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Damages or Rent?

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its effect as thus interpreted. It is difficult to understand how the decision in the *Epstein* case, wherein the assignee was plaintiff, could be regarded as a basis upon which to rest the proposition that the vendor is to be permitted to sue the assignee of the vendee. Nevertheless, there remained considerable doubt that the earlier application of the mutuality doctrine was to be dispensed with so easily. Now that it was held that the assignee could sue for specific performance, it was contended, that since equity is equality the converse ought to be true. Reciprocity ought to be permitted. The Appellate Division held, therefore, that the vendor could compel specific performance against the vendee's assignee.[11] Upon reaching the Court of Appeals this erroneous conception was corrected and the third party denied performance against the assignee.[12] It was pointed out that the question in the *Epstein* case was wholly one of remedy rather than right, and the extent of the holding in that case was that mutuality of remedy is important only so far as its presence is necessary to attain the ends of justice. No new rights were created by the *Epstein* decision, the interpretation of the assignment of a contract still remains that an assignee does not assume the duties under an assigned contract, but only succeeds to the rights thereunder. Because it was adjudicated that no injustice is done if the assignee enforces his rights, did not mean the burdening of him with duties not assumed, and the creation of a new right in the vendor. Equity follows the law and specific performance is a remedy predicated only upon the existence of a legal right.[13]

E. P. W.

DAMAGES OR RENT?—Landlords early found it necessary to provide some means of securing unto themselves the profit of their position. The lease which evidences the agreement with the tenant is, as such, merely an agreement for the use of the premises. Out of that use a rent issues [1] and so *a priori* when the use is terminated no further rent can accrue. Even though the tenant has broken a condition of his tenancy, for example, the payment of rent, the landlord if he re-enters and is repossessed of the estate terminates all his rights under the lease except the right to collect arrears of rent. Therefore,

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[11] H. & H. Corp. v. Broad Holding Corp., 204 App. Div. 569, 198 N. Y. Supp. 763 (2nd Dept. 1923); Langel v. Betz, 224 App. Div. 266, 229 N. Y. Supp. 712 (2nd Dept. 1928).

[12] Langel v. Betz, 250 N. Y. 159 (1928).

[13] Pomeroy's, Specific Performance (3rd ed. 1926) Sec. 52 *et seq.*

[1] A right to a certain profit (something not before in esse whether in labor, provisions or part of annual product, money, or other thing) issuing annually or periodically out of lands and tenements corporeal in return for land that passes—Gilbert, Rents, 9.

in an attempt to prevent a failure of profit as a result of such breach by the tenant, contracts are used to give the transaction stability. Any liability of the tenant after his ejectment or dispossession for non-payment of rent or other breach must rest then on these contracts or covenants [2] (contained usually in the lease instrument) looking to this very contingency.

How many times landlords by carelessly drawn instruments have failed to eliminate risk would be difficult to say. The case of Hermitage Company v. Levine [3] shows the practical need of a careful draftsman.

The Hermitage Company entered into a written lease with Levine for the use of a seven-story building. The lease was for twenty-one years and two months from August 1, 1924 at a rental of $72,000 a year for the first five years, $75,000 for the next ten, $78,000 for the next three and $80,000 for the last three years of the term in addition to which the defendant was required to pay taxes, water rates and assessments which might become liens on the property during the term of the lease.

The defendant went into possession on August first, nineteen twenty-four and paid the stipulated rent to and including November first, nineteen twenty-four. On December first $6,000 became due for rent for December and some $7,000 for current taxes. Upon defendant's default in the payment of any part of these sums, summary proceedings were instituted [4] and an order of dispossess issued on December 31, 1924.

Plaintiff, upon resuming possession, made diligent efforts to relet. Three floors it relet to one tenant, two to a second and a part of one floor to a third. For a few months it ran a garage on the remaining part of the first floor, but later relet this also. By August 1, 1925 it had relet the whole building. The new leases were for varying terms. Three and a half floors were relet for fifteen years; two and a half for ten years; and one for three years. After all are at an end, a substantial period will remain before October 1, 1945, when the defendant's liability expires.

The action begun in March, 1926 was brought to recover the damages suffered by the landlord through the deficiency of rents computed to that time. The defendant was credited with $30,000, a security deposit, and with the profits earned through the use of the garage as well as with the rents collected. The result was a deficiency of $25,529.39 for which judgment was demanded.

The liability of the tenant to the landlord after the termination of the tenant's use of the premises and upon which liability the action was brought sprang from the covenant in the lease:

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[2] Hall v. Gould, 13 N. Y. 127, 134 (1855).

[3] 222 App. Div. 12 (1st Dept. 1927), rev'd, 248 N. Y. 333, 162 N. E. 97 (1928).

[4] C. P. A., Sec. 1410.

"To pay the rent as herein specified. If any rent shall be due and unpaid or if the tenant shall make default in any of the covenants herein contained, it shall be lawful for the landlord to re-enter the said premises by force or process of law or otherwise and the same have again, re-possess and enjoy. In case the tenant shall be dispossessed or ejected or shall remove from or abandon the demised premises after a demand for the rent or service of a notice as provided by Section 1410 of the Civil Practice Act or after the commencement of dispossess proceedings or for any other reason, the landlord may re-enter the said premises by force or process of law or otherwise and relet the same as agent for the tenant and the tenant shall remain liable for all damages which the landlord may sustain by any such breach of this agreement or through such entry or reletting."

It is to be noted that the landlord under the first clause in this covenant reserves to himself the right to re-enter the premises "by force or process of law or otherwise and the same have again, re-possess and enjoy." This is a usual provision in a present-day lease but the necessity for so providing was brought out by the interpretations which the court placed on the language of covenants previously drawn. For example, in the decision of Michaels v. Fishel [5] it was said that a provision permitting the landlord to re-enter referred solely to a re-entry by ejectment and so the tenant was discharged from his liability for deficiency of rent upon reletting because the landlord re-possessed himself by summary proceedings. An extensive and intelligent revision of leases followed. The moral which landlords drew was that the language of leases should be made broader by reserving a right additionally to re-enter and dispossess the tenant pursuant to summary proceedings under the statute or, as in the case of Anzolone v. Paskusz,[6] a right "to re-enter by force *or otherwise.*"

In addition to its right to re-enter in any manner, the Hermitage Company reserved its right to relet the premises as agent for the defendant. Judge Cardozo in his opinion in Kottler v. New York Bargain House, Inc.,[7] points out that a type of covenant which gives the landlord merely the privilege of re-entering the premises to have again, repossess and enjoy the same by its very terms goes no further. The landlord in such a case would have no authority to relet for the account of the lessee and no deficiency could be chargeable to him. In other words, summary dispossession under the statute terminates the tenant's liability to pay subsequently accruing rent [8] unless a sur-

[5] 169 N. Y. 381, 62 N. E. 425 (1902).
[6] 96 App. Div. 188, 193, 89 N. Y. Supp. 203, 206 (1st Dept. 1904). (Italics ours.)
[7] 242 N. Y. 28, 34, 150 N. E. 591, 592 (1904).
[8] Chaude v. Shepard, 122 N. Y. 397, 25 N. E. 358 (1890); Cornwell v. Sanford, 222 N. Y. 248, 118 N. E. 620 (1918).

viving obligation is imposed by a covenant of personal responsibility "to pay rent or indemnify the landlord for future loss." [9]

Another point worth noting in this clause, permitting a reletting, is that it provides this privilege whether the tenant has been dispossessed, ejected or has abandoned the premises. New York Courts have held that, where a landlord relets after the tenant's abandonment, consent on the part of the abandoning tenant to the making of this new lease must be shown, otherwise the new lease made by the landlord is a surrender of his rights against the original tenant.[10] Such consent or acquiescence will not be implied by the silence of a tenant after his abandonment upon the receipt of a letter from the landlord suggesting that he intends to relet as the tenant's agent,[11] though such consent would be spelled out from a conversation regarding reletting in which the tenant made no objection.[12]

It is hard to see why the landlord should be prevented from asserting the old lease merely because he has tried to reduce the tenant's obligation thereunder. The tenant having repudiated his obligations should not be allowed to assert his non-consent to reletting. However, the New York rule is otherwise. The landlord may in the case of an abandonment remain inactive and hold the tenant for his liability under a continuing lease. In order for him to claim then that he made a new lease on behalf of the tenant to mitigate damages [13] it must be shown to have been with the tenant's consent.

In the *Hermitage* case the landlord has safeguarded himself against this difficulty by securing such consent in advance.

However, the reletting of the premises did not come as the result of the tenant's abandonment but as the result of his dispossession for non-payment of rent. In such a case a landlord, it is sometimes said, must use reasonable diligence to relet where in pursuance of the lease he is authorized so to do.[14] This the Hermitage Company did and so there is thus far then no valid defense to its action against the defendant. If there be one it must be founded on some other ground of non-liability at the time of the action.

The last clause of the lease provides that upon reletting *"the tenant shall remain liable for all damages which the landlord may sustain by any such breach of this agreement or through such entry or reletting."* (Italics ours.)

The defendant claimed that a proper interpretation of this clause made the action in 1926 premature, that after he was ejected in

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[9] *Supra* Note 8.

[10] Coe v. Hobby, 72 N. Y. 141, 145 (1878). Surrender is implied and so effected by operation of law within statute when another estate is created by reversioner or remainderman incompatible with existing state or term.

[11] Gray v. Kaufman Dairy and Ice Cream Co., 162 N. Y. 388, 56 N. E. 903 (1900).

[12] Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576 (1892).

[13] *In re* Hevenor, 144 N. Y. 271, 39 N. E. 393 (1895); 3 Williston, Contracts (1920), Sec. 1403.

[14] Knabe & Co. Mfg. Co. v. Dinwiddie, 116 N. Y. Supp. 716 (1909).

summary proceedings the lease was at an end and what survived was a liability for damages not rent, the ascertainment of which damages would not be possible until October 1, 1945. The plaintiff insisted that by proper construction of this covenant the loss was to be determined monthly as if the lease were still in force with the result that successive causes of action will arise with monthly deficits in rental.

It is not denied that by a properly drawn contract the parties could have effected a survival of the obligation to pay the rent reserved following dispossess [15] in which case the reletting would have been a reletting by the landlord as agent of the tenant [16] with his permission during the continuance of the term of the lease to mitigate damages arising thereunder and if so provided to pay over any surplus to the tenant.

Such a lease is found in the *Kottler* case,[17] which provides that "if said premises or any part thereof shall become vacant during the term the landlord or his representatives may re-enter the same, either by force or otherwise without being liable to prosecution therefor; and relet said premises as agent of said tenant and receive rent thereof applying the same, first to the payment of such expenses as they may be put to in re-entering and then to the payment of rent due by these presents; balance if any to be paid over to the tenant who shall remain liable for any deficiency." The lease in this case was to run until 1925 and the action was begun in 1924, among other things for a deficiency as a result of reletting following abandonment. The defendant argued that the action in so far as it included a claim for deficiency upon reletting was premature when begun in 1924 for the liability was for damages which could not be known until 1925 when the lease was to have expired by its terms.

The Court, however, said: [18]

> "We think the claim is * * * for rent. There is a distinction between a reletting by a landlord after the expiration of a term, and a reletting as agent for the tenant during the existence of the term. In the one case, the tenant, even though chargeable by force of a covenant with a subsequent deficiency, is liable for damages. The term is at an end. In the other, he is liable for rent, what is received through a reletting being merely a payment on account. The term is still in being. The covenant in this lease does not say that the tenant is to be chargeable with a deficiency after the lease shall be terminated for re-entry for condition broken. It

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[15] Mann v. Ferdinand Munch Brewery, 225 N. Y. 189, 121 N. E. 746 (1919) rev'g, 173 App. Div. 746, 160 N. Y. Supp. 314 (1st Dept. 1916); Baylies v. Ingram, 181 N. Y. 518, 73 N. E. 1119 (1905).

[16] *Supra* Note 12.

[17] *Supra* Note 7.

[18] *Ibid.* 33.

> covers a single situation. If the premises be vacant 'during the term,' the landlord is empowered to re-enter and relet." [19]

In so doing the landlord does not forfeit or put an end to the existence of the term and the lessee is liable for a deficiency of rental. The term remains alive.

A lease similar in effect is found in the case of Mann v. Munch Brewery Company.[20] "If the tenant is dispossessed by issuance of service of any warrant or final order in summary proceedings or if he abandon the premises he shall nevertheless continue liable for payment of rent and the performance of all other conditions contained therein. The tenant shall not be relieved from liability for payment of rent by any assignment which may be made of this lease whether with or without the consent of the landlord but each and every assignee and assignor of this lease *shall continue to remain liable for payment of rent and the performance of other covenants and conditions until the expiration of the term thereof.*" The assignee in this case having assumed the covenants of the lease was held liable therefor for monthly rental, collectible as it accrued.

To return to the case under consideration, the Hermitage Company's contention was that the interpretation of the above-mentioned leases was the one which should be placed on its lease, that is, that the rent obligation survived dispossession and reletting and hence for rental deficiencies it could collect. Its contention was sustained by the prevailing opinion of the Appellate Division.[21]

> "It is our view, from the nature of the terms of the clause in question, that it was not intended to cover damages at the end of a long term for breach of the covenant to pay rent, but was intended to give an immediate right of action for deficiency of rentals from the amount provided in the lease, whenever that deficiency arose. This is apparent to us from the phrase 'damages * * * through such entry or reletting' at the end of the clause which points to a loss of rental as 'such' damages to be recovered under the lease and intended to survive eviction, abandonment or dispossession of the tenant. 'Each covenant must be taken as we find it.' "

From this opinion, Judge O'Malley dissenting said: [22]

> "Unquestionably if the covenant in question is one whereby the obligation to pay rent survives the termination of the

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[19] Fleisher v. Friob, 177 App. Div. 921, 164 N. Y. Supp. 1092 (1st Dept. 1917); Chaude v. Shepard, *supra* Note 8.

[20] Mann v. Ferdinand Munch Brewery, *supra* Note 15. (Italics ours.)

[21] *Supra* Note 3, 222 App. Div. at 13 (Opinion by McAvoy, *J.*, Merrell and Finch, *JJ.*, concurring).

[22] *Ibid.* 16 (Dowling, *P. J.*, concurred).

> lease the plaintiff's position is sound. On the other hand, if the covenant is a provision for damages strictly as such, the action may not now be maintained. * * * I am of the opinion that the covenant here under consideration is one for damages. The covenant itself mentions only 'damages.' It contains no provision to the effect that the obligation to pay rent should survive the term; nor does it provide that the tenant was to be liable for any deficiency resulting from a reletting. Neither does it provide that any surplus from a reletting was to be payable to the tenant."

On appeal by the defendant, Judge Cardozo writing for a unanimous court reversed the decision of the Appellate Division. The question, he said, was one of the intention of the parties. While the lease in all cases is terminated by the eviction under summary proceedings, *"in the case where the covenant provides for damages the term of the lease is also ended"* and where the term is so ended the reletting by the landlord as agent for the tenant does not mean "that he is agent in a strict sense. Plainly he is not, for after the termination of the lease, what he relets is his own. The privilege to relet as agent for the former tenant means this and nothing more that the reletting shall be evidence of the damages sustained. * * * The damages when the time to ascertain them comes will be computed upon the basis of what is realized through the reletting without other evidence of value."

The defendant was liable for damages then but the question still remained how were they to be computed. "Is there to be a single cause of action in which all the damages will be computed down to October, 1945, or are there to be monthly causes of action to recover successive deficits, though conceivably new leases made when the present ones are over will make the net result a surplus?"

The clause in McCready v. Lindenborn [23] made monthly causes of action for damages a possibility. The parties after providing for reletting upon default covenanted, "as damages for breach of covenant for rent herein the difference between the amount of rent hereby reserved and the amount which shall be collected and received or might with due diligence be collected and received during the residue of the term remaining unexpired at or immediately before the time of such re-entry *in equal monthly payments as the amount of such shall from time to time be ascertained.*"

But, as pointed out by Judge Cardozo, "in the absence of a provision that points with reasonable clearness to a different construction a liability for damages resulting from reletting is single and entire; not multiple and several. The deficiency is to be ascertained when the term is at an end." For a defendant to be held liable for

[23] McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208 (1902). (Italics ours.)

monthly deficiencies of rental the tenant must plainly remain liable for rent during his term surviving eviction or, where his term under the covenant of the lease ceases upon such eviction, clear expression must show that his damages were to be computed monthly on the rental loss sustained through reletting, for to hold him to liability in the latter case is to place upon him a burden possibly heavier than he sustains for a deficiency at the end of the term. "He must pay in the lean months without recouping in the fat ones. He must do this though it may turn out in the end that there has been a gain and not a loss." But where the damages are computed at the end of the term his liability is determined by allowing him all sums collected so that there might be a deficiency. "A liability so heavy may not rest upon uncertain inference."

Rather evidently by the drafting of this last clause the Hermitage Company failed in its purpose. To quote Judge Cardozo again;[24]

> "We do not overlook the hardship to the landlord in postponing the cause of action until October, 1945. The hardship is so great as to give force to the argument that postponement to a date so distant may not reasonably be held to have been intended by the parties. There is no reason to suppose, however, that the landlord was expectant of so early a default or so heavy a deficiency. It had in its possession a deposit of cash security in the sum of $30,000. Very likely this was supposed to be enough to make default improbable and the risk of loss remote. If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of a tenant whose liability for the future ended with the cancellation of the lease except in so far as he bound himself by covenant to liability thereafter."

G. M. B.

VALIDITY OF STATE SUPERVISION OF SECRET SOCIETIES.—A member of a secret society who was held in custody to answer a charge of violating a New York statute brought a proceeding in habeas corpus to obtain his discharge on the ground that the warrant under which he was arrested and detained was issued without jurisdiction in that the statute, with violation of which he was charged, was unconstitutional.[1] The offense alleged was that he attended

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[24] *Supra* Note 3, 248 N. Y. at 338.

[1] People *ex rel.* Bryant v. Zimmerman.