQUIRED TO TERMINATE MONTHLY OR MONTH TO MONTH TENANCIES OUTSIDE THE CITY OF NEW YORK.—Section 232b of the Real Property Law,[1] enacted in 1942 and amended by the Legislature of the State of New York at this session, represents another step in the direction of statutory standardization of the notice required to terminate monthly or month to month tenancies. In its original form this section sounded the death knell for the alleged distinction between monthly and month to month tenancies outside the City of New York; the proposed modification merely defined the character of the notice required[2] and reaffirmed the common law. Unlike tenancies for a fixed period which end on the date provided for in the agreement, notice is a condition of the contract when the leasing is for an indefinite term.[3] This was formerly subject to

[1] N. Y. REAL PROP. LAW § 232b: NOTIFICATION TO TERMINATE MONTHLY TENANCY OR MONTH TO MONTH TENANCY OUTSIDE THE CITY OF NEW YORK. A monthly tenancy or tenancy from month to month of any lands or buildings located outside of the city of New York may be terminated by the landlord or the tenant [upon his notifying] *by written notice from the one to* the other of at least one month before the expiration of the term *of* his election to terminate; provided, however, that no notification shall be necessary to terminate a tenancy for a definite term. *Such notice must be served upon the tenant or the landlord, as the case may be, either personally or by registered mail.* The matter in *italics* is new; the matter in [brackets] is old law to be omitted.

[2] *See Report of Law Rev. Comm.* (1938) 405-421.

[3] Pugsley v. Aikin, 11 N. Y. 494 (1854).

qualification in view of the various irreconcilable decisions rendered by our courts.[4]

At common law a tenancy from year to year could be terminated by either the landlord or his lessee in giving to the other six months' notice before the expiration of the term.[5] This same rule governed tenancies of a shorter duration except that the notice was generally equivalent to the letting. In a month to month tenancy a month's notice was necessary, and similarly a week's notice where the tenant held from week to week.[6] The method in which tenancies of uncertain duration are created [7] and the decisions construing their determination accounts for the lack of uniformity within the State of New York. The distinguishing characteristics under the common law as evidenced by our decisions with regard to the notice required to terminate monthly or month to month tenancies are the lack of definitiveness and certainty. In early New York cases it was held that a month's notice was required to excise a renting from month to month,[8] although there are a minority of cases sustaining the contrary view.[9] Other cases hold that only reasonable notice need be given [10] and still others argue for thirty days.[11] That notice might be given within thirty-two days was not bad [12] but when given sixty days before the expiration of the term it was held to be premature and invalid.[13] When there was a monthly letting and a holding over subsequent thereto, no notice was necessary.[14] Notice to quit given by the tenant dispenses with any on the part of the landlord.[15] Under Section 232a of the Real Property Law which is restricted to New

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[4] Adams v. City of Cohoes, 127 N. Y. 184 (1891); *cf.* Hand v. Knaul, 116 Misc. 714, 191 N. Y. Supp. 667 (1921); Mandel v. Koerner, 90 Misc. 9, 152 N. Y. Supp. 847 (1915). *Contra:* People v. Darling, 47 N. Y. 666 (1872).

[5] *See* WALSH, THE LAW OF REAL PROPERTY (2d ed. 1927) 251.

[6] *See* P. Marcus, *Periodic Tenancies* (1938) 7 FORDHAM L. REV. 167; *continued* (1939) 8 FORDHAM L. REV. 356.

[7] *See* WALSH, THE LAW OF REAL PROPERTY (2d ed. 1927). Periodic tenancies are created in the following ways:

1. By express agreement between the parties.
2. By entry and payment of rent under a lease void by the Statute of Frauds.
3. By holding over after the expiration of a fixed term.

[8] Kligenstein v. Goldwasser, 58 N. Y. Supp. 342 (1899); Hungerford v. Wagoner, 39 N. Y. Supp. 369 (1895).

[9] People *ex rel.* Aldhouse v. Goelet, 64 Barb. 476 (N. Y. 1873); Park v. Castle, 19 How. Pr. 29 (N. Y. 1860).

[10] *See* O'Brien v. Clement, 160 N. Y. Supp. 975 (1916). Where parties specify for reasonable notice without stating the time, it has been held that a month's notice is reasonable. *Cf.* Hungerford v. Wagoner, cited *supra* note 8.

[11] Ludington v. Garlock, 9 N. Y. Supp. 24 (1890).

[12] Moore v. Scullion, 198 N. Y. Supp. 760 (1923).

[13] Gill v. Gill, 161 Ill. App. 221 (1911).

[14] Hand v. Knaul, 116 Misc. 714, 191 N. Y. Supp. 667 (1921); Ludington v. Garlock, 55 Hun 612, 9 N. Y. Supp. 24 (N. Y. 1890).

[15] A. N. P. Realty Co. v. Tunick, 115 Misc. 190, 187 N. Y. Supp. 347 (1921).

York City, the obligation to give notice rests solely on the landlord;[16] outside New York City it is asserted that the duty is reciprocal.[17] At common law the notice did not have to be reduced to writing;[18] the statute enacted specifies otherwise.[19]

The impetus given to a year to year tenancy as opposed to one at will was dictated by a sound agrarian policy and especially favored at common law.[20] With the era of industrial economy, counterpart of the year to year tenancy found expression in that of a month to month letting. New York, however, blazed a new trail fraught with many hazards. A tenuous line of distinction has been drawn between monthly and a month to month tenancy.[21] Authorative definition of the monthly tenancy in *Hand v. Knaul*[22] states:

> A monthly hiring or tenancy is where the premises are actually or by necessary implication hired for the single term of one month, and the tenancy automatically expires *at the end of each month* and is *renewed for another month whenever the* tenant holds over into the next month. Such a tenancy requires no notice for its termination. . . . The tenancy from month to month is where the tenant's term is indefinite and uncertain although the rent is paid monthly . . . such a tenancy requires a notice of 30 days for its termination.

When a landlord exercises his right of election in derogation of trespass by a holdover tenant, apart from any express or implied contractual agreement between the parties, the law imposes on the holdover the duty of paying rent at the same terms of the original demise. The tenancy that results incorporates all the incidents of the former relationship and its duration is for a fixed period.[23] If the holding over after the expiration of the fixed period without the consent of the landlord is for but one month and not continuous, then the doctrine as laid down in *Smith v. Littlefield*[24] would seem to apply. This theory is not tenable where there is a continued holding over with the assent of the landlord.

In the report of the Law Revision Commission[25] recommending legislative abrogation of this distinction, it is stated in support of the change that:

> The principle on which a monthly tenancy is based is contrary to common experience, for only in unusual cases do the parties contemplate a tenancy for a month at a time, each month being a separate term which expires at the end of

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[16] Ertischek v. Blanco, 173 Misc. 153 (1940).

[17] Boyar v. Wallenberg, 132 Misc. 116 (1928), states: "When there is an obligation to give notice, other than statutory, it is binding on both parties, their rights and duties being correlative and reciprocal." *See* Hand v. Knaul, cited *supra* note 14.

[18] *See* P. Marcus, *Periodic Tenancies* (1938) 7 FORDHAM L. REV. 186.

[19] Cited *supra* note 1.

[20] HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 243.

[21] *See Report, Law Rev. Comm.* (1938) 379–383.

[22] Cited *supra* note 14.

[23] *See* WALSH, cited *supra* note 7, at 258–260.

[24] 51 N. Y. 539, 542 (1873).

[25] *Report, Law Rev. Comm.* (1938) 379–380.

the month and which is renewed by holding over for another definite term of one month. Where the premises are occupied without a definite agreement as to the length of the occupancy, the tenancy is almost universally thought of as being indefinite as to term.

Although the concept of monthly tenancies, peculiar to the State of New York only, is the source of much confusion, the nature of the tenancy created by entry and payment of rent under a void parol lease of more than a year has resulted in confusion worse confounded.

In the case of *Adams v. City of Cohoes*[26] the court's fatal dicta[27] that the tenancy from month to month is analogous in all respect to a tenancy from year to year and that in each case the period of occupation is fixed so that there is no occasion for notice, seems to be without merit. The doctrine laid down in the instant case finds no support in like cases where there is an entry under a void lease with rent reserved by the month. In *Anderson v. Prindle*,[28] the facts being substantially similar to those in the *Adams* case, it was held that the subsequent acceptance of rent by the landlord in accordance with the terms of the void agreement created a tenancy from month to month with the tenant entitled to a month's notice to quit at the end of some month from the commencement of the tenancy. Yet in *Talamo v. Spitzmiller*,[29] the court argued that the entry under a parol lease for more than a year is ineffective to vest any term in the lessee named and that when he goes into possession without any further agreement, he is a tenant at will and merely subject to liability to pay at the stipulated rent as for use and occupation. That this tenancy may be converted into a yearly, monthly, year to year, or month to month tenancy, depends on the acts and intention of the parties at the time of the entry. Acceptance of the rent under the void lease by the landlord or some other unequivocal act results in a tenancy from year to year or month to month as the case may be.[30] The intent of the parties to hold for a fixed period as manifested by the void lease is necessarily defeated. In *Laughran v. Smith*[31] the court asserts that a contract declared void under the Statute of Frauds cannot be enforced as one for a fixed term consistent with the statute, and that neither does the tenant desire to hold at will.

The converse of this proposition would seem to be that in order to characterize a tenancy arising under a void parol lease as one for a year or a month certain, there need be some affirmative act such as express words of limitation specifying that the duration of the tenancy be for but one month or for one year. In the light of the

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[26] 127 N. Y. 184 (1891).

[27] *See* WALSH, LAW OF REAL PROPERTY, cited *supra* note 5, at 259, n.7.

[28] 19 Wend. 391 (N. Y. 1838), *aff'd*, 23 Wend. 616 (N. Y. 1840); *accord*, People v. Darling, cited *supra*, note 4.

[29] 120 N. Y. 37 (1890).

[30] *See* WALSH, LAW OF REAL PROPERTY, cited *supra* note 5, at 260-261.

[31] 75 N. Y. 205 (1878); *cf.* Reeder v. Sayre, 70 N. Y. 180 (1877).

foregoing cases the logical rule to be formulated is that entry into possession and payment under a void parol lease pursuant to the monthly reservation contained therein, no other facts appearing, creates a periodic tenancy from month to month within the scope of Section 232b of the Real Property Law. As a monthly tenant is within the scope of the statute, the next problem to be considered is can the parties to the contractual letting agree to waive the benefits thereof and can they by agreement stipulate for a shorter or longer period of notification as the case may be? In an opinion recently handed down by the Court of Appeals of the State of New York in the case of *Wood v. Horgan*,[32] involving Section 230 of the Real Property Law, a waiver by the tenant of notice required under the statute with regard to the automatic renewal clause, was held void as against public policy. In other cases our courts have argued that a tenant's contract with his landlord making the latter not responsible for damages to the tenant because of the landlord's failure to repair, is valid and enforceable.[33] Although the reason supporting this case is not necessarily opposed to that of *Wood v. Horgan,* validity of such clauses will probably only receive judicial sanction when they are not of public concern and where the parties stand upon an equal footing.[34] In the absence of an express provision in the lease specifying the requisite notice, undoubtedly the statute will prevail. Where the landlord and the tenant by clear and unequivocal language waive statutory notification and stipulate for a longer or shorter period or upon some other contingency, then their voluntary act in surrendering statutory benefits should not be condemned.

It was desirable that this statute be embodied into our Real Property Law in order to remedy the chaotic condition that prevailed as to the character and length of notice required to terminate monthly or month to month tenancies outside the City of New York. The fact that the words of the statute are plain, and its meaning is also plain, is a tribute to our legislature which we hope will receive the support of our judiciary and not be dubbed as pernicious oversimplification.

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[32] 291 N. Y. 422, 427 (1943).
[33] Kirschenbaum v. General Outdoor Adv. Co., 258 N. Y. 489 (1932).
[34] Cited *supra* note 33.