Landlord's Duty to Re-Rent Premises

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are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it. . . . 'It is clear from the statutes referred to and the authorities cited and from the understanding of business men as well as jurists and legislators, that mortgages, bills and notes have for many purposes been regarded as property and not as mere evidences of debt and *that they may thus have a situs at the place where they are found, like other visible, tangible chattels.*'"[9] It is submitted that with this authority, bonds, bills and notes and other similar instruments may be considered as tangible personal property, and so come within the rule of the Frick case. But the Supreme Court has not yet decided squarely that bonds and negotiable notes may be taxed at situs only, and there is reason to believe that the Frick case will not be followed as to bonds and negotiable notes.

Fourth; may a state tax the bond-holder's interest represented by a mortgage on property within the state? Under the present rule, of which the principal case is an example, such an interest is not taxable but there is considerable argument on the other side, the essence of which is that the laws of the state in which the property is located must be invoked for the protection of the bond-holder's interest.[10]

Several plans for relieving the situation have been formulated by the National Tax association, the most promising of which seems to be the plan for reciprocity among the states.[11] It seems that this is the path to the solution rather than by court decision.

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LANDLORD'S DUTY TO RE-RENT PREMISES

In *Walsh et al. v. E. G. Shinner & Co.*,[1] a tenant abandoned premises two years before the expiration of his lease. Before vaca-

[9] Italics ours. *DeGanay v. Lederer, etc.*, 250 U. S. 376 (1918) at 381, but see *State Tax on Foreign-Held Bonds*, 15 Wallace 300 (1872) at page 323: "It is undoubtedly true that actual *situs* of personal property which has a visible and tangible existence, and not the domicile of the owner, will, in many cases, determine the state in which it may be taxed. The same is true of public securities consisting of municipal bonds, and circulating notes of banking institutions; the former by general use, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. *But other personal property, consisting of bonds, mortgages and debts generally, have no situs independent of the domicile of the owner.* . . ."

[10] *State Tax on Foreign-Held Bonds or Notes Secured by a Mortgage on Land in the State, supra*, note 4.

[11] *Proceedings of the National Tax Ass'n.*, 1926, at page 325.

[1] 20 Fed. (2d) 586 (C. C. A. 3, 1927).

ting he undertook to get the landlords a tenant for the remainder of the term and promised to continue responsible for the reserved rent. The tenant found and presented to the landlords several persons who would have been suitable and responsible tenants and who desired to rent the premises upon the same terms. But the landlords declined except for a prohibitive rental and, declaring a breach of the lease, entered and took possession. The landlords sued for damages for breach of the lease reckoned on the cost of restoring the premises to their original condition, and on loss of rent for the remainder of the term, and had a verdict for a sum which excluded rent. They appealed assigning error in the admission of testimony to prove that loss of rent was due to their refusal to accept suitable tenants when available, and in instructions to the jury that it was their duty as landlords to mitigate the damages resulting from the breach of the lease, if possible. *Held,* that the judgment be affirmed.

By an early English statute[2] the landlord had no right to enter premises abandoned by the tenant except by special proceeding. Likewise there are two early decisions in this country, evidently influenced by the English law, which hold that the landlord is a trespasser if he enters before the end of the term, though the tenant has abandoned the premises.[3] But by the weight of authority in this country today, it is held that the landlord may enter the abandoned premises to perform any necessary repairs or to prevent a deterioration of the premises, without subjecting himself to liability.[4] And a few jurisdictions hold that the landlord may resume possession of the premises as if the lease had never been made.[5] In an Iowa and a North Carolina case[6] it is decided that after resumption of control of the premises by the landlord the tenant cannot assert a right to return. However, if his re-entrance is in exclusion of the tenant, the decisions vary as to the result. If he re-lets the premises,[7] or re-enters for the purpose of assuming occupancy him-

[2] 11 Geo. 2, c. 19, § 16 (1737).

[3] *Brown v. Kite,* 2 Tenn. (2 Overt.) 233 (1814); *Shannon v. Burr,* 1 Hilt. 39 (N. Y., 1856).

[4] *Rucker v. Mason,* 161 Pac. 195 (Okl., 1916); *Ruple v. Taughenbaugh,* 72 Colo. 171, 210 Pac. 72 (1922); *Scott v. Beecher,* 91 Mich. 590, 52 N. W. 21 (1892) *semble.*

[5] *Wheat v. Watson,* 57 Ala. 581 (1877); *Kiplinger v. Green,* 61 Mich. 340, 28 N. W. 121 (1886); *Zigler v. McClellan,* 15 Or. 499, 16 Pac. 179 (1887).

[6] *Haller v. Squire,* 91 Iowa 10, 58 N. W. 921 (1894); *Torrans v. Stricklin,* 52 N. C. (Jones Law) 50 (1859).

[7] *Kean v. Rogers,* 146 Iowa 559, 123 N. W. 754 (1909); *McGinn v. Gladding Dry Goods Co.,* 40 R. I. 348, 101 Atl. 129 (1917); *Gray v. Kaufman Co.,* 162 N. Y. 388, 56 N. E. 403 (1900); note, 3 A. L. R. 1080. *Contra: Hoke v. Williamson,* 98 Kan. 580, 158 Pac. 1115 (1916).

self,[8] most courts hold this a *surrender by operation of law.* If the lease provides that upon non-payment of rent there may be a re-entry and consequent termination of the leasehold estate, there is a danger that the landlord may be held to have ended the term by *forfeiture.*[9] Or the act of the landlord in making a new lease, together with the entrance and possession of the new lessee, may be construed as an *eviction* of the original tenant.[10] If the court concludes that the landlord has effected a release of the tenant by any of the foregoing methods, the tenant's liability for rent as such is terminated, because such liability is based on the relationship between landlord and tenant.

Therefore the question, whether upon abandonment of the premises the landlord may lease to another without thereby terminating the tenant's liability for rent, becomes one of great practical importance. Numerous decisions hold that the landlord may so re-let to another and still hold the former tenant.[11] In other jurisdictions, in order to prevent a surrender, the landlord must notify the tenant that the re-letting is on the latter's account.[12] The general rule and weight of authority is that a landlord, on abandonment of the premises by the tenant, is under no obligation to re-let them; he may remain inactive and sue the tenant for rent as it matures.[13] Of course this result is eminently correct where the entrance of the landlord is to be attended by any of the disastrous results of forfeiture, etc., noted above; and in such jurisdictions it can never be the so called "duty"[14] of the landlord to re-rent the premises.

[8] *Dennis v. Miller,* 68 N. J. L. 320, 53 Atl. 394 (1902); *Hart v. Pratt,* 19 Wash. 560, 53 Pac. 711 (1898).

[9] *International Trust Co. v. Weeks,* 203 U. S. 364 (Mass., 1906); *Woodbury v. Print,* 198 Mass. 1, 84 N. E. 441 (1908).

[10] *Cibell v. Hill,* 1 Leo. 110, 74 Eng. Reprint 102 (1588); *Hall v. Burgess,* 5 B. & C. 332 (Eng., 1826).

[11] *Marshall v. Grosse Clothing Co.,* 184 Ill. 421, 56 N. E. 807 (1900); *Schelky v. Koch,* 119 N. C. 80, 25 S. E. 713 (1896); *Murill v. Palmer,* 164 N. C. 50, 80 S. E. 55 (1913); *Auer v. Haffman,* 132 Wis. 620, 112 N. W. 1090 (1907).

[12] *Hayes v. Goldman,* 71 Ark. 251, 72 S. W. 563 (1903); *Brown v. Cairns,* 63 Kan. 584, 66 Pac. 639 (1901).

[13] *Abraham v. Gheens,* 205 Ky. 289, 265 S. W. 778 (1924); *Goldman v. Broyles,* 141 S. W. 283 (Tex. Civ. App. 1911); note, 40 A. L. R. 190.

[14] According to Hohfeld's terminology it is erroneous to use the term *duty* in this sense. Where a *duty* exists there is a concurrent *liability,* and hence if this relation of the landlord to the tenant were a *duty* in the strict, legal sense, it would follow that upon failure to make a reasonable attempt to mitigate the damages, he would himself be liable to an action for damages resulting from breach of the *duty.* Obviously this is not the result. A correct statement would be that the plaintiff rested under a legal *disability* to claim for damages which he might reasonably have obviated or reduced. Hohfeld, *Fundamental Legal Conceptions,* pp. 35, 65; 26 Yale L. J. 710; 28 *ibid.,* 827; 29 *ibid.,* 130; *Rock v. Vandine,* 106 Kan. 588, 189 Pac. 157; 30 Yale L. J. 100.

But in the jurisdictions where the landlord can re-let without forfeiture, is there any reason why the general duty to the defendant to minimize his damages should not be applicable to the landlord in this case? It is recognized that if the landlord re-enters under a provision of the lease permitting him to do so after his tenant has vacated the premises,[15] or where the lease requires him to re-rent in case of abandonment,[16] it is his duty to use reasonable diligence in seeking a new tenant in order to lessen his damages. But some courts are in accord with the principal case in recognizing this re-letting by the landlord as a duty irrespective of the provisions of the lease.[17] This application of the rule of avoidable consequences would permit the landlord upon breach of a lease only to recover the rent for the remainder of the term, *less such revenue as he could reasonably have secured by re-letting during that period.*

This is apparently the better rule. It is in conformity with the present day development of the law of landlord and tenant which is away from the feudal basis of privity of estate and toward the modern conception of contractual obligation. In the event of its general adoption the penalizing of the landlord incident to a surrender by operation of law, forfeiture or eviction will be supplanted by the principles governing the effect of repudiation, breach and rescission of other contracts.[18] The landlord then will be remitted from the economic waste of standing idly by and permitting the premises to lie vacant, and forbidden a recovery for damages which, by reasonable efforts, he could have avoided.[19]

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[15] *Marling v. Allison,* 213 Ill. App. 224 (1919); *Bradbury v. Higginson,* 162 Cal. 602, 123 Pac. 797 (1912).

[16] *Harmon v. Callahan,* 214 Ill. App. 104 (1919). Cf. *Imperial Water Co. v. Cameron,* 67 Cal. App. 591, 228 Pac. 678 (1924).

[17] *Campbell v. McLaurin Invest. Co.,* 74 Fla. 501, 77 So. 277 (1917); *Murill v. Palmer, supra,* note 11; *semble; Holton v. Andrews,* 151 N. C. 340, 66 S. E. 212 (1909) *semble.* See *Roberts v. Watson,* 196 Iowa 816, 820, 195 N. W. 211, 212 (1923), approved in 9 Iowa L. B. 140.

[18] Tiffany, *Landlord and Tenant;* Williston, *Contracts,* Vol. III; 23 Mich. L. Rev. 211.

[19] In a jurisdiction such as North Carolina where the duty to re-let is recognized, the practical question arises as to whether the burden is on the landlord to allege and prove reasonable efforts to re-rent or upon the tenant to plead in mitigation a failure of the landlord to make such efforts. As to avoidable consequences generally, the accepted rule is that the burden of proof is upon the defendant to show that the plaintiff, by the exercise of proper industry, could have mitigated his damages, and that in absence of such proof the plaintiff is entitled to recover the amount fixed by the contract. *Beissel v. Vermillion Farmer's Elevator Co.,* 102 Minn. 229, 113 N. W. 575 (1907); *Milage v. Woodward,* 186 N. Y. 252, 78 N. E. 873 (1906); *Mindes Millinery*

DISPARAGEMENT OF GOODS AS TRADE LIBEL

The general American rule is that Equity Courts have no jurisdiction to interfere by injunction to restrain the publication of a trade libel.[1] The reason usually given is not constitutional, as a restraint upon free speech or the press, but because, as the courts and text writers say, there is an adequate remedy at law.[2] This denial of equitable relief to one libeled will oftentimes work an irreparable injury and leave him, in effect, remediless. Manifestly the legal remedy offers no relief against an insolvent; and even though damages could be collected, more often than not it would be impossible to know or prove the actual damage which results from a disparaging statement. The English Courts have led the way from this position, and they now exercise the same injunctive discretion over trade libels as over other torts.[3] And the modern American decisions, while not so outspoken as the English authorities, are

Co. v. Wellborn, 201 S. W. (Tex. Civ. App.) 1059 (1918). But a minority view adopts the contrary result requiring the plaintiff to allege diligence on his part and the results thereof, in mitigation of damages. *Shepard v. Gambill,* 29 Ky. L. Rep. 1163, 96 S. W. 1104 (1906); *Hunt v. Crane,* 33 Miss. 669, 69 Am. Dec. 381 (1857); Williston, *Contracts,* § 1360. And this would seem the more desirable rule in view of the difficulty of the tenant in ascertaining the facts as to the possibility of re-letting.

[1] 6 Pomeroy, *Equity Jurisprudence,* 629; 2 High, *Injunctions* (4th ed.) 968; Nims, *Unfair Competition,* 485, 262; 22 Cyc 900; *Kidd v. Horry,* 28 Fed. 773 (C. C. Penn., 1886); *Citizen's Light, etc. Co. v. Montgomery,* 171 Fed. 553 (C. C. Ala., 1909); *American Malting Co. v. Keitel,* 209 Fed. 351 (C. C. A. 2nd, 1913); *Willis v. O'Connell,* 231 Fed. 1004 (S. D. Ala., 1916); *Francis v. Flynn,* 118 U. S. 385 (1885); *Mitchell v. Grand Lodge,* 56 Tex. Civ. App. 306, 121 S. W. 178 (1909); *Singer Mfg. Co. v. Singer Sewing Machine Co.,* 49 Ga. 70, 15 Am. Rep. 674 (1872), the court said: "It is well settled that an injunction will not be granted to restrain libel of title or reputation. Not that it is not wrong, not that the wrong might not be irreparable, but simply because equity courts have refused to act in such cases." Illustrates the stubborn attitude the courts have taken. *Boston Diatite Co. v. Florence Mfg. Co.,* 114 Mass. 69, 19 Am. Rep. 310 (1873); *Marlin Fire Arms Co. v. Shields,* 171 N. Y. 384, 64 N. E. 163 (1902).

[2] *Francis v. Flynn,* 118 U. S. 385 (1885): "Plaintiff has full remedy at law. . . . If equity could interfere in such cases, it would draw to itself the greater part of litigation properly belonging to courts of law"; *Citizens Light etc. Co. v. Montgomery,* 171 Fed. 553 (C. C. Ala., 1909); *Baltimore Life Ins. Co. v. Gleisner,* 202 Pa. St. 356, 51 Atl. 1024 (1902); *Chamber of Commerce v. Fed. Trade Commission,* 13 Fed. (2nd.) 673, 686 (C. C. A. 8th, 1926): "No jurisdiction in equity to enjoin publication of a libel . . . but not because of constitutional reasons, and such jurisdiction could be conferred by statute."

[3] *Saxby v. Easterbrook,* 3 C. P. D. 339 (1878); *Halsey v. Brotherhood,* 15 Ch.D. 514 (1879); (required, however, plaintiff to go first to law and have jury pass upon question whether libelous . . . if so would grant the decree); *Liverpool Assn. v. Smith,* 37 Ch.D. 170 (1887); *James v. James,* 13 Eq. 421 (1872). (No longer require plaintiff to go first to law court—will grant the injunction if the matter is libelous.)