

1925

Property: Rights of the landlord upon abandonment of the leased premises

Harry J. Aronson

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Harry J. Aronson, *Property: Rights of the landlord upon abandonment of the leased premises*, 10 Marq. L. Rev. 49 (1925).

Available at: <https://scholarship.law.marquette.edu/mulr/vol10/iss1/11>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

upon this statute, the court had held that it extended only to such alienation of the land as interfered with its use, and that a deed executed by the husband alone would convey an equitable interest, entitling the grantee to legal title when the homestead right ceased;⁴ and if a husband executed a deed without the wife joining with him, an action might be maintained to compel specific performance so far as it could be performed, excepting, of course, the wife's inchoate right of dower. Apparently this rule had become a part of the property law of this state. The court, in *Jerdee v. Furbush*,⁵ said: "The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law, the same as if the idea involved was literally expressed in the statute. It relates to property and has, by lapse of time, become a rule of property, which, by well settled principles, can only be changed by legislative enactment."

As the statute now stands, it declares every alienation by a married man of his homestead absolutely void without his wife's signature. And this holds true no matter in what form or what interest the husband may seek to alienate.⁶ Regarding contracts for the sale of the homestead wherein the wife refuses to join, the courts will not enforce specific performance. Neither can liquidated damages be recovered, for such contract being void *in toto* cannot be made a basis for an action for damages.⁷ No rights could be acquired thereunder even though the conveyance of personal property is included therein.⁸

In the present case, *Hovie v. Pleshek*, it was held that even though the lease was void, the entry and payment of rent under a void lease created the relationship of landlord and tenant, the relation arising out of the occupation irrespective of the lease, and that an action could be maintained, the tenant being liable for the reasonable value of the use of such premises. The court's decision is in harmony with the states of Alabama and Arkansas. In the former state, it was held that even though a verbal lease was consummated on a Sunday, the relation of landlord and tenant was created by the occupation of the premises and that there was a month to month tenancy.⁹ In Arkansas, it was held that entry and occupation under a void lease constitutes the necessary relation of landlord and tenant implied by law.¹⁰

WILLARD A. BOWMAN

Property: Rights of the landlord upon abandonment of the leased premises.—When a tenant abandons possession intending to terminate his lease, the landlord may, by the weight of authority, providing there is no provision in the lease to the contrary, stand aside from the

⁴ *Conrad v. Schwamb*, 53 Wis. 372, 10 N.W. 395.

⁵ 115 Wis. 277, 91 N.W. 661.

⁶ *Rosenthal v. Park*, 166 Wis. 598, 166 N.W. 445.

⁷ *Rosenthal v. Park*, *supra*.

⁸ *Helander v. Wogensen*, *supra*.

⁹ *Eddins v. Galloway Co.* (Ala) 87 So. 557.

¹⁰ *State ex rel. School District v. Robinson*, (Ark) 220 S.W. 836.

premises entirely and recover rent for the whole term;¹ or, with the tenant's consent, either express or implied, relet the premises as the tenant's agent and apply the proceeds to the tenant's account without accepting the surrender of the lease.² In a few jurisdictions, a landlord may accept the surrender of the lease, sue on the contract as for anticipatory breach, and recover the difference between the amount of rent reserved in the lease and the rental value of the premises to the end of the term.³

Section 2302, Wisconsin Statutes, provides: "No estate or interest in lands other than leases for a term not exceeding one year . . . shall be . . . surrendered unless by act or operation of law, or by deed or conveyance in writing subscribed by the party . . . surrendering same."

An offer by a tenant to surrender his lease, made before the expiration of his term, followed by the taking of exclusive possession of the premises by the landlord, amounts to a surrender and acceptance which terminates the lease.⁴

What the rights of the landlord are upon abandonment of the leased premises, especially when the tenant is a financially responsible party and the making of a new lease involves a loss, is the purpose of this study.

It seems well established that the landlord may stand aside from the premises entirely, providing there is no provision in the lease to the contrary, and recover rent for the whole term. He is not obliged to re-enter and relet the premises to mitigate damages. In the case of *Camp Co. v. Pabst Brewing Co.*,⁵ the court stated: "A landlord is under no obligation to mitigate damages by evicting the tenant and reletting the premises. In most jurisdictions it is held that even if a tenant abandons the premises he is under no obligation to re-enter and relet; that he can stand upon the terms of the lease and recover rent for the whole term."⁶

Upon abandonment the landlord may re-enter and take possession for certain purposes without accepting the surrender,⁷ as making necessary repairs for the preservation of the property, taking care of the prem-

¹ *Camp Co. v. Pabst Brewing Co.*, 172 Wis. 211, 178 N.W. 474; *Brown v. Hayes*, 92 Wash. 300, 159 Pac. 89; *Higgins v. Street*, 19 Okla. 45, 92 Pac. 153; *Racke v. Anheuser-Busch Co.* 17 Tex. Civ. App. 167, 42 S.W. 774.

² *Gray v. Kaufman*, 162 N. Y. 388, 56 N.E. 903; *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63; *Rosenblum v. Uber*, 256 Fed. 584; an agreement with tenant after default and before taking possession held no acceptance in *Zwietusch v. Luehring*, 156 Wis. 96, 144 N.W. 257. Also see Taylor on Landlord & Tenant, Vol. 2, sec. 516; Reeves on Real Property, Vol. 2, sec. 652.

³ *Brown v. Hayes*, *supra*; *Bradbury v. Higginson*, 162 Cal. 602, 123 Pac. 797; *Markovitz v. Greenwall Co.*, 97 Tex. 479, 76 S.W. 1197.

⁴ *Kuecland v. Schmidt*, 78 Wis. 345, 47 N.W. 438; *West Concord Milling Co. v. Hosmer*, 129 Wis. 8, 107 N.W. 12.

⁵ *Camp Co. v. Pabst Brewing Co.*, *supra*.

⁶ A lessor is not required to lease to another if he has an opportunity and is not confined to his remedy for damages; but may refuse to accept the rescission and hold the lessee liable for rent. *Becar v. Flues*, 64 N. Y. 518; *Camp Co. v. Pabst Brewing Co.*, *supra*.

⁷ *Chandler v. Hinds*, 135 Wis. 43, 115 N.W. 339.

ises,⁸ or to protect the property from waste or from injury by trespassers.⁹ But where the landlord makes alterations beyond the necessity of preservation of the demised premises, there is an acceptance.

The acceptance of the keys to the premises by the landlord and the mere retention of them are not sufficient of themselves to show an acceptance of the surrender,¹⁰ especially when the landlord, at the time, expressly declines to agree to terminate the lease or notifies the tenant that he will rent the premises on the tenant's account.¹¹ However, the retention of the keys in connection with other acts may show an acceptance of the surrender.

An attempt to relet does not of itself show an acceptance, but taken in connection with other acts it may.¹²

Where there is no provision in the lease to the contrary, and the landlord takes exclusive possession upon abandonment and relets the premises, his acts constitute an acceptance. There is no acceptance, however, where the reletting is done with the express consent of the tenant or pursuant to a provision in the lease authorizing reletting.¹³ Where there is a covenant in the lease that upon termination for non-payment of rent and abandonment the tenant shall be liable for all loss and damage to the end of the term, the landlord, before he can recover, must show that the premises remained unoccupied and that he exercised due diligence to relet them.¹⁴ Where the lease provides that the landlord *may* relet the premises in case they become vacant by the tenant's removal for any cause, the landlord is impliedly bound also to do this; and if he fails in this duty, he must credit to the account of the tenant what might fairly have been obtained by a proper letting of the premises to another.¹⁵

Where the landlord notifies the tenants at the time that the reletting will be made on the tenant's account and the proceeds credited upon the claim against him and no objection is made by the tenant, the majority of the courts hold there is no surrender and the silence of the tenant gives assent.¹⁶

It is quite well settled that where there is a voluntary surrender, accepted by the landlord, all liabilities under the lease which could arise in

⁸ *Smith v. Hunt*, 32 R. I. 326, 79 Atl. 826.

⁹ *Sander v. Holstein Comm. Co.*, 121 Mo. A. 293, 99 S.W. 12.

¹⁰ *In re Mullings Clothing Co.*, 238 Fed. 58; *Underhill v. Collins*, 132 N. Y. 269, 30 N.E. 576; *Kean v. Rogers*, 146 Iowa 559, 123 N.W. 754.

¹¹ *Rosenblum v. Uber*, *supra*, where a landlord accepted a key from the tenant "upon the express condition that he would care for the building and rent it, if possible, for the benefit of the (tenant's) estate." Held that landlord did not accept a surrender of the lease and could hold the tenant liable for the difference between the rent provided for in the lease and the rent actually collected after taking possession.

¹² *Joslin v. McLean*, 99 Mich. 480, 58 N.W. 467.

¹³ *Zwietusch v. Luchring*, *supra*.

¹⁴ *Woodbury v. Sparrell*, 198 Mass. 1, 84 N.E. 441.

¹⁵ *International Trust Co. v. Weeks*, 203 U. S. 364.

¹⁶ *Oldewurtel v. Weisenfeld*, 97 Md. 155, 54 Atl. 969; *Stewart v. Sprague*, 71 Mich. 50, 38 N.W. 673; *Alsop v. Banks*, 68 Miss. 664, 9 So. 895.

the future, had no surrender taken place, are terminated, but liabilities which have already accrued remain unaffected.¹⁷

In only a few jurisdictions, not strictly in accord with the above rule, the courts have held that the landlord has also the right to treat the lease as terminated, re-enter and sue for damages for the breach, the damages to be measured by the difference between the amount reserved in the lease and the rental value of the premises to the end of the term.¹⁸

According to the weight of authority, then, we may conclude that the landlord has the right to stand aside from the premises entirely, providing there is no provision in the lease to the contrary, and recover rent for the whole term; or with the tenant's consent express or implied, relet the premises as the tenant's agent and apply the proceeds to the tenant's account without accepting the surrender of the lease.¹⁹

HARRY J. ARONSON

Workmen's Compensation Act: Miscellaneous provisions.—The courts place a liberal construction on the Workmen's Compensation Act with the intention of carrying out its manifest purpose, e.g., to relieve workmen from the distress of work accidents by placing a portion of the burden upon the employers, and through such employers, in the cost of production, upon the public as a whole.¹ Payment is not considered in the light of a gift made to the injured employe, but is treated as a moral and equitable obligation.² The exclusive remedy provided by the act³ includes all injuries for which the employer might be liable at common law by reason of his failure to exercise ordinary care or comply with the statutory requirements as well as those resulting from pure accident or negligence of the employe or of a fellow servant.⁴

In Wisconsin, an employer is not compelled to place himself under the act, but, in order to escape its provisions, he "must file with the industrial commission a notice in writing to the effect that he elects not to accept the provisions thereof."⁵ Under this section, it was held that a principal contractor who was subject to the act, was liable to an employe of a subcontractor who had elected not to come under the act; and that such principal contractor had his remedy over against the one actually liable.⁶ And a claimant for compensation for the death of an employe of a subcontractor who employed less than three persons and was not subject to the act, but whose principal contractor was subject to the act, was given the option either to hold the primary employer, its insurance carrier, and the principal contractor, or to hold the sub-

¹⁷ *Boyd v. Gore*, 143 Wis. 531; 128 N.W. 68.

¹⁸ *Brown v. Hayes*, *supra*.

¹⁹ See 23 Mich. Law Rev. 211; 35 C. J. 1086 to 1096.

¹ *Town of Germantown v. Ind. Comm.*, 178 Wis. 642, 190 N.W. 448; *Ronning v. Ind. Comm.*, 185 Wis. 384, 200 N.W. 652.

² *State v. Carter*, (Wyo.) 215 Pac. 477, 28 A. L. R. 1089.

³ Sec. 102.03 to 102.34, Wis. Stats.

⁴ *Knoll v. Schaler*, 180 Wis. 66, 192 N.W. 392.

⁵ Sec. 102.05, Wis. Stats.

⁶ *Miller v. Ind. Comm.* 179 Wis. 192, 190 N.W. 81.