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THE COMMON-LAW CONCEPTION OF LEASING: MITIGATION, HABITABILITY, AND DEPENDENCE OF COVENANTS

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I. INTRODUCTION

Property law may be the most eternal of secular law. Its basic precepts and conceptions are largely stable and long settled.¹ An aspect of property law undergoing notable change, however, is the law of landlord and tenant.²

The most important recent change in landlord-tenant law involves

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1. In part, this stability results from a deliberate policy choice to preserve the character of titles and long-term expectations.

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Minnesota Mining Co. v. National Mining Co., 70 U.S. (3 Wall.) 332, 334 (1865). "Uniformity and certainty in rules of property are often more important and desirable than technical correctness." *Rock Spring Distilling Co. v. Gaines & Co.*, 246 U.S. 312, 320 (1918) (quoting *Layton Pure Food Co. v. Church & Dwight Co.*, 182 F. 35, 39 (1910)). See *Heyert v. Orange & Rockland Utils., Inc.*, 17 N.Y.2d 352, 359-63 (1966). For an application of these ideas in the leasehold context, see *Gruman v. Investors Diversified Servs., Inc.*, 247 Minn. 502, 509-10, 78 N.W.2d 377, 381-82 (1956).

2. No doubt this activity partly accounts for the considerable, perhaps even disproportionate emphasis which is given to landlord-tenant law in first-year property courses. A survey of first-year property teachers revealed that 80% of those responding spend eight or more hours, and 30% spend 15 or more hours, on the law of the relation between landlord and tenant, making it,

the reversal of responsibility for the quality of leased premises. In place of the tenant's traditional burden of *caveat emptor*³ and duty of repair,⁴ many courts now recognize an implied warranty of habitability,⁵ at least for residential tenancies.⁶ These same courts typically reject the traditional doctrine that mutual obligations in leases are "independent," that is, that the tenant's obligations are enforceable by a landlord even when the landlord is in breach. Rather, the landlord's right to rent is made to depend on the landlord's meeting the newly recognized obligations to supply habitable premises.⁷

Even the tenant who wrongfully repudiates a lease is receiving new protections. Increasingly, courts are requiring landlords to mitigate their damages after a tenant abandons, rather than allowing them to do nothing and collect the full rent.⁸

The traditional rules governing the landlord-tenant relation generally have been thought to rest on the idea that leases are essentially conveyance transactions,⁹ that is, when a lease is made, an "estate" in land is conveyed by the landlord to the tenant.¹⁰ Changes in the landlord and tenant obligations such as those described above seem to go to the root of this conveyance conception of leases. The question therefore arises whether the whole conception of the landlord-tenant relation, at least for residential tenancies, is in need of wholesale revision.

It is indeed the new vogue to call the conveyance idea "antiquated"

after the estate system, the second most heavily covered area in first-year property courses. See Humbach, *What is Taught in the First Year Property Course?*, 29 J. LEGAL EDUC. 459, 466 (1978).

3. *E.g.*, *Civale v. Meriden Hous. Auth.*, 150 Conn. 594, 192 A.2d 548 (1963); *Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 255, 72 S.E. 312 (1911); *Hart v. Windsor*, 12 M. & W. 84, 152 Eng. Rep. 14 (1843); 2 M. FRIEDMAN, *LEASES* 392-93 (1974); 2 R. POWELL, *REAL PROPERTY* § 233 (1977). See *infra* notes 225-29 and accompanying text.

4. See *infra* note 266.

5. See generally Annot., 40 A.L.R.3d 646 (1971); *infra* text accompanying notes 238-61.

6. Even the innovative Second Restatement of Property did not enlarge the landlord's duties to maintain the condition of the premises for commercial tenancies to include those duties that it had prescribed for residential tenancies. See RESTATEMENT (SECOND) OF PROPERTY § 5.1 comment b, reporter's note 2. The present state of judicial and statutory development does not warrant such extension. *Id.*

7. See *supra* note 5.

8. See generally Annot. 21 A.L.R.3d 534 (1968); *infra* text accompanying notes 110-218.

9. See *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *infra* note 270. See also *Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 255, 72 S.E. 312 (1911); 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 213-17 (5th ed. 1942); 2 R. POWELL, *REAL PROPERTY* ¶ 221[1] (1980); *infra* notes 15 & 115-18 and text accompanying notes 47-56.

10. See *infra* text accompanying notes 47-56, 115, 131-61, 226-27 & 270-77.

and to pretend to treat leases like other contracts,¹¹ substituting an essentially contract conception of leasing for the traditional conveyance conception. In fact, however, courts do not treat leases like ordinary contracts, even in those ground-breaking cases in which they purport to do so.¹² Moreover, on careful analysis, ordinary contract law appears even less conducive to the reformists' desired substantive changes than the traditional conceptions.¹³ To be sure, contract principles such as the rule of mitigation of damages, and the usual dependency of mutual promises, have been plucked out of context and set up as models for lease law to emulate.¹⁴ The recent importation of half-truth versions of contract principles into landlord-tenant law does not, however, treat leases as ordinary contracts, nor is it very good jurisprudence.

It is thus a matter for debate whether the law of leases is due for a conceptual revolution, rejecting the old "conveyance" theory and applying ordinary "contract" law to leasing transactions. Nevertheless, a

11. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 528 P.2d 637 (1974); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470 (1969); *Sommer v. Kridel*, 77 N.J. 446, 378 A.2d 767 (1977); *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288 (1979); *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. City Civ. 1976). *See infra* text accompanying notes 201-11 & 264.

A number of commentators have likewise viewed the conveyance conception of leasing as an obstacle to reform, suggesting that a contractual treatment is a preferable modern substitute. *E.g.*, McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211 (1925); Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); Note, *Contract Principles and Leases of Realty*, 50 B.U.L. Rev. 24 (1970); *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952).

One commentator argued that leases have always been treated as contracts. Siegel, *Is the Modern Lease a Contract or a Conveyance? A Historical Inquiry*, 52 J. URB. L. 649 (1975). The fact that parallelisms are found in the treatment of the two types of exchange transactions does not, however, mean that the two are *mutatis mutandis* the same. Leases have received distinctive treatment, and the distinctions are intimately bound to the conception of leases as conveyances, in contrast to purely contractual arrangements for occupancy. Professor Siegel implicitly recognizes that leases are conveyances by analogizing leases to contracts for the sale of goods. Siegel, *supra*, at 657-59, 670-72, 673-74. Such analogies, however, miss the point of the argument that leases should be treated as contracts: the point is that leases should be treated as contracts instead of as conveyances, not as contracts of conveyance. There are, however, some often overlooked parallels between lease law and ordinary contract law. *See infra* notes 269-95 and accompanying text. Nevertheless, these parallels are not quite as Professor Siegel imagines them. *See infra* notes 273 & 287.

12. *See infra* text accompanying notes 204-11 & 269-95.

13. *Id.*

14. *See infra* cases cited at notes 116 & 238.

suitable conceptual account for certain socially required changes in the law of leases clearly seems wanting. A primary objective of the discussion that follows is to attempt to provide such an account along traditional lines. The approach will be to reexamine the core of landlord-tenant law—the basic framework—as it has come to us from the medieval mists of the common law.¹⁵ It is this framework, and its implications—indeed, its mandate—for change that will be the focus at this Article.

The common-law conception of the landlord-tenant relation will be portrayed as a natural result of an interplay between basic law of property and of contract. This conception will be described by the rules and results which it implies and by the theories that underlie these rules.¹⁶ This will not be a historical account, though history must be mentioned. Neither will it be a complete account.¹⁷ A flood of specific applications would more likely obscure than elucidate the underlying conception which those applications imply and from which they can be seen to flow. Rather, the object here is to describe the basic conception itself.

The hypothesis is that landlord-tenant law is in large part logically coherent¹⁸ and that most of the specific applications of landlord-tenant

15. The extension by 1499 of the writ of *ejectione firmae* (ejectment) to allow a leasehold tenant to recover actual possession may be seen as the point at which the modern concept of leases as property was crystallized. See 3 W. HOLDSWORTH, *supra* note 9, at 213-17; F. MAITLAND, *FORMS OF ACTION AT COMMON LAW* 46-47 (1971). For an early case expounding the common-law dual conception of leases, see *Walker's Case*, 3 Co. Rep. 22a, 76 Eng. Rep. 676 (1587).

16. The common-law conception of leasing, as portrayed in this Article, is by no means the sole conception ever held or expounded by the common-law courts in deciding landlord-tenant controversies. One may easily find cases which are irreconcilable with the conception or which, though compatible in outcome, depart from its details in their reasoning. Nevertheless, the conception portrayed has been the dominant common-law conception of leasing over the last 400 years, and suitably explains the outcomes of most lease cases, even those which courts rationalized on somewhat different bases. See *infra* notes 172-78 and accompanying text. The fact that the conception can explain those cases which ostensibly proceed on different rationales only shows the validity and vitality of the conception as a fitting embodiment of the basic and intuitive policies and purposes underlying the law of landlord and tenant. Irreconcilable cases merely evidence further the resource and risk of the casuistic method of the common law.

17. For excellent detailed discussions of landlord-tenant law, see 1 *AMERICAN LAW OF PROPERTY* (A. Casner ed. 1952) [hereinafter cited as A.L.P.]; M. FRIEDMAN, *supra* note 3; 2 R. POWELL, *supra* note 3; R. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* (1980); 3 & 3A G. THOMPSON, *REAL PROPERTY* (1980).

18. In a frequently quoted phrase, Justice Holmes observed 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." *Gardiner v. William S. Butler Co.*, 245 U.S. 603, 605 (1918). We are indeed indebted to Lord Coke, and

law follow from a basic conceptual framework. Thus, understanding the framework should allow lawyers to develop sound "instincts" about interstitial rules with which they may be unfamiliar. Furthermore, those aspects of landlord-tenant law most in need of reform can be seen as inconsistent with its fundamental conceptions. "Instincts" about these aspects may likewise develop; a visceral sense of injustice need not be the lone claim for reform. Change can be seen to promote, not derogate, the logical coherence of the law.¹⁹

II. THE DUAL RELATION

The fundamentally unique characteristic of the legal relation of landlord-tenant is that it consists of two intertwined legal relationships or "privities." The first of these legal relationships, based on contract, is called privity of contract; the other, called privity of estate, is based on ownership.²⁰

The relationship, or privity, of contract is perhaps better understood because of its analogies in other areas of law. Landlord and tenant are in privity of contract because²¹ they exchange promises between themselves that create bundles of entitlements and detriments, or rights and

certainly not for logic *in vacuo*, but for an articulation of a coherent basic conception of landlord-tenant law. See Walker's Case, 3 Co. Rep. 22a, 76 Eng. Rep. 676 (1587).

19. Perhaps no apology is necessary for the implicit faith and homage which this Article as a whole accords to a "doctrinal" or "formalistic" approach to judicial decisionmaking. After all, it is the courts' appeals to conception, the making of conscious choices between conveyance or contract theories of leasing, which are the basis of the discussion. On this basis alone, doctrinal legal reasoning is inevitably germane to a discussion of what courts really do, irrespective of what ought to be the relevance of such reasoning. More importantly, doctrinal reasoning may contribute to consistency of results and, therefore, equality of treatment under the law, a point argued *infra* at text following note 325.

20. See, e.g., Samuels v. Ottinger, 169 Cal. 209, 211, 146 P. 638, 639 (1915); Arthur Treacher's Fish & Chips v. Chillum Terrace, Ltd., 272 Md. 720, 728-29, 327 A.2d 282, 287 (1974); Kanawha-Gauley Coal & Coke Co. v. Sharp, 73 W. Va. 427, 80 S.E. 781 (1914); Walker's Case, 3 Co. Rep. 22a, 76 Eng. Rep. 676 (1587).

21. Rather than "because," it would be more accurate to say "if," for it is not necessary to the existence of a landlord-tenant relation that any contract promises be made between the parties. National Bank of Commerce v. Dunn, 194 Wash. 472, 78 P.2d 535 (1938). See also Klinger v. Peterson, 486 P.2d 373 (Alaska 1971); Consumer's Ice Co. v. Bixler, 84 Md. 437, 35 A. 1086 (1896). See generally R. MEGARRY & H. WADE, REAL PROPERTY 623 (3d ed. 1966); 1 A.L.P., *supra* note 17, at § 3.2. If no promises are either expressly or impliedly made, then there is no contractual relationship or privity of contract, and hence no dual relation as such. See Ellingson v. Walsh, 15 Cal. 2d 673, 674-75, 104 P.2d 507, 509 (1940). There is only privity of estate. Because an exchange of contractual promises is, at least by implication, almost invariably involved in the creation of a landlord-tenant relationship, the parties are in privity of contract with one another. Their relation, therefore, is necessarily a dual one. See Samuels v. Ottinger, 169 Cal. 209, 146 P.

duties,²² which are enforceable on a theory of contract. If the landlord-tenant relationship involved only this, it could truly be said that a lease is merely a contract, enforceable purely as such. But landlord and tenant are not only seen by the law to be in privity of contract; they are also conceived to be in "privity of estate."

Privity of estate, that is, the parties' legal relationship based on ownership, exists between landlord and tenant because a lease is viewed as a "conveyance"—the landlord conveys and the tenant receives an ownership interest, albeit a temporary ownership interest, in the premises.²³ The conveyance causes the landlord and tenant to become co-owners, and their legal relationship as co-owners provides a distinct and independent basis, a "conveyance-theory" or property basis, for enforcing many of the performances required between them. Thus, privity of estate is the other part of the dual relationship between landlord and tenant.

Unlike the rights and duties that make up the contractual relationship, arising out of the parties' privity of contract, the rights and duties arising out of privity of estate are more in the nature of tort. That is to say, they are law-imposed rights and duties, attaching to persons having the legal status of landlord and tenant. Unlike contractual rights and duties, which are essentially voluntarily or consensually created

638 (1915); *Consumer's Ice Co. v. Bixler*, 84 Md. 437, 35 A. 1086 (1896); *National Bank of Commerce v. Dunn*, 194 Wash. 472, 78 P.2d 535 (1938).

The promise implied-in-fact referred to above means a genuinely "intended" promise. *See infra* note 230. It is thus distinguishable from the constructive "real covenant" to pay reserved rent or covenant "in law" which is sometimes referred to in the older cases. *E.g.*, *Paradine v. Jane*, Aley 26, 82 Eng. Rep. 897 (1647); *Walker's Case*, 3 Co. Rep. 22a, 76 Eng. Rep. 676 (1587). *See also* *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 73 W. Va. 437, 80 S.E. 781 (1914). *See generally* I H. TIFFANY, LANDLORD AND TENANT 960-64, 1030-34 (1912). In *Arthur Treacher's Fish & Chips v. Chillum Terrace Ltd.*, 272 Md. 720, 327 A.2d 282 (1974), the court observed:

Therefore, the obligations which the parties bear to each other may arise out of contract or from the real covenants of the leasehold estate, or sometimes from both. Generally, enforcement of the real covenants is independent of the contract obligations in the instrument; the former obligations arise out of and inhere in the estate itself.

Id. at 727-28, 327 A.2d at 286.

22. The entitlements and detriments comprising these bundles may consist of contractual "rights" and "duties" in the Hohfeldian sense as well as Hohfeldian privileges, powers, immunities, and their respective opposites. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), reprinted in W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 23 (Cook ed. 1923). For the sake of simplicity and to avoid introducing unnecessary terminological distinctions, the entire packages of entitlements and detriments will be referred to as "rights and duties."

23. *See infra* text accompanying notes 47-56.

and assumed, the specific rights and duties of privity of estate arise and are enforced whether or not they are voluntarily created or assumed.²⁴

Among the most important rights and duties arising out of privity of estate are (1) the landlord's obligation to allow peaceful possession to the tenant and the tenant's corresponding right to peaceful possession,²⁵ and (2) the landlord's right to receive the rent and the tenant's corresponding duty to pay it.²⁶ Although this possession-for-rent exchange is basic to the usual landlord-tenant relation, there are also other aspects of privity of estate, including the duty of the tenant to refrain from waste²⁷ and the landlord's traditional immunity from responsibility to the tenant for the acts of strangers.²⁸ The theoretical explanation for these privity of estate rights and duties are discussed below, but for the present, it is enough to observe that they may exist and be enforced solely as a consequence of the supposed "conveyance" from landlord to tenant, and entirely apart from any contract-based rights and duties that the parties may or may not have.²⁹

24. Contractual rights and duties are not always the result of conscious volition, and are often law-imposed by the operation of such doctrines as objective mutual assent, the parol evidence rule and the whole of interpretive presumptions. *Cf.* *Hotchkiss v. National City Bank*, 200 F. 287, 293 (D.C.N.Y. 1911) ("A contract is an obligation attached by mere force of law to certain acts, usually words, which ordinarily accompany and represent a known intent"), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913); 1 S. WILLISTON, *CONTRACTS* § 95 (3d ed. 1957) ("It is even conceivable that a contract may be formed which is in accordance with the intention of neither party").

Likewise, the rights and duties incident to privity of estate are voluntarily created and assumed to the extent that the parties voluntarily assume the status of landlord and tenant. Furthermore, the specifics of the privity of estate relation can be altered by contract and thus exist only to the extent that the parties do not agree to the contrary, *see infra* note 222. Nonetheless, it appears both historically accurate and analytically useful to assign the privity-of-estate rights and duties to the category of tort instead of contract. As a matter of history, the enforcement of such rights and duties was by means of actions which would now be thought of as tort actions: trespass and its offspring, ejectment, and the recuperatory action of debt. *See* F. MAITLAND, *supra* note 15, at 45, 51; *infra* note 32 & text accompanying notes 54-71 & 86-89.

In any event, a distinction generally is made between rights and duties created by manifested consent and, on the other hand, rights and duties imposed by law irrespective of consent. The package of rights and duties that accompany privity of estate seem to fall into the latter category. *See* Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 5 (1888) (emphasizing this distinction in relation to the duties imposed in the analogous relationship of bailment).

25. *See infra* text accompanying notes 54-56 & 86-89.

26. *See infra* text accompanying notes 57-71.

27. *See infra* notes 51 & 227. *See also infra* text accompanying notes 80-81.

28. *See infra* text accompanying notes 90-101.

29. *E.g.*, *Klinger v. Peterson*, 486 P.2d 373, 378 (Alaska 1971); *Ellingson v. Walsh*, 15 Cal. 2d 673, 675-76, 104 P.2d 507, 509 (1940); *Arthur Treacher's Fish & Chips v. Chillum Terrace, Ltd.* 272 Md. 720, 727-29, 327 A.2d 282, 286 (1974); *National Bank of Commerce v. Dunn*, 194 Wash.

Because landlords and tenants are almost always in both privity of contract and privity of estate, there is a dual relationship—a dual set of rights and duties—existing between them. One might ask why all this is necessary. The rights and duties between landlord and tenant that arise out of privity of estate appear as though they could easily be founded and enforced on a purely contractual basis.³⁰ Indeed, they could be contractually founded and enforced, at least so long as third parties are not involved.³¹ One of the reasons for the duality of the landlord-tenant relationship is that third parties do get involved.³² As

472, 481, 78 P.2d 535, 539-40 (1938); *Walker's Case*, 3 Co. Rep. 22a, 23a, 76 Eng. Rep. 676, 680 (1587); 1 H. TIFFANY, *supra* note 21, at § 171. The nature of the rent obligation is discussed *infra* at text accompanying notes 57-71.

30. "As an original question, a lease might well have been regarded as a wholly bilateral agreement by which the lessor, instead of making a conveyance, promises a continuing permission to occupy the premises." 6 S. WILLISTON, *supra* note 24, at § 890.

In fact, "the lease started as a matter of contract, and it grew into a counterfeit proprietary interest because the contractual protection was insufficient." S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 101, 127-29 (1969). Origins are not, of course, an infallible key to modern classification: the antecedents of modern estate in fee simple were arrangements that likewise had an essentially contractual rather than proprietary nature. *Id.* at 93.

31. The contractual theory for protecting the tenant's right to possession is perhaps less obvious than the contractual theory upon which the rent obligation may be enforced. The common-law approach to protecting possession contractually has been to hold that a lease contains, absent provision to the contrary, an "implied covenant of quiet enjoyment." Historically, and still in most American jurisdictions, this implied covenant exists by virtue of the "mere relation" of landlord and tenant. *See, e.g.*, *Fifth Ave. Bldg. Corp. v. Kernochon*, 221 N.Y. 370, 117 N.E. 579 (1917); 7 W. HOLDSWORTH, *supra* note 9, at 251; 1 A.L.P., *supra* note 17, at § 3.47; Annot., 62 A.L.R. 1257, 1258-62 (1929), *supplemented by* 41 A.L.R.2d 1414, 1420-22 (1955). The "relational" origins of the implied covenant of quiet enjoyment suggest that this contractual contrivance was in fact rooted in privity of estate itself. *See* 7 W. HOLDSWORTH, *supra* note 9, at 251; 1 F. POLLACK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 301, 306 (1968). Ultimately, however, via the route of analogue from the doctrine of "ancient warranty," the actual foundation for the protection, like the foundations for all fee and leasehold property, was the essentially contractual relationship existing shortly after the Norman Conquest between English lords and tenants. *See* S. MILSOM, *supra* note 30, at 90 ("The lord's obligation was, in our language, to guarantee the payment, to protect the holding of land"; namely, the land which was paid for the tenant's military services). *See also supra* note 30; *infra* notes 32-36 and accompanying text.

The implied covenant of quiet enjoyment makes the landlord answerable only for the landlord's own acts, acts of persons in connivance with the landlord and acts of holders of paramount title, but not for acts committed by strangers to the title. *E.g.*, *Evans v. Williams*, 291 Ky. 484, 165 S.W.2d 52 (1942); *Smith v. Nortz Lumber Co.*, 72 N.D. 353, 7 N.W.2d 435 (1943). *But cf.* *Blackett v. Olanoff*, 358 N.E.2d 817 (Mass. 1977) (landlord liable for leasing part of premises for use as a noisy cocktail lounge, clashing with use by residential tenants). *See generally* Annot., 41 A.L.R.2d 1414, 1440-45 (1955).

32. As the owner of a possessory interest in real estate acquired by conveyance, a leasehold tenant has standing to maintain such actions as trespass, ejectment, and nuisance against interfering third parties. 1 A.L.P., *supra* note 17, at § 3.53. *See Ramos v. Fell*, 128 So. 2d 481 (Ala. 1961)

with so much of property law, however, the reason why dual relationship was conceived is historical.

The modern law of contract—with the routine enforcement of promises that are intended to be binding—simply did not exist when, in the late fifteenth century, the need arose to reformulate the interpretive conceptualization of legal rights and duties existing between landlords and tenants.³³ A main problem at the time was protecting ejected tenants whose landlords were trying to convert arable land to sheep grazing and who were, in the process, depopulating the countryside.³⁴ The theoretical basis for the enforcement of legitimately expected performances and for the protection of tenants' reasonable expectations could not be drawn from the then nonexistent modern theory of contract.³⁵ Rather, the most obvious analogue, and probably the most fitting at the time,³⁶ was the feudal relation of lord and tenant, created by subinfeudation.³⁷ Because this feudal relation provided a legal basis for protec-

(trespass); *Thompson v. Harris*, 9 Ariz. App. 341, 452 P.2d 122 (1969) (nuisance); *Sherman v. Fall River Iron Works Co.*, 84 Mass. (2 Allen) 524, 5 A. (1861) (same); *Papadopoulos v. Defabrizio*, 102 Utah 84, 125 P.2d 416 (1942) (trespass). See generally Annot., 12 A.L.R.2d 1192 (1950). By comparison, a mere occupant under a license who has no "interest in land" traditionally has not had such standing. See H. TIFFANY, *REAL PROPERTY* 118 (3d ed. 1939); compare *Nahas v. Local 905, Retail Clerks Int'l Ass'n*, 144 Cal. App. 2d 808, 302 P.2d 829 (1956) with *United Elec. Light Co. v. Deliso Constr. Co.*, 315 Mass. 313, 52 N.E.2d 553 (1943).

33. See S. MILSOM, *supra* note 30. On the development of the general enforcement of informal promises, see *id.* at 271-315; Ames, *supra* note 24, at 1-19. In commenting on certain substantive effects of the order of historical development, Williston noted that "the law governing leases . . . became settled before the law of mutually dependent promises was established . . ." 6 S. WILLISTON, *supra* note 24, at § 890. The independence of lease covenants is erroneously supposed to be one of the important stumbling blocks to reaching just results. See *infra* text accompanying notes 262-306.

34. 3 W. HOLDSWORTH, *supra* note 9, at 216-17.

35. See *supra* note 33. The medieval functional antecedents to modern contract law—account, covenant, and debt—could have been extended or supplemented to provide much of the desired protection, and indeed Pollack and Maitland observed that the action of covenant "was invented chiefly for the enforcement of what we should call leases." 2 F. POLLACK & F. MAITLAND, *supra* note 31 at 106, 203-25. These contract-law antecedents, however, were not extended or sufficiently supplemented.

36. To solve the problem of protecting ejected tenants, see *supra* text accompanying note 34, a basis for regarding leasehold rights as rights in rem, enforceable against the whole world, was needed. Thus, modern contract theory, which provides a basis only for in personam rights, probably would not have served the intended purpose even if it had existed. See *Golde Clothes Shop, Inc. v. Loew's Buffalo Theatres*, 236 N.Y. 465, 141 N.E. 912 (1923) (protection of tenant's occupancy founded in legal title). "[A]fter the development of ejectment and the law of covenants running with the land, the concept of a lease as a conveyance afforded the parties remedies superior to those available in contract." 1 A.L.P., *supra* note 17, at § 3.11.

37. In early feudal times, when a transfer of land was made—even in fee simple absolute—

tion of sets of expectations not dramatically different from those of parties to leases, the application of its precepts to the landlord-tenant relation made considerable sense.

Because of the Statute Quia Emptores,³⁸ feudal land law, in its original application, was slowly becoming obsolete.³⁹ The adaption and application of feudal land law to the landlord-tenant relationship, however, gave it new life⁴⁰ and supplied an analytical basis for protecting

the transferor usually retained a proprietary interest analogous in many ways to that of a modern landlord. The transferee, though having the sole right of potentially perpetual possession, was thus only a co-owner. The legal relation which existed between transferor and transferee was referred to as "tenure" or privity of estate, and resulted in a number of law-imposed rights and duties between the parties. This type of transfer, wherein the transferee became the tenant or vassal of the transferor, was known as "subinfeudation." *See generally* H. CHALLIS, REAL PROPERTY 4-19 (3d ed. 1911); R. MEGARRY & H. WADE, *supra* note 21, at 725; F. POLLACK & F. MAITLAND, *supra* note 31, at 232-34. Successive subinfeudations resulted in a multilayered hierarchy of land ownership, ranging from the King at the top, through intermediate lords, down to the actual occupants. This ownership hierarchy characterized English feudalism.

The Statute Quia Emptores, 18 Edw. I (1290), had the effect of prohibiting, with narrow exceptions, any future transfers of fee simple absolute interests by subinfeudation. Its enactment meant that the transferor of a fee simple absolute could no longer retain any proprietary interest in lands transferred. Thus a transferee of a fee simple absolute after 1290 was "substituted" in the place of the transferor in the feudal ownership hierarchy. Consequently, the transferee stepped into the privity of estate already existing between the transferor and the transferor's feudal lord. Such transfers were therefore said to be by "substitution" as distinguished from subinfeudation. 1 A.L.P., *supra* note 17, at 10-12; H. CHALLIS, *supra*, at 18-20; F. POLLACK & F. MAITLAND, *supra* note 31, at 337.

Transfer by substitution is the only method applicable to fee simple interests today except possibly in Pennsylvania and South Carolina. 1 A.L.P., *supra* note 17, at 58-60. Nevertheless, because the Statute Quia Emptores did not apply to transfers of less than potentially perpetual (fee simple) interests, it did not prevent subinfeudation between landlords and tenants. *See* R. MEGARRY & H. WADE, *supra* note 21, at 45-46. Therefore, today's subinfeudation and substitution remain two alternative methods for transferring leasehold interests. When the modern leasehold tenant makes a transfer by substitution, the transaction is called an "assignment," whereas the modern leasehold version of subinfeudation is called a "sublease." *See infra* note 103 and text accompanying notes 102-09.

38. *See supra* note 37.

39. Because the Statute Quia Emptores prohibited the creation of new privity of estate relations for lands held in fee simple, *see supra* note 37, and because fee simple estates were gradually extinguished by escheats over time, the feudal hierarchy of ownership gradually collapsed. *See* H. CHALLIS, *supra* note 37, at 22; R. MEGARRY & H. WADE, *supra* note 21, at 33, 46. Furthermore, economic inflation resulted in the increasing irrelevance of the transferors' retained interest in the fixed money rents on lands transferred earlier. *See* R. MEGARRY & H. WADE, *supra* note 21, at 789; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 24 (1962).

40. "By a paradox of history the relationship of landlord and tenant, originally no tenure at all, is now the only tenure which has any practical importance." R. MEGARRY & H. WADE, *supra* note 21, at 46.

most of the then usual expectations of parties to leasing transactions.⁴¹ Later, when promises became routinely enforceable as contracts,⁴² promises between landlord and tenant were not excepted.⁴³ Contract theory not only provided a supplementary basis for the enforcement of the rights and duties incident to privity of estate; it also supplied a basis for the creation and enforcement of many other landlord and tenant expectations.⁴⁴ It is only necessary that the landlord or tenant successfully bargain for the right to enforce such other expectations.⁴⁵ When the privity of estate or conveyance conception proved too inflexible to satisfy the multitudinous diversity of landlords' and tenants' desiderata, contract theory was applied, not merely as a parallel basis for enforcing the fundamental property relation, but as a superaddition to it. Thus arose the present dual relation of property and contract between landlord and tenant.

III. THE BASIC CONVEYANCE-THEORY INTERPRETATION

The most basic observation that can be made about the landlord-tenant relation is that it is a relationship of exchange: rent is exchanged for possession, or in the more modern view, rent is exchanged for possession-plus-services.⁴⁶ In this section, the conveyance-theory interpretation of the basic rent-for-possession exchange will be considered. The objective will be to show the grounds upon which the tenant's right to possession and the landlord's right to rent can be enforced without resort to contract theory and without assuming the existence of any contract at all between the parties. In the following section, the role of contract law in the traditional lease conception will be considered.

41. See RESTATEMENT (SECOND) OF PROPERTY, introduction 3-4 (1977).

42. See *supra* note 33.

43. Ames, *Assumpsit for Use and Occupation*, 2 HARV. L. REV. 377, 378-79 (1889).

44. For example, tenant rights to repairs and services not otherwise required of the landlord by law, provisions for continuation or noncontinuation of the lease on condemnation or destruction of the premises, and the sharing of any proceeds or awards in condemnation. Commercial leases, sometimes running to several dozen pages, demonstrate how far parties may seek by contract to secure advantages not accorded them as incidents of privity of estate alone.

45. See *infra* note 222. But see *infra* text following note 222.

46. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); cases cited *infra* notes 219 & 238.

Professors Quinn and Phillips argue that the law's failure to accord the services portion of a lease the same degree of importance as possession has resulted in a two-level exchange relationship, consisting of a possession level and a services level. The subordination of services to a separate level is in turn argued to be the source of much of the injustice of landlord-tenant law today. See Quinn & Phillips, *supra* note 11, at 233-34.

Specifically, the interplay between the conveyance and contract aspects of lease transactions will be described as it pertains to two aspects of landlord-tenant law which have recently been the subject of notable changes: mitigation by the landlord after a tenant's abandonment or forfeiture, and the assurance of tenants' rights to services provided by an implied warranty of habitability and dependency of lease covenants. The final section will address the question of whether any function is served by insisting that leases create a dual relation.

Under the conveyance theory, the tenant's right to possession is enforced as though the tenant has an ordinary property right in the premises. For example, when a landlord leases to a tenant for a term of five years,⁴⁷ the common law conceives the result to be a conveyance to the tenant of a property interest in the land—a property interest designed to last five years.⁴⁸ Under this theory, the tenant receives the entire property interest, the right to possession for the entire five years, all at once at the time of conveyance.⁴⁹ The conveyance-theory conception of a leasehold is thus an application of the basic common-law conception of possessory interests in land generally. Such interests or "estates" may be created so as to continue potentially forever or for lesser periods of time, such as a life estate measured by the lifetime of a person.⁵⁰ Just as the owners of land can divide up their rights to possession spatially (for example, east half to *X*, west half to *Y*), they can also

47. Here, and throughout the discussion, the assumption is being made that the leasehold in question is a term or estate for years. For most purposes, other than duration, the periodic tenancy is treated the same as an estate for years, *see* 1 A.L.P., *supra* note 17, at § 3.23, and though the tenancy at will is for many purposes treated differently, *see id.* at § 3.28-3.31, it is a comparatively infrequent interest in most states and will be disregarded entirely.

Inasmuch as this is a discussion of the common law conception of leasing, statutory tenancies, and other peculiar effects of rent control, rent stabilization and the like are beyond the scope of this Article. Rent laws are essentially superadditions to, not abrogations of, the basic common law precepts; accordingly, the present discussion is also introductory to their subject matter.

48. *See* Commonwealth v. Monumental Properties, 459 Pa. 450, 470-72, 329 A.2d 812, 822-24 (1974) and cases cited therein. *See also* Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407, 414 (D.C. Cir. 1975); Sagamore Corp. v. Willcutt, 120 Conn. 315, 319, 180 A. 464, 465 (1935); Brown's Adm'rs v. Bragg, 22 Ind. 122 (1864); Becar v. Flues, 64 N.Y. 518, 520 (1876); Siegel, *supra* note 11 at 658 n.8. *See generally* 1 A.L.P., *supra* note 17, at § 3.11. Compare the language quoted from Williston, *supra* note 30 with Whitaker v. Hawley, 25 Kan. 674, 687 (1881) ("[A] lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a purchase single and completed of a term in lands.").

49. *See supra* note 48.

50. *See* 2 F. POLLACK & F. MAITLAND, *supra* note 31, at 10-11.

divide up their rights to possession in terms of time (for example, during *X*'s lifetime to *X*, remainder of perpetuity to *Y*).

Thus, in line with the common-law conception of the divisibility of estates generally, we have the conception that a lease effects a temporal division in the landlord's ownership interest. Following this theory, the tenant's right to possession is just as complete during the stipulated term of the lease as a fee simple owner's interest would be in perpetuity. The only difference is duration—"a leasehold estate . . . during the life of the lease . . . for all 'practical purposes is equivalent to absolute ownership.'"⁵¹ The landlord cannot interfere with the tenant's enjoyment during the lease term just as a grantor of a fee simple cannot invade the lands of the grantee. If the lease is for five years, then the tenant "owns" possessory rights, that is, the right to exclude others, for the five-year period.

The important point is that the right to possession does not move to the tenant in a continuous flow from the landlord over the course of the lease term.⁵² Rather, the right to possession for the whole term passes to the tenant as a unitary block at the commencement of the lease.⁵³ Thereafter, the landlord becomes, for purposes of possession, like any

51. *Baker v. Clifford-Mathew Inv. Co.*, 99 Fla. 1229, 1232, 128 So. 827, 829 (1930). Because the leasehold tenant is not the perpetual owner and the landlord has rights to eventual possession, the tenant is constrained to avoid injuring what will one day pass to the successor in possession. In other words, the tenant is required to refrain from committing waste. *See, e.g., People v. May*, 46 Ill. 2d 120, 262 N.E.2d 908 (1970) (arson by tenant). For discussions of the doctrine of waste, see A.L.P., *supra* note 17, at §§ 20.1-23; R. POWELL, *supra* note 9, at §§ 636-650. *See also infra* text accompanying notes 80-81 & 227.

52. *See supra* note 48 and accompanying text.

53. *Id.* Under the obsolete doctrine of *interesse termini*, the tenant had to actually enter into possession to acquire the right of possession itself. Prior to actual possession, the tenant's interest was characterized as an "interest in the leasehold term," or an *interesse termini*. The distinction, which apparently grew out of the rigorously possession-oriented idea of property rights, should now be irrelevant. *See C. MOYNIHAN, supra* note 39, at 67, 166-67; H. UNDERHILL, *LANDLORD AND TENANT* 241-42 (1909). *See also James v. Kibler's Adm'r*, 94 Va. 165, 174, 26 S.E. 417, 419 (1896).

More recently, courts have held that a lease need not convey a present interest but may create a future possessory interest, a leasehold to commence in the future. *In re Wonderfair Stores, Inc.*, 511 F.2d 1206 (9th Cir. 1975); *Imperial Water Co. No. 8 v. Cameron*, 67 Cal. App. 591, 228 P. 678 (1924); *Motels of Md., Inc., v. Baltimore County*, 244 Md. 306, 223 A.2d 609 (1966). It is debatable whether there can now be privity of estate without possession by the tenant. *See Imperial Water Co. No. 8 v. Cameron*, 67 Cal. App. 591, 228 P. 678 (1924). *Cf. Arthur Treacher's Fish & Chips v. Chillum Terrace Ltd.*, 272 Md. 720, 729, 327 A.2d 282, 286-87 (1974) ("when a lessee breaches a lease agreement prior to entering into possession, he cannot be held liable for rent, because the leasehold estate has never come into existence as a present possessory interest, and rent is an incident of the leasehold estate"). *Accord Deming v. Scoville*, 220 Ala. 224, 125 So. 683

other stranger to the title⁵⁴ with the same concomitant duty to respect the tenant's possession as any other third party.⁵⁵ The landlord who violates this duty is subject to actions in trespass, nuisance, and ejectment by the tenant.⁵⁶ From the outset of the term and for its duration, the tenant owns the possessory interest.

The tenant's obligation to pay rent is more difficult to explain under the conveyance theory, but this obligation can likewise be interpreted to result from a purely "property" interest in the land, in this case a property interest held by the landlord. Unlike the tenant's possessory property interest, the landlord's property interest in the rent is not possessory, but rather an "incorporeal" interest in the land,⁵⁷ similar to an easement⁵⁸ or profit a prendre.⁵⁹ These interests are referred to as "incorporeal" because they do not carry a right to possession.⁶⁰

Rent is a kind of incorporeal interest consisting of the right to a return rendered out of the benefits of possession, that is, out of the benefits which a possessor of land is deemed to get purely by virtue of the possession.⁶¹ Depending on whether the possessor is making valuable

(1930); *James v. Kibler's Adm'r*, 94 Va. 165, 26 S.E. 417 (1896). See generally R. SCHOSHINSKI, *supra* note 17, at 23-24; *infra* note 154.

54. The landlord may, of course, reserve special privileges or rights if these are specified in the lease, and the landlord is not a stranger to title with respect to waste. See *supra* note 51.

55. See, e.g., *Tooke v. Allen*, 85 Cal. App. 2d 230, 192 P.2d 804 (1948) (trespass and nuisance); *Ivey v. Davis*, 81 Ga. App. 598, 59 S.E.2d 256 (1950) (trespass); *Winchester v. O'Brien*, 266 Mass. 33, 164 N.E. 807 (1929) (nuisance); *Chelsea Hotel Corp. v. Gelles*, 129 N.J.L. 102, 28 A.2d 172 (1942) (trespass); *Golde Clothes Shop, Inc. v. Loew's Buffalo Theatres, Inc.*, 236 N.Y. 465, 141 N.E. 917 (1923) (ejectment); 1 A.L.P., *supra* note 17, at § 3.38. See also *infra* text accompanying notes 86-89.

56. See *supra* note 55.

57. See 2 A.L.P., *supra* note 17, at § 9.41. See also *Smith v. Smith*, 56 Hawaii 295, 303, 535 P.2d 1109, 1115-16 (1975) and cases cited therein; 2 F. POLLACK & F. MAITLAND, *supra* note 31, at 125-33.

58. For example, a right to use the land for a specific purpose, such as a right of passage.

59. For example, a right to sever a substance such as coal or timber from the land.

60. *Valley Nat'l Bank v. Avco Dev. Co.*, 14 Ariz. App. 56, 58-59, 480 P.2d 671, 673-74 (1971). Technically, only a right to rent payments unconnected with a lease, the so-called rent-charge, is truly "incorporeal." Rent reserved under a lease, the "rent-service," is "incident to the reversion," and, because the reversion itself is probably not an incorporeal interest, see H. CHALLIS, *supra* note 37, at 51-53; 2 F. POLLACK & F. MAITLAND, *supra* note 31, at 129, neither strictly speaking is the incident rent. See R. MEGGARY & H. WADE, *supra* note 21, at 693, 789. This definitional distinction, however, is more confusing than significant and, following the example of the AMERICAN LAW OF PROPERTY, see 2 A.L.P., *supra* note 17, at § 2.41, will be ignored.

61. "Rent may be defined in a general way, as a tribute or return of a certain amount, which is regarded as *issuing out of the land, as part of its actual or possible profits*, and is payable by one having an estate in the land, as compensation for his use and enjoyment of the land . . ." 2 H.

use of the land or not, this benefit "by virtue of the possession" may or may not really accrue to the possessor. In either event, it is nevertheless *deemed* to accrue to the possessor because possession itself is valuable.⁶² The compensation that the tenant is to pay out of these benefits issued by the land is referred to as "rent,"⁶³ and the incorporeal interest which gives a person the right to a part of this putative benefit is also called a rent.⁶⁴

The incorporeal property interest called rent, which is the property-right source of the landlord's right to payments, is created by a so-called "reservation" in the lease. In making a lease, the landlord does not have to part with the entirety of the ownership interest. The landlord may hold back or "reserve" part of the ownership. Indeed, the landlord always holds back a right to future possession, the so-called reversion.⁶⁵ He may, however, also retain other rights, such as incorporeal rights, which are not inconsistent with the passing of possession to the tenant. For example, the landlord may reserve a right of passage across the land, or a right to sever timber. Or, as in the case of a mineral lease with a royalty, the landlord may reserve the right to receive every fifth barrel of oil produced by the land. Comparably, a landlord may reserve a right to receive a stipulated monetary amount out of the benefits that the land is deemed to yield during specific time periods, for example, \$500 per month for each month of the lease term. Although the subject matter of reserved "rent" is certainly less palpable

TIFFANY, *supra* note 32, at 1459 (emphasis added). *Accord* *Hall v. City of Baltimore*, 252 Md. 416, 424, 250 A.2d 233, 238 (1969); *Graves v. Berdan*, 29 Barb. 100, 102 (N.Y. Sup. Ct. 1859), *aff'd*, 26 N.Y. 498 (1863); 1 H. TIFFANY, *supra* note 21, at § 168.

62. When the land is not being used by the possessor, or if it is being underutilized, the accruing benefit seems rather hypothetical. Even in the cases of total nonuse, however, the land's potential is nevertheless continuously available to the possessor. The potential value of possession is equal to the fair rental value of the land and is deemed to be continuously received by the possessor, even though the possessor, for reasons of his own, decides to squander the value by letting the land lie fallow or putting it to a less than optimal use. *See* 1 H. TIFFANY, *supra* note 21, at § 182b. *See also infra* notes 149 & 151 and accompanying text. *But cf.* *Williams v. Puccinelli*, 236 Cal. App. 2d 512, 521, 46 Cal. Rptr. 285, 290 (Dist. Ct. App. 1965) (no value received by tenant who was "never able to actually use the premises . . . during the short period in which [tenant] was in constructive possession thereof.").

63. *In re Daben Corp.*, 469 F. Supp. 135, 141 (D.P.R. 1979).

64. 2 A.L.P., *supra* note 17, at § 9.41. Tiffany identifies two other distinct senses in which the word "rent" is used: to refer to particular payments or installments, and to refer to the proceeds received. 2 H. TIFFANY, *supra* note 32, at 1459-60.

65. The possibility of a perpetual lease or "lease in fee" is not addressed in this Article. *See* *McLean v. United States*, 316 F. Supp. 827, 829-31 (E.D. Va. 1970) (perpetual leases not favored in the law).

than the subject matter of reserved easements or profits a prendre, these different types of incorporeal interests are analogous.⁶⁶ Like other incorporeal interests, rent is a property interest in the land itself, reserved and held by the landlord, and this reserved property right to share in the benefits of possession exists irrespective of any express contractual promise by the tenant to pay rent.⁶⁷

Although the landlord leases to the tenant with a reservation of a portion of the benefits produced, the landlord does not automatically get the reserved benefit. Benefits of possession accrue to the possessor by virtue of possession. The tenant is the possessor, and therefore it is the tenant who will, in the first instance, receive the benefit of possession. If, however, the landlord has reserved a monetized portion of the total possessory benefit in leasing to the tenant then, when the tenant "receives" the whole possessory benefit, he receives in effect something belonging in part to the landlord. Thus, the tenant becomes personally obligated to turn over to the landlord that portion of the received benefit which belongs to the landlord. In this way the landlord's incorporeal rent interest in the land is, over time, converted into a chose in action against the tenant.⁶⁸ Under common law pleading, an action in debt was the appropriate form of action for enforcing the duty to pay.⁶⁹ The gist of this action was that the defendant held a sum of money

66. "The word rent is derived from 'render,' and the name thus emphasizes the distinction between rent, which is actually rendered or paid by the tenant, and a *profit a prendre*, which is taken by the party entitled thereto, without the active intervention of the tenant." 2 H. TIFFANY, *supra* note 32, at 1459. *See also supra* note 61.

67. "[R]ent is not the result of an ordinary contract for future payments of money The land is the debtor, 'yielding and paying' the rents at the stipulated intervals; the covenant to pay is an accessory one." *Hall v. City of Baltimore*, 252 Md. 416, 424, 250 A.2d 233, 238 (1969). *See also supra* note 29. Generally, the creation of a landlord-tenant relation will itself result in a contract, implied in fact, to pay rent. *See supra* note 21.

68. While the right to unaccrued rent has been considered an incorporeal interest in the land, accrued and unpaid rent is treated as a chose in action. *See Smith v. Smith*, 56 Hawaii 295, 304, 535 P.2d 1109, 1116 (1975); 2 A.L.P., *supra* note 17, at § 9.41. In a number of American jurisdictions, however, even unaccrued rent is called a chose in action. *See 49 AM. JUR. 2D Landlord and Tenant* § 515 (1970). The loss of the distinction between the respective characters of accrued and unaccrued rent should not be of any practical significance since the abolition of the forms of action; in particular, the substantive requirements for the recuperatory action in debt.

69. *See Gunn v. Scovil*, 4 Day 234 (Conn. 1810); 7 W. HOLDSWORTH, *supra* note 9, at 261-75; Ames, *supra* note 43. The action of debt was also proper for enforcement of contract-based obligations of the tenant, as well as the conveyance-based constructive "real covenant" or covenant "in law" to pay reserved rent. *See Paradine v. Jane*, Aley 26, 27, 82 Eng. Rep. 897, 898 (1647); *Walker's Case*, 3 Co. Rep. 22a, 76 Eng. Rep. 676-77 (1587). *See generally* 1 H. TIFFANY, *supra* note 21, at 960-64, 1030-34; *supra* note 21.

belonging to the plaintiff.⁷⁰

The important point is that a sum of money could become due, and the action in debt was available even if the tenant never, even impliedly, promised or contracted to pay a penny.⁷¹ The landlord's right to the rent payments could exist purely as a property interest whenever, by "reserving" a rent, he withheld from the tenant a part of the total interest that he held in the land.

Several important principles of landlord-tenant law follow from this conception of the leasing transaction:

1. *Failure to pay the rent does not affect the tenant's right to possession.*⁷² In the common-law conception, a failure to pay the rent cannot affect the tenant's right of possession because, by the time a rent default occurs, the tenant already has received a right of possession, as a unitary block, for the entire term of the lease.⁷³ Hence, the tenant's right of possession is independent from the performance of the obligation to pay rent.

The landlord is thus in the same position as any other seller who

70. See 2 W. HOLDSWORTH, *supra* note 9, at 366-68; F. MAITLAND, *supra* note 15, at 31, 51. Even though the action of debt was for recovery of a sum of money, the modern action most conceptually similar is replevin. The landlord would, in concept, "replevy" rents captured by the tenant but belonging under reservation to the landlord.

At an even earlier time, the proper forms of action for the recovery of rents by a freeholder were the so-called real actions, such as the assize of novel disseisin—a functional precursor of modern ejectment actions. In theory, non-payment by the tenant "disseised" the landlord of the rents. See 7 W. HOLDSWORTH, *supra* note 9, at 262-63; 2 F. POLLACK & F. MAITLAND, *supra* note 31, at 125-26; 2 H. TIFFANY, *supra* note 32, at 1507-08.

71. See 2 H. TIFFANY, *supra* note 32, at 1509-10; *supra* note 67. See also 2 F. POLLACK & F. MAITLAND, *supra* note 31, at 126-27. In modern cases, this phenomenon is most clearly seen in the liability of assignees in possession who have not "assumed" the obligations of the lease. See *infra* note 107 and accompanying text; but see *supra* note 21.

72. See e.g., *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919 (4th Cir. 1976); *Hyde v. Bains*, 247 Ala. 8, 22 So. 2d 324 (1945); *Klinger v. Peterson*, 486 P.2d 373 (Alaska 1971); *Brown's Adm'rs v. Bragg*, 22 Ind. 122 (1864); *Western Rebuilders & Tractor Parts, Inc. v. Felmley*, 237 Or. 191, 391 P.2d 383 (1964); 1 A.L.P., *supra* note 17, at § 3.94. Cf. *Continental Grain Co. v. Afram Bros.*, 35 Wis. 2d 676, 151 N.W.2d 685 (1967) (lease of vessel). At common law, when a feudal tenant defaulted on promised services, the feudal lord had no procedure for regaining possession and was remitted to the power of "distress," that is, the right to seize chattels found on the land to satisfy the claim for rent. See S. MILSOM, *supra* note 30, at 95-96.

73. See *supra* note 72 and text accompanying notes 47-56. See also D. DOBBS, *REMEDIES* 857-58 (1973). For an analogous rule applicable to sales of real estate in the absence of an implied vendors' lien, see M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* 792-94 (1975).

transfers title to a buyer on credit.⁷⁴ If a landlord wishes to use the leasehold as collateral for the payment of the original purchase price, the lease must stipulate the retention of a security interest in the leasehold. This security interest, like any other, is a qualification of the tenant's title, making the right to possession defeasible in case the rent is not paid.⁷⁵ The right to repossess the leased premises may take the form of a special limitation, analogous to a fee simple determinable, or it may be a condition on the term, analogous to a fee simple on condition subsequent, enforceable by the right of entry.⁷⁶ Only on the basis of retained interests, such as a right of entry or special limitation, may the landlord assert a right of forfeiture against the tenant.

It should be observed that at common law the tenant's right to possession cannot be affected by the failure of the tenant to perform any other obligations, whether created by covenant or otherwise, unless expressly provided in the lease.⁷⁷ Thus, it is typical today for leases to provide expressly for termination by special limitation or condition in case the tenant defaults in the payment of rent or otherwise.⁷⁸ In a number of states, the common-law rule has been modified by statute so that a default in the payment of rent or certain other defaults will con-

74. See *Brown's Adm'rs v. Bragg*, 22 Ind. 122 (1864). Cf. U.C.C. § 2.702(a) (extremely limited statutory right of a seller to reclaim goods after receipt by the buyer).

75. See U.C.C. § 9-503; D. DOBBS, *supra* note 73, at 857-58.

76. See *Burnee Corp. v. Uneeda Pure Orange Drink Co.*, 132 Misc. 435, 230 N.Y.S. 239 (App. Term 1928). See generally 1 A.L.P., *supra* note 17, at § 3.89; R. SCHOSHINSKI, *supra* note 17, at 377-85; Niles, *Conditional Limitations in Leases in New York*, 11 N.Y.U. L. Rev. 15 (1933); Annot., 118 A.L.R. 283 (1939). Occasionally, particularly in leases, the special limitation is called a conditional limitation. See M. FRIEDMAN, *PREPARATION OF LEASES* 43-45 (1962); 2 W. WALSH, *COMMENTARIES ON LAW OF REAL PROPERTY* § 193 (1947). Such a limitation, like a special limitation on a freehold, for example, a fee simple determinable, automatically terminates the lessee's estate. On the other hand, a condition, like a condition subsequent, confers only a right of entry or power of termination which has no terminating effect on the lessee's estate until exercised by the lessor, either by reentry or ejectment. See *Conger v. Conger*, 208 Kan. 823, 828-39, 494 P.2d 1081, 1086-87 (1972); 1 A.L.P., *supra* note 17, at § 3.89; R. SCHOSHINSKI, *supra* note 17, at 37-85; Annot., 118 A.L.R. 283 (1939). Both types of provisions operate to effectuate a forfeiture of the tenant's interest following the occurrence of the stipulated triggering events.

77. See, e.g., *Greenfeld v. Supervisors' Dist. No. 3*, 205 F.2d 323 (5th Cir. 1953) (violation of use restriction); *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975) (no express covenant in forfeiture clause); *Keller v. Model Coal Co.*, 142 W. Va. 597, 97 S.E.2d 337 (1957) (no forfeiture provisions); 1 A.L.P., *supra* note 17, at § 3.94. There were minor exceptions with only historical significance, such as the possibility of a tortious alienation. See Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 *FORDHAM L. REV.* 223, 258-59, 259 n.116 (1976).

78. See 1 A.L.P., *supra* note 17, at § 3.94; 2 M. FRIEDMAN, *supra* note 3, at § 16.2.

stitute grounds for defeasance of the tenant's estate.⁷⁹ One such statute, the Statute of Gloucester,⁸⁰ was enacted as early as 1278, and provided for termination in case the tenant committed waste. The Statute of Gloucester has been reenacted or received as a part of the common law in many states.⁸¹ In the absence of a statute or an express provision in the lease, however, a defaulting tenant is still secure in his possession.⁸²

2. *Eviction of the tenant by the landlord, or one who has a better title than the landlord, terminates the obligation to pay rent.*⁸³ This rule follows obviously enough from the analytical basis of the common-law duty to pay reserved rent; namely, that the tenant by possession receives a benefit, a portion of which belongs to, and must be rendered to the landlord.⁸⁴ If the tenant is evicted from possession by the landlord or by a paramount title holder, then the tenant no longer receives the putative benefit of possessor as such; that is, the tenant no longer receives anything belonging to the landlord. Either the landlord receives the benefit or, in case of eviction by a paramount title holder, the rightful beneficiary receives it.⁸⁵

Incidentally, eviction by the landlord without some right to evict is a

79. *E.g.*, MASS. ANN. LAWS ch. 139, § 19 (Law Co-op 1981); N.Y. REAL PROP. ACTS §§ 711, 715 (McKinney 1979). For a compendium, see RESTATEMENT (SECOND) OF PROPERTY § 12.1, statutory note 1a (1977).

80. 6 Edw. 1 ch. 5 (1278), *repealed by* Repeal Act, 42 & 43 Vict., ch. 59 (1879).

81. For a compendium of authorities, see 5 R. POWELL, *supra* note 9, at § 650. *See also infra* note 227.

82. Typically, an express provision in the lease or a statute now provides for defeasance. *See supra* note 78. Generally, therefore, a tenant who defaults is subject to eviction. Nonetheless, in the common-law conception of leases, defeasibility is exceptional and must be viewed as such if the contours of the conception are to be understood.

83. *E.g.*, *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969) (constructive eviction); *Morris v. Kettle*, 57 N.J.L. 218, 30 A. 879 (1895) (actual eviction from a part of premises); *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917) (actual eviction); 1 A.L.P., *supra* note 17, at § 3.52. "Eviction" is used in this Article in the narrow technical sense, referring only to ousters by the landlord, through his connivance, or by a holder of paramount title. *National Furniture Co. v. Inhabitants of Cumberland County*, 113 Me. 175, 179, 93 A. 70, 71-72 (1915); 49 AM. JUR. 2D, *Landlord and Tenant* § 300 (1970).

84. *See supra* text accompanying notes 57-71.

85. The tenant's contractual duty to pay rent, based on his promise to pay, would likewise be discharged by an eviction, since an eviction would surely constitute a material breach of the implied covenant of quiet enjoyment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981); RESTATEMENT OF CONTRACTS § 276 (1932); 1 A.L.P., *supra* note 17, at §§ 3.48, 3.50; *infra* note 278. Nevertheless, relieving the tenant of his obligation to pay rent because of an eviction does not depend on the existence or breach of an implied covenant of quiet enjoyment. *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 117 N.E. 579 (1917).

tort.⁸⁶ If the landlord commits the tort of eviction, he is liable for damages to the tenant because such eviction constitutes an interference with possession rightfully belonging to the tenant.⁸⁷ Further, trespasses and nuisances committed by the landlord are torts, which are actionable by the tenant.⁸⁸ Nevertheless, if the landlord's wrongful acts fall short of depriving the tenant of possession, privity of estate—and hence the obligation for reserved rent—is not affected.⁸⁹

3. *Ouster of the tenant by strangers to the title, destruction of buildings on the premises, or any other event detracting from the tenant's use does not affect the rent obligation.*⁹⁰ Ouster of the tenant by a stranger to the title is not a technical "eviction," which refers only to ouster by the landlord or a paramount title holder.⁹¹ Absent a true eviction, as so defined, a mere wrongful ouster does not affect the obligation to pay reserved rent.⁹² Likewise, it is well-established at common law that neither partial nor total destruction of buildings or improvements on the premises will in any way affect a tenant's liability for rent,⁹³ although the rule is subject to numerous statutory and case-law exceptions.⁹⁴

86. *E.g.*, *Schuler v. Bordelon*, 78 Cal. App. 2d 581, 177 P.2d 959 (1947); 1 A.L.P., *supra* note 17, at §§ 3.28, 3.49, 3.52. *See also supra* text accompanying notes 55-56; *infra* note 87.

87. *Kearns v. Sparks*, 296 S.W.2d 731 (Ky. 1956); *Brown v. Holyoke Water-Power Co.*, 152 Mass. 463, 25 N.E. 966 (1890); *Slater Realty Corp. v. Meys*, 137 N.J.L. 263, 59 A.2d 650 (1948); *supra* note 86.

88. *See supra* note 55.

89. *E.g.*, *Donaldson v. Mona Motor Oil Co.*, 193 Minn. 283, 258 N.W. 504 (1935). *See also Talbot v. Citizens' Nat'l Bank*, 389 F.2d 207 (7th Cir. 1968); 1 A.L.P., *supra* note 17, at § 3.50; 2 H. TIFFANY, *supra* note 32, at 1501. For a discussion of the recent trend to recognize certain lease obligations as "dependent," see *infra* text accompanying notes 262-313.

90. *Paradine v. Jane*, Aley 26, 82 Eng. Rep. 897 (1647) (dispossession in civil war) is one of the earlier landmarks. *See also Bowers v. Sells*, 125 Ind. App. 324, 123 N.E.2d 194 (1954); *Katz v. Duffy*, 261 Mass. 149, 158 N.E. 264 (1927); *Stewart v. Lawson*, 199 Mich. 497, 165 N.W. 716 (1917); Annot., 1 A.L.R. 4th 849 (1980); cases cited *infra* note 93. *See generally* 1 A.L.P., *supra* note 17, at § 3.103; M. FRIEDMAN, *supra* note 3, at § 9.1.

91. *See supra* note 83.

92. *See supra* note 90. Nor would such an ouster of the tenants violate the implied warranty of quiet enjoyment. *See supra* note 31.

93. *E.g.*, *Sheets v. Selden*, 74 U.S. 416 (1868); *Cook v. Anderson*, 85 Ala. 99, 4 So. 713 (1888); *Osterling v. Sturgeon*, 261 Iowa 836, 156 N.W.2d 344 (1968); *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944); *Anderson v. Ferguson*, 17 Wash. 2d 262, 135 P.2d 302 (1943). *See generally* 1 A.L.P., *supra* note 17, at § 3.103; M. FRIEDMAN, *supra* note 3, at § 9.1.

94. *E.g.*, *Graves v. Berdan*, 26 N.Y. 498 (1863); *Albert M. Greenfield & Co. v. Kolep*, 380 A.2d 758 (Pa. 1977); N.Y. REAL PROP. LAW. § 227 (McKinney 1968); 1 A.L.P., *supra* note 17, at § 3.103. Total destruction of the demised premises, for example, when a destroyed building has

Of course, after such an ouster or other use-impairing event it cannot easily be said that the tenant still receives the full possessory benefit from the land. Hence, after such events, it is harder to say that the tenant receives something out of which he must render rents belonging to the landlord.⁹⁵ In the case of ouster, however, the tenant does have actions in trespass to recover damages⁹⁶ and mesne profits⁹⁷ and in ejectment.⁹⁸ Indeed, it is because the tenant has an action in ejectment that, under the common-law conceptualization, the tenant is treated as an owner of an interest in land.⁹⁹ As such an owner, it arguably follows that it is the tenant's responsibility to bring ejectment actions against dispossessors and to maintain the premises so that the premises are actually useful and yield the expected potential benefit.¹⁰⁰ These ideas of the tenant's position reflect, of course, the doctrine of caveat emptor, albeit writ rather large. They do not, however, necessarily follow from the conveyance theory. Even viewing the lease as a conveyance transaction, the law still may choose to impose a continuing responsibility upon the landlord for the usefulness of the land after the tenant agrees to take possession. Specifically, the conveyance may, that is, be accompanied by an implicit warranty of habitability.¹⁰¹

been only partially leased to the tenant, is a typical common-law exception which constitutes grounds for termination of the lease and extinguishes the duty to pay rent. The tenant's duty to pay rent after destruction is often affected by lease provisions.

95. Compare *supra* text accompanying notes 57-71 with *infra* note 151. See also note 100.

96. See cases cited *supra* notes 32 & 55.

97. E.g., *Irwin v. Nolde*, 176 Pa. 594, 35 A. 217 (1896); *Creswell Ranch & Cattle Co. v. Scoggins*, 15 Tex. Civ. App. 373, 39 S.W. 612 (1897). See also Annot., 12 A.L.R.2d 1192, 1203-14 (1950).

98. See *Heroux v. Katt*, 76 R.I. 122, 68 A.2d 25 (1949). See also Annot., 12 A.L.R.2d 1192, 1197-99 (1950). It has even been held that only the tenant, not the landlord, has standing to maintain ejectment. See *Western N.Y. & P. Ry. v. Vulcan Foundry & Mach. Co.*, 251 Pa. 383, 96 A. 830 (1916).

99. See *supra* note 15. See also R. MEGGARY & H. WADE, *supra* note 21, at 1133-34; *supra* text accompanying notes 15 & 33-37.

100. See *infra* note 151 and text accompanying note 225. The issue may also be couched, and resolved, in terms of contractual allocation-of-risk analysis. For example, in the early landmark case of *Paradine v. Jane*, Aleyn 26, 82 Eng. Rep. 847 (1647) the court observed that "as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses." *Id.* at 27, 82 Eng. Rep. at 898. In order to reconcile its interpretation of the parties' allocation of risk with the notion that the rent issues out of the land, the *Paradine* court cited an earlier case which adopted the fiction that, if part of the leased land is destroyed, "then entire rent shall issue out of the remainder." *Taverner's Case*, 1 Dyer 56a, 73 Eng. Rep. 123 (1544). For a remedy, the tenant was remitted to recourse against the wrongdoers who deprived him of his benefit. *Paradine v. Jane*, Aleyn at 26, 82 Eng. Rep. at 897.

101. See *infra* text accompanying notes 225-61.

IV. THE INTERPLAY BETWEEN CONVEYANCE AND CONTRACT

The pure conveyance-theory paradigm for landlords' and tenants' rights and duties demonstrates that contractual promises are not necessary ingredients of an enforceable landlord-tenant relationship. Nevertheless, contractual promises are usual ingredients of the relationship, and it is the interplay between the conveyance and contractual aspects of leases that gives the landlord-tenant relationship much of its unique character.

In many cases, the dual nature of leases can be ignored because it is irrelevant to the outcome of the particular controversy at hand. In actions between lessor and lessee, for example, to enforce the basic rent-for-possession exchange, both the conveyance and contract aspects of leases relate to the very same subject matters and, typically, require exactly the same performance behavior. The fact that the landlord-tenant relationship is a dual relationship is obscured and thus can be safely overlooked. In other cases, however, such as when the tenant abandons the premises or makes an assignment of the lease, recognition of the dual nature of leases is the key to the outcome.

An assignment by the tenant separates the normally intertwined obligations of privity of estate and privity of contract, revealing them as concurrent yet different grounds for enforcement of the rent-for-possession exchange.¹⁰² Because an assignment causes this separation, it usefully illuminates the distinct existences of conveyance-based duties and contract-based duties.

Fundamentally, an assignment is a conveyance by the tenant of his entire proprietary interest or estate in all or part of the leased premises.¹⁰³ Thus, an assignment eliminates the privity of estate between

102. See *Ellingson v. Walsh*, 15 Cal. 2d 673, 675, 104 P.2d 507, 509 (1940); *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 73 W. Va. 427, 430, 80 S.E. 781, 783 (1914); cases cited *infra* notes 106-08.

103. *E.g.*, *J.D. Cornell Millinery Co. v. Little-Long Co.*, 197 N.C. 168, 170, 148 S.E. 26, 27 (1929); *Davis v. Vidal*, 105 Tex. 444, 447, 151 S.W. 290, 293 (1912). See generally 1 A.L.P., *supra* note 17, at §§ 3.56-.57, 3.61-.63; R. SCHOSHINSKI, *supra* note 17, at 552-74. A tenant also may transfer the possession of the demised premises for a period shorter than the time remaining in his own term, thereby retaining a portion of his proprietary interest in the premises. This latter type of transfer is a sublease, as distinguished from an assignment.

A sublease is simply a lease from a lessee. It is little different from any other lease. By subleasing, the transferor-tenant remains the tenant of the prime-landlord and becomes the landlord of the subtenant, creating an ownership hierarchy. Subleasing is thus the modern version of subinfeudation. See *supra* note 37. The sublease does not affect either the privity of estate or the contract obligations existing between the original landlord and tenant under the prime lease.

the assignor-tenant and the landlord while establishing that same privity of estate between the assignee and the landlord. The legal effects of an assignment are in part a reflection of this shifting of the privity of estate to the assignee.

The usual effect of an assignment by the tenant is to give the landlord two persons from whom he may recover the rent: the assignor-tenant and the assignee-tenant. The landlord may recover rent from the assignor-tenant because, as a matter of contract law, assignments do not ipso facto relieve an assignor of the contractual duty to perform as promised.¹⁰⁴ Accordingly, even after an assignment of a lease, the assigning tenant remains liable on the contractual promise¹⁰⁵ to pay rent made expressly or impliedly in the original lease.¹⁰⁶ For purposes of

Rather, it creates a second and simultaneous set of privities of estate and contract between the original tenant and the subtenant.

By contrast, an assignment substitutes the assignee in the assignor's place with respect to original privity-of-estate obligations. It is the modern leasehold version of transfers by substitution, *see supra* note 37, and therefore corresponds to the modern conveyance of fee simple estates.

Because the designation of a transfer as a sublease or assignment is substantively significant—affecting the question of who is liable to whom and for what, courts should probably seek to ascertain and follow the parties' intentions in such matters. *Jaber v. Miller*, 219 Ark. 59, 239 S.W.2d 760 (1951). Courts, however, often ignore the intent of the parties. Rather, a transfer is designated as a sublease only if the transferor retains a sufficient interest in the premises to remain in privity of estate with the landlord. A minority of jurisdictions will recognize a sublease based upon the transferor's retention of a mere right of entry for condition broken. To create a sublease under the majority rule, however, the retained interest must be a reversion, for without a reversion, the transferor has no "estate" and thus cannot be in privity of estate with the original landlord. *See generally* authorities cited *supra*; *Ferrier, Can There be a Sublease for the Entire Unexpired Portion of a Term?*, 18 CALIF. L. REV. 1 (1929); *Wallace, Assignment and Sublease*, 8 IND. L.J. 359 (1933).

In addition to conveying the assignor-tenant's estate, an assignment may also, depending on the parties' intentions, include: an assumption by the assignee of the assignor's contractual obligations under the lease, *see, e.g.*, *Packard-Bamberger & Co. v. Maloof*, 83 N.J. Super. 273, 199 A.2d 400 (1964), *rev'd on other grounds*, 89 N.J. Super. 128, 214 A.2d 45 (1965), or a release by the landlord of the assignor-tenant's contractual obligations under the lease, *see, e.g.*, *Eastman v. Nelson*, 8 Alaska 548 (1935), or both. Neither such an assumption nor release is, however, a necessary concomitant of an assignment, and a release of the assignor will not be implied ipso facto from an assumption by the assignee, *Eastman v. Nelson*, 8 Alaska 548 (1935).

104. Duties may be delegated, but the person delegating the duty remains liable for the failure of the delegate to perform. RESTATEMENT (SECOND) OF CONTRACTS § 318(3) comment d & illustration 10 (1981); A. CORBIN, CONTRACTS § 866 (1964).

105. This assumes that the original lease contains either an express or implied contractual promise to pay rent. *See supra* note 21. If the original lease included no contractual promise but only a reservation of rent, the assignor-tenant would not remain liable for rent accruing after the assignment. *See National Bank of Commerce v. Dunn*, 194 Wash. 472, 487-88, 78 P.2d 535, 539-40 (1938). *See also infra* note 107 and accompanying text.

106. *See Viera v. Soto*, 240 F. Supp. 541 (D.V.I. 1965); *Eastman v. Nelson*, 8 Alaska 548

the duty to pay rent, therefore, the assignor-tenant remains in privity of contract with the landlord. In addition, upon taking possession the assignee of the lease is also liable to pay the rent, whether or not he contractually promises or "assumes" to pay rent. This liability arises out of the privity of estate which the assignment establishes between the assignee and the landlord: "The assignee who does not assume [the lease] is not . . . bound by its contractual obligations. But the nonassuming assignee who occupies the premises is liable by reason of his tenancy, and his obligation, arising out of privity of estate continues at least through the period of his occupancy."¹⁰⁷

There can, of course, be only one recovery by the landlord¹⁰⁸ and, as between assignor and assignee, the latter is primarily liable for the rent.¹⁰⁹ Nevertheless, the assignment situation presents an interesting exploded view of the dual nature of leases, showing the two privities of estate and contract in simultaneous but separate operation as bases for enforcement of the rent obligation.

Two recurring factual circumstances involving the interplay between conveyance and contract deserve particular attention because they have

(1935); *Samuels v. Ottinger*, 169 Cal. 209, 146 P. 638 (1915); *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965); *Gerber v. Pecht*, 15 N.J. 29, 104 A.2d 41 (1954). See also *Walker's Case*, 3 Co. Rep. 22a, 23a, 76 Eng. Rep. 676, 680 (1587) ("the lessee himself shall not prevent by his own act such remedy which the lessor hath by his own contract."). Even if the landlord's consent to the assignment is necessary and obtained, such consent would not release the assignor from the contract obligation to pay rent. A deliberate release by the landlord is required. *Eastman v. Nelson*, 8 Alaska 548 (1935); *Broida v. Hayashi*, 61 Hawaii 493, 464 P.2d 285 (1970); *Gerber v. Pecht*, 15 N.J. 29, 104 A.2d 41 (1954); *Buck v. J.M. McEntee & Sons*, 275 P.2d 984 (Okla. 1954). See *supra* note 103.

107. *Ellingson v. Walsh*, 15 Cal. 2d 673, 676, 104 P.2d 507, 509 (1940). *Accord* *Consumer's Ice Co. v. Bixler*, 84 Md. 437, 35 A. 1086 (1896); *Kanawha-Gauley Coal & Coke Co. v. Sharp*, 73 W. Va. 427, 80 S.E. 781 (1914). See also *Walker's Case*, 3 Co. Rep. 22a, 22b, 76 Eng. Rep. 676, 678 (1587) ("Forasmuch as the rent issues out of the land, the assignee who hath the land, and is in privity of estate is debtor with respect to the land.") The nonassuming assignee, however, remains liable for accruing rents only until he makes a bona fide reassignment to another. See *Reid v. John F. Wiessner Brewing Co.*, 88 Md. 234, 40 A. 877 (1898); *Packard-Bamberger Co. v. Maloof*, 83 N.J. Super. 273, 199 A.2d 400 (1964), *rev'd on other grounds*, 89 N.J. Super. 128, 214 A.2d 45 (1965); *National Bank of Commerce v. Dunn*, 194 Wash. 472, 78 P.2d 535 (1938); *Annot.*, 89 A.L.R. 433 (1934), *Annot.*, 148 A.L.R. 393 (1944).

The assignee's liability is for reserved rent based upon the reservation made by the landlord in leasing to the original tenant. The assignee acquires the leasehold estate subject to this reservation because no one can convey a better title than he has. See *supra* text accompanying notes 57-71.

108. See, e.g., *Gholson v. Savin*, 137 Ohio St. 551, 31 N.E.2d 858 (1941); *Lincoln Fireproof Warehouse Co. v. Greusel*, 199 Wis. 428, 224 N.W. 98 (1929).

109. See *Kintner v. Harr*, 146 Mont. 641, 408 P.2d 487 (1965); *Gerber v. Pecht*, 15 N.J. 29, 104 A.2d 41 (1954). See also *supra* note 108 and accompanying text.

engendered the greatest criticism of the conveyance theory, and hence, the dual relationship conception of leases: first, cases of abandonment or forfeiture by the tenant, and second, cases in which the landlord fails to provide necessary services. These are discussed in turn.

A. *Abandonment and Forfeiture*

If the tenant abandons the premises and ceases to pay rent prior to the termination of the lease, and if the tenant is not justified¹¹⁰ in doing so, then there is a breach of duty by the tenant.¹¹¹ Upon such a breach, the landlord traditionally has been entitled to leave the premises empty and recover the entire agreed rent as it accrues under the terms of the lease, as if the premises were still occupied by the tenant.¹¹² Moreover, this entitlement to recover the full rent for empty premises traditionally has been available to the landlord irrespective of the landlord's ability

110. An abandonment is justified when there is eviction, either actual or constructive. *See, e.g.,* Fifty Assocs. v. Berger Dry Goods Co., 275 Mass. 509, 176 N.E. 643 (1931); Dittman v. McFadden, 159 Okla. 262, 15 P.2d 139 (1932); First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis. 2d 258, 286 N.W.2d 360 (1980). *See also supra* text accompanying notes 84-89; *infra* notes 275-77.

111. As a general matter, merely abandoning occupancy would probably not constitute a breach of the lease unless the tenant has agreed, expressly or by implication, to remain in occupancy. *E.g.,* Stevens v. Mobil Oil Corp., 412 F. Supp. 809 (E.D. Mich. 1976); Miller v. Benton, 55 Conn. 529, 13 A. 678 (1887); Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100 (Miss. 1981); Baron Bros. v. National Bank, 83 S.D. 93, 155 N.W.2d 300 (1968); K & C Assoc. v. Airborne Airfreight Corp., 20 Wash. App. 653, 581 P.2d 1082 (1978). *See generally* 1 A.L.P., *supra* note 17, at § 3.41; Annot., 40 A.L.R.3d 971 (1971). It is the failure to pay rent as it accrues which most frequently constitutes the breach of duty at issue. Thus, abandonment as a legal wrong refers more often to an attempt by the tenant to abandon, and thereby repudiate, the whole arrangement rather than merely to relinquish his actual occupancy. *See* tenBraak v. Waffle Shops, 542 F.2d 919, 924 n.5 (4th Cir. 1976) ("two elements are necessary to show abandonment: (1) vacation of the premises; and (2) a clear intent not to be bound by the lease.")

It might have been better to refer to abandonment of the whole arrangement as "repudiation" in order to distinguish it from mere relinquishments of occupancy. *See* K & C Assoc. v. Airborne Airfreight Corp., 20 Wash. App. 653, 581 P.2d 1082 (1978). Nevertheless, abandonment is the word usually employed to describe the type of events under discussion, perhaps because the term "repudiation" has strong contract associations while "abandonment" has, in the case of chattels, the fairly long-standing property connotation of relinquishment of title. *See* R. BROWN, PERSONAL PROPERTY § 1.6 (3d ed. 1975).

112. *E.g.,* Respini v. Porta, 89 Cal. 464, 26 P. 967 (1891); Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935); Gruman v. Investors Diversified Servs., Inc., 247 Minn. 502, 78 N.W.2d 377, (1956); Centurian Dev. Co. v. Kenford Co., 60 A.D. 2d 96, 400 N.Y.S.2d 263 (4th Dept. 1977); Becar v. Flues, 64 N.Y. 518 (1876). *See generally* 1 A.L.P., *supra* note 17, at § 3.99; 2 M. FRIEDMAN, *supra* note 3, at § 16.3; 3 H. TIFFANY, *supra* note 32, at 1492-93; 2 S. WILLSTON, *supra* note 24, at § 1403; Annot., 21 A.L.R.3d 534, 546-56 (1968).

to mitigate damages by taking back possession or reletting.¹¹³ In the typical modern context of an apartment dweller who must move before the end of the lease, this no-mitigation rule seems harsh from the tenant's point of view. Moreover, it appears to be at variance with the general rule applied to "ordinary" contracts that no recovery may be had for losses that the plaintiff, with reasonable effort, could have avoided.¹¹⁴ The no-mitigation rule for leases is founded, however, not on ordinary contract principles, but rather on the view that a lease is a conveyance of an ownership interest in land.¹¹⁵ Because of the perceived injustice of the no-mitigation rule for leases, it has been subjected to considerable criticism¹¹⁶ and, in some jurisdictions modification.¹¹⁷ The modification is sometimes accompanied by disparaging remarks about the conveyance theory of leasing out of which the no-mitigation rule flows.¹¹⁸

When the tenant attempts to abandon a lease arrangement, there is

113. See *supra* note 112 and accompanying text.

114. See generally RESTATEMENT OF CONTRACTS § 336 (1932); 5 A. CORBIN, *supra* note 104, at § 1039; D. DOBBS, *supra* note 73, at § 12.6; J. MURRAY, CONTRACTS § 227 (1974). It is often said that there is not, strictly speaking, an obligation or duty to mitigate damages, but rather a rule prohibiting recovery of compensation for so-called "avoidable consequences." This rule is implicit in the general measure of damages for the breach of executory contracts of exchange, that is, the difference between the contract price and fair market value. D. DOBBS, *supra* note 104, at § 12.6. See *infra* text accompanying notes 133-37.

115. "[A lease] is like the sale of specific personal property to be delivered. In such a case the title passes to the vendee, and of course he is liable for the purchase-money." *Becar v. Flues*, 64 N.Y. 518, 520 (1876). See also D. DOBBS, *supra* note 104, at § 12.6; 2 M. FRIEDMAN, *supra* note 3, at 667-68; *supra* note 48.

116. *E.g.*, *Gruman v. Investors Diversified Servs.*, 247 Minn. 502, 78 N.W.2d 377 (1956); *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969); *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977); *Mar-Son v. Terwaho Enters., Inc.*, 259 N.W.2d 289 (N.D. 1977); *Wright v. Baumann*, 239 Or. 410, 398 P.2d 119 (1965). The seminal article on the subject is McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211 (1925).

117. A dozen or more states have created rules which depart from the traditional common-law rule allowing the landlord to recover full damages without mitigation. Annot., 21 A.L.R.3d 534, 565-70 (1968). See also *Sommer v. Kridel*, 74 N.J. 446, 452-53, 378 A.2d 767, 771 (1977). See generally 2 M. FRIEDMAN, *supra* note 3, at 665 (1974 & Supp. 1982). The rule has also been modified by statute. See, *e.g.*, MD. REAL PROP. CODE ANN. § 8-207 (1981); WIS. STAT. ANN. § 704-29 (West 1981).

118. McCormick's statement is typical: "The notion of 'privity of estate' and its attendant rights and duties appears as quaint and startling as a modern infantryman with a cross-bow." McCormick, *supra* note 116, at 222.

See also *Parkwood Realty Co. v. Marcano*, 77 Misc. 2d 690, 692, 353 N.Y.S.2d 623, 626 (N.Y. Civ. Ct. 1974). "[T]his [mitigation] issue should be met head-on by removing the long-established and deeply encrusted veneer from the real estate lease contract and showing it for what it is—a contract like any other contract." *Id.*

no reason to suppose that either privity of contract or of estate is extinguished. The unilateral repudiation of an executory contract by one of the parties does not in itself rescind the obligation or privity of contract.¹¹⁹ The nonrepudiating party presumably could elect to treat the repudiation as an offer of mutual rescission; that is, as an offer to terminate by mutual agreement all extant rights and duties under the contract.¹²⁰ Such an election to extinguish all aspects of the contractual relation, including the remedial aspects, is certainly one which the nonrepudiating party is, however, free to reject.¹²¹ Similarly, the unilateral repudiation of a conveyance by the transferee does not place the

119. See *Walker & Co. v. Harrison*, 347 Mich. 830, 81 N.W.2d 352 (1957); *Rosenthal Paper Co. v. National Folding Box Co.*, 226 N.Y. 313, 123 N.E. 766 (1919). See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 243, 253 (1981); RESTATEMENT OF CONTRACTS §§ 313, 317, 318 (1932); 5A A. CORBIN, *supra* note 104, at §§ 982, 1236; see also RESTATEMENT OF CONTRACTS § 410 (1932). It should not be inferred from the statement in the text that the disappointed promisee may regard the contract as unaffected by the repudiation and proceed to provide a wasteful and unwanted counterperformance. It is well established that if the repudiation was accompanied by a present breach, the promisee cannot proceed with his own performance and refuse to mitigate damages, except at his own risk. See, e.g., *Clark v. Marsiglia*, 1 Denio 317, (N.Y. 1845); RESTATEMENT (SECOND) OF CONTRACTS §§ 243(2), 350 comment b (1981); RESTATEMENT OF CONTRACTS § 317(2) (1932); Farnsworth, *The Problems of Non-Performance in Contract*, 17 NEW ENG. L. REV. 249, 314 (1982). Even if the repudiation is entirely anticipatory, the weight of authority denies the promisee an election to proceed with performance at the repudiator's expense, precedence being given to the rule of mitigation. See, e.g., *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488 (10th Cir. 1930); *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929); RESTATEMENT (SECOND) OF CONTRACTS §§ 253, 350 comment b (1981); RESTATEMENT OF CONTRACTS § 317 (1932); but see *Reliance Cooperage v. Treat*, 195 F.2d 977, (8th Cir. 1952); 4 A. CORBIN, *supra* note 104, at §§ 981-983. Nevertheless, despite the effects of repudiation on the parties' obligations of performance, the contract remains alive at least for purposes of the remedial obligations, see *infra* notes 133-37, and, indeed, the remedies may even be accelerated by virtue of the repudiation. *Long Island R.R. v. Northville Indus. Corp.*, 41 N.Y.2d 455, 362 N.E.2d 558, 393 N.Y.S.2d 925 (1977); *Hochster v. De la Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853). See also *Coughlin v. Blair*, 41 Cal. 2d 587, 262 P.2d 305 (1953). See generally 5A A. CORBIN, *supra* note 104, at §§ 959, 982, 1236; J. CALAMARI & J. PERILLO, CONTRACTS § 12-2 (2d ed. 1977); *infra* note 134.

120. See *McCreary v. Mercury Lumber Distrib.*, 124 Cal. App. 2d 477, 268 P.2d 762 (1954); *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975). See generally U.C.C. § 1-107; RESTATEMENT (SECOND) OF CONTRACTS § 277(1) (1981); RESTATEMENT OF CONTRACTS § 410 (1932). The repudiating party is hardly in a position to object to such an election by the aggrieved party. Nevertheless, the nonrepudiating party would ordinarily have available the more favorable alternative of treating the repudiation as an event which both discharges the duty of further performance and which triggers a right to recover damages for breach of contract from the repudiating party. See generally RESTATEMENT (SECOND) OF CONTRACTS, §§ 243(2), 253 (1981); RESTATEMENT OF CONTRACTS §§ 274, 313, 317, 318, 397 (1932); 4 A. CORBIN, *supra* note 104, at § 975; 5A A. CORBIN, *supra* note 104, at §§ 1236-1237; *supra* note 119.

121. See *supra* note 120. The leading case is *Hochester v. De la Tour*, 2 El. & Bl. 678, 118 Eng. Rep. 922 (1853).

conveyed title back in the transferor. The transferor may elect to accept reconveyance of the title, but there is no requirement to do so.¹²²

When a leasehold tenant conveys title back to the landlord and the landlord accepts such reconveyance, the transfer is called a "surrender."¹²³ A surrender thus places both parties back in the positions that they held, with respect to title, prior to making the lease. It follows that, at the very least, a surrender extinguishes the privity of estate and its attendant obligations.¹²⁴ Accordingly, an accepted surrender is to privity of estate what mutual rescission is to contract. An abandonment by the tenant, however, cannot be in itself an accepted surrender; it can only be regarded as a unilateral offer, or "proffer," of surrender, which the landlord may either accept or reject.¹²⁵ Just as one party to a contract cannot, by breaching, force the other to accept a mutual rescission of the contract, so also a tenant cannot, by breaching, force the landlord to accept a surrender of the tenant's leasehold.

Because of the dual-relationship conception of leases, when a tenant abandons with the intention to relinquish his arrangement with the landlord, it may be said that the tenant proposes two changes in the legal relationships between them: the tenant *offers to rescind* the con-

122. Examples of this principle outside the landlord-tenant context include: the requirement of acceptance by the donee as a requisite to the effectuation of a transfer of chattels by gift, *see* R. BROWN, *supra* note 111, at § 7.14, and the requirement of acceptance by a grantee in order to complete the delivery of a deed to real property. *See* Hood v. Hood, 384 A.2d 706 (Me. 1978); Holbrook v. Trusdale, 100 A.D. 9, 90 N.Y.S. 911 (1904); 23 AM. JUR. 2D, *Deeds* §§ 77, 127 (1965).

123. *See* Welcome v. Hess, 90 Cal. 507, 27 P. 369 (1891); Parris-West Maytag Hotel Corp. v. Continental Amusement Co., 168 N.W.2d 735 (Iowa 1968); Ralph v. Deiley, 293 Pa. 90, 141 A. 640 (1928); 2 H. TIFFANY, *supra* note 32, at 1578. A transfer by the landlord of his reversionary interest to the tenant in possession is called a "release." *Id.* at 1568-70. Release is, therefore, the counterpart from the landlord's side of surrender.

124. *See* Kanter v. Safran, 68 So. 2d 553 (Fla. 1953); *supra* text accompanying note 23; 2 H. TIFFANY, *supra* note 32, at 1588; McCormick, *supra* note 116, at 216.

125. *See, e.g.,* Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935); Noce v. Steman, 77 N.M. 71, 419 P.2d 450 (1966); Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928); Ralph v. Deiley, 293 Pa. 90, 141 A. 640 (1928). Of course, what the landlord says and what he in fact does may be two quite different things. The application of such general principles as estoppel may cause courts to recognize surrenders even in the absence of any deliberate or informed acceptance by the landlord. *E.g.,* Williams v. Kaiser Aluminum & Chem. Sales Corp., 396 F. Supp. 288 (N.D. Tex. 1975); Welcome v. Hess, 90 Cal. 507, 27 P. 369 (1891); Kanter v. Safran, 68 So. 2d 553 (Fla. 1953); Sanden v. Hanson, 201 N.W.2d 404 (N.D. 1972); Pague v. Petroleum Prods., Inc., 77 Wash. 2d 219, 461 P.2d 317 (1969). When surrenders are imputed on the basis of conduct inconsistent with the continuation of the tenancy, for example by reletting, they are referred to as "surrenders by operation of law." *See generally* 1 A.L.P., *supra* note 17, at § 3.99; 2 M. FRIEDMAN, *supra* note 3, at §§ 16.301-02; Updegraff, *The Element of Intent in Surrender by Operation of Law*, 38 HARV. L. REV. 64 (1924). *See also infra* note 148.

tract and *proffers a surrender* of title. In theory, at least, the landlord may accept either or both of these proposed changes, or he may accept neither and thus keep alive both the privity of contract and the privity of estate.¹²⁶ Faced with an abandoning tenant, the landlord thus has in theory three¹²⁷ choices available:

Choice I—refuse to accept both the proffered surrender and the offer of mutual rescission implied by the abandonment;

Choice II—accept the proffered surrender but refuse to accept the offer of mutual rescission;

Choice III—accept both the proffered surrender and the offer of mutual rescission.

Considering these three choices in light of the dual-relationship conception of leases, it appears that a no-mitigation rule for leases would arise and apply only if the landlord elects Choice I. In electing Choice II, the landlord only retains a contract basis for enforcing the future rent obligation and this rationale of enforcement would be subject, one may correctly suppose, to the rules and limitations of ordinary contract law, including the rule of mitigation. In the third choice, the landlord would have no basis at all for enforcement of the rent obligation as to the future,¹²⁸ and rent accrual would cease.

Choice I leaves the dual nature of the lease intact and, accordingly, leaves intact the dual nature of the relationship arising from the breach of the lease.¹²⁹ Thus, Choice I, but only Choice I, could theoretically lead to the application of the no-mitigation rule founded upon the dual

126. See McCormick, *supra* note 116, at 216-21.

127. A cursory look at the three listed choices makes obvious a fourth possibility available to the landlord: acceptance of the offer of rescission but refusal to accept the proffered surrender. This fourth choice would leave the landlord without the extra protection of the privity-of-contract rights while he still has a tenant—and a breaching one at that. Therefore, it is hard to see why the landlord would ever, as a practical matter, wish to elect this fourth possibility.

There may also be a fifth possibility, namely, termination of the lease pursuant to a forfeiture provision, if such a provision is contained in the lease. See *supra* text accompanying notes 72-73. This possibility represents a somewhat different category of choice, with legal effects that depend to some extent on the language of the forfeiture provision, and will be discussed separately *infra* at text accompanying notes 183-200. A sixth possibility, in many states, is statutory forfeiture. See *supra* notes 79-80 and accompanying text. Because the operation of such statutes is a matter of statutory interpretation, and not of common-law conception, it is beyond the scope of this Article.

128. For this reason, it may be speculated that a landlord generally would not deliberately elect Choice III except as part of a settlement, for additional consideration, negotiated with the tenant. Local rules on surrender by operation of law may, however, cause the landlord to extinguish inadvertently all the tenant's liability (Choice III) when the landlord only is trying to extinguish the privity of estate (Choice II). See *supra* note 125; *infra* text accompanying notes 167-82.

129. See *supra* notes 119-20.

relationship. Indeed, the cases seem to support the position that, under the traditional rules, the landlord may recover the full rent without mitigating only if the landlord selects Choice I in response to the tenant's abandonment. Otherwise, the landlord's recovery, if any, will be reduced by the losses which the landlord could have avoided by mitigation.

Applying the traditional dual-relation framework to cases in which the landlord elects Choice I or Choice II,¹³⁰ and cases of tenant forfeiture, the analysis proceeds as follows:

1. *Landlord Rejects Both Surrender and Mutual Rescission* (Choice I). If the tenant abandons and the landlord decides to accept neither the offer of mutual rescission nor the proffered surrender, the landlord continues to have a right to rent based on both the contract and estate aspects of the dual relation. In other words, by refusing to accede to the termination of either aspect of the dual relation, the landlord should retain both the right to reserved rent based on the privity of estate,¹³¹ as well as an action for damages based on the contractual promise to pay rent.¹³² There is a difference between contract damages and rent.

Damages are essentially a *compensatory* payment exacted by the law in order to protect a disappointed promisee from losing, among other things, the value of his bargain.¹³³ Damages give the promisee a substi-

130. Because the election of Choice III terminates the basis for any future rent obligation, the analysis under Choice III does not merit separate discussion. See *supra* note 128 and accompanying text. The only issue that could arise is the essentially factual one of whether the election of Choice III was also accompanied by a release of the obligations for any accrued rents as well. See *supra* note 119-20 and accompanying text.

131. See, e.g., *Winshall v. Ampco Auto Parks, Inc.*, 417 F. Supp. 334 (E.D. Mich. 1976); *Pague v. Petroleum Prods., Inc.*, 77 Wash. 2d 219, 461 P.2d 317 (1969).

132. See, e.g., *Sagamore Corp. v. Willcutt*, 120 Conn. 315, 180 A. 464 (1935). The landlord would not, of course, be able to obtain both the rent and damages if this would result in a double recovery. In addition, there may be limitations on the times at which he may sue for damages. *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928). See *infra* note 143.

133. See, e.g., *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929); *Freund v. Washington Square Press*, 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974); C. McCORMICK, DAMAGES 561 (1935). See generally RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981); J. CALAMARI & J. PERILLO, *supra* note 119, at 518-19, 521-22; J. MURRAY, *supra* note 114, at §§ 219-220. Typically, when damages are assessed to protect the expectation interest under a contract for an exchange, the measure of recovery is the difference between the contract price and the fair market value of the item being sold. See J. MURRAY, *supra* note 114, at § 220; *infra* note 136. Damages may also be assessed to protect the disappointed promisee from other losses, so-called special damages, to protect other interests such as reliance, or to force disgorgement by the breach-

tute for the performance bargained for, but they do not always, or even usually give him the performance itself.¹³⁴ Even if the very performance owed to the promisee was intended to consist solely of a payment of money, for example, a contractual agreement to purchase for a price, damages would still not generally be the equivalent of the performance itself. This is because the cost or value of the promisee's own performance would, to the extent not incurred or rendered, be deducted from the recovery.¹³⁵ Thus, when an ordinary executory contract to purchase is breached by the buyer, the damages recoverable are not equal to the agreed price. Rather, the general measure of damages is the difference between the agreed price and the market value of the thing to be sold.¹³⁶ Or, viewed another way, the disappointed seller is expected to mitigate his damages either by retention of the thing sold or by resale at its market value.¹³⁷ From either viewpoint, however, the seller's recovery would be only the seller's net loss or "loss of bargain" due to the breach, not the whole price. The recovery of contract damages thus gives the seller a substitute for performance and not the contract performance itself.

Rent, by contrast, is seen at common law as an incorporeal interest in land.¹³⁸ A tenant in possession is required to pay the reserved amount of rent to the landlord in order for the landlord, as the owner of the

ing party of an unjust enrichment via restitution. *See generally* D. DOBBS, *supra* note 73, at § 12.1; J. MURRAY, *supra* note 114, at §§ 219-220; Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970). These and other functions of damages are disregarded in the text because their discussion would not further illuminate the distinction between an exaction in lieu of performance made to compensate for the nonperformance (damages), and an exaction of the agreed performance itself (rent).

134. *See Coughlin v. Blair*, 41 Cal. 2d 587, 598, 262 P.2d 305, 311 (1935) ("The judgment for damages is substituted for the wrongdoer's duty to perform the contract" and "absolves the defendant from any duty, continuing or otherwise, to perform the contract"). *See also* Freund v. Washington Square Press, 34 N.Y.2d 379, 314 N.E.2d 419, 357 N.Y.S.2d 857 (1974); RESTATEMENT OF CONTRACTS § 313(1) comment c (1932); Farnsworth, *supra* note 133, at 1149-60.

135. *See, e.g., Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); J. MURRAY, *supra* note 114, at § 221. For the sake of simplicity, numerous nongermane exceptions and provisos have been ignored in this generalization.

136. *E.g., Coombs & Co. v. Reed*, 5 Utah 2d 419, 303 P.2d 1097 (1956); D. DOBBS, *supra* note 73, at § 12.11; C. McCORMICK, *supra* note 133, at § 186. *See also* U.C.C. § 2-708(1), which has somewhat modified the details but not the basic principles for calculating damages applicable to breaches of contracts for the sale of goods.

137. U.C.C. §§ 2-703, -706, -708 (1973); D. DOBBS, *supra* note 73, at § 12.6. The implicit incorporation of the rule of mitigation into the general measure of damages for breach is thus a very important occasion for its application.

138. *See supra* text accompanying notes 57-67.

rent, to have the enjoyment of the incorporeal interest.¹³⁹ When the courts exact payments of reserved rent from a tenant they are not giving the landlord a compensatory remedy but rather a recuperatory one, a kind of specific performance.¹⁴⁰ Like an action in ejectment, an action for reserved rent gives the landlord exactly what is his, not merely compensation for its loss.¹⁴¹ The landlord's incorporeal interest—rent—is thus treated as being comparable to, and as specifically protectable as, the tenant's corporeal, possessory interest in the land.¹⁴² A tenant's right to regain possession by ejectment is not qualified by rule of mitigation nor, on this basis, would one expect that the landlord's right to reserved rent would be so qualified.¹⁴³

The next logical inquiry is how privity of estate, as the basis for rent obligations, can persist after the tenant has abandoned occupancy. Af-

139. See *supra* notes 67-70 and accompanying text.

140. *Id.* See also 7 W. HOLDSWORTH, *supra* note 9, at 262-63; F. MAITLAND, *supra* note 15, at 38-39, 51-52.

141. See *supra* text accompanying notes 69-70.

142. The comparability of rent and possession at common law is further underlined by the fact that, before their abolition, real actions such as the assize of novel disseisin were the appropriate forms of action for the recovery of rents held in freehold. See *supra* note 70.

143. The policy significance of the differences between payments of money and possession is disregarded in this analytical explanation of the traditional no-mitigation rule for leases. Obviously, though, it is precisely due to the difference between payments and possession that the analytical explanation given in the text fails so stunningly to find any parallel policy justification. See D. DOBBS, *supra* note 73, at § 12.6. This appears to be a place where the implications of the common-law conception seem to stray too far from the underlying policy desiderata. Nevertheless, as pointed out *infra* at text accompanying notes 212-18, the fault may not be with the traditional conception, but rather with unsuitable factual assumptions which typically accompany its application.

Incidentally, as a corollary to the idea that rent is a benefit yielded up to the tenant and then paid to the landlord, the common-law rule is that, absent agreement, the landlord may not recover rent in advance even if the tenant has totally repudiated the lease. 2 M. FRIEDMAN, *supra* note 3, at § 5.101. See also *Jordan v. Nickell*, 253 S.W.2d 237 (Ky. 1952). This rule at least has the merit of analytical consistency, but the same cannot be said of the related rule, applied in a minority of jurisdictions, which prevents the recovery even of contract damages for anticipatory repudiation or breach. See, e.g., *Barrow v. Irving Trust Co.*, 68 F.2d 731 (2d Cir. 1934); *Cooper v. Casco Merchandise Trust Co.*, 134 Me. 372, 186 A.2d 885 (1976); *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928); *General Dev. Corp. v. Wilber-Rogers Atlanta Corp.*, 28 Ohio App. 35, 273 N.E.2d 908 (1971); *Henson v. B. & W. Finance Co.*, 401 S.W.2d 261 (Tex. Civ. App. 1966). The latter holdings appear to indefensibly disregard the difference between damages and rent. *Amick v. Metropolitan Mortgage & Sec. Co.*, 453 P.2d 412 (Alaska 1969), *overruled on other grounds*, *Wickware v. Juneau*, 557 P.2d 783 (Alaska 1976); *Grayson v. Mixon*, 196 Ark. 1123, 5 S.W.2d 312 (1928); *Sagamore Corp. v. Willcutt*, 120 Conn. 315, 180 A. 464 (1935); *Stableford v. Schulinkamp*, 67 So. 2d 306 (Miss. 1953); *South Main Akron v. Lynn Realty*, 106 N.E.2d 325 (Ohio Ct. App. 1951). See also *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir. 1941). See generally Note, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 47, 48-55 (1937).

ter all, the theory of the landlord's privity-of-estate right to reserved rent depends on the assumption that possession yields benefit to the tenant-possessor and that a portion of this benefit belongs, by reservation, to the landlord.¹⁴⁴ If the tenant removes himself from possession, it is not readily apparent that the tenant continues to receive something belonging to the landlord. In order to account for the continuation of privity of estate after the tenant's abandonment, it is necessary to indulge a fiction; namely, that a nonoccupying tenant's right to possession is equivalent, for these purposes, to possession itself. Such a fiction is closely related to the idea that it is up to the tenant, like any other owner, to see that the land produces the benefit which it can produce.¹⁴⁵ The tenant is deemed to receive the benefits of possession by virtue of having an entitlement to them. If the tenant decides to squander the benefit by underuse or nonoccupancy, blame for the loss lies solely with the tenant.¹⁴⁶

The frequent inappropriateness of the fiction that the tenant's right to possession is for these purposes the equivalent of possession will be examined below.¹⁴⁷ There is one argument, however, that may be made in its favor. The landlord should not, by the tenant's abandonment, be made a possessor against his will. The landlord who refuses to accept a proffered surrender does not necessarily become the possessor just because the tenant, as a matter of actual possession, is no longer in possession.¹⁴⁸ If the landlord does not in fact resume possession after the tenant abandons, then it would seem to be in best accordance with general principles to regard the tenant as being in

144. See *supra* text accompanying notes 57-71.

145. See *supra* text accompanying notes 90-101.

146. See *supra* note 62.

147. See *infra* text accompanying notes 212-18.

148. After it is discovered that the tenant has abandoned possession, the landlord may take steps to protect the premises from damage or deterioration. The usual holding is that such protective steps by the landlord do not constitute acceptance of the proffered surrender. *Coffin v. Fowler*, 483 P.2d 693 (Alaska 1971); 1 A.L.P., *supra* note 17, at § 3.99; 2 M. FRIEDMAN, *supra* note 3, at § 16.301. *But see supra* notes 125 & 128. Nor is acceptance and retention by the landlord of the keys to the premises treated as a per se acceptance of the surrender. See, e.g., *Coffin v. Fowler*, 483 P.2d 693 (Alaska 1971); *Noce v. Stemen*, 77 N.M. 71, 419 P.2d 450 (1966); *Surety Realty Corp. v. Asmer*, 249 S.C. 114, 153 S.E.2d 125 (1967); *but see Bove v. Transcom Elec.*, 116 R.I. 210, 353 A.2d 613 (1976). Nor is offering the premises for reletting. See, e.g., *Noce v. Stemen*, 77 N.M. 71, 419 P.2d 450 (1966); 2 M. FRIEDMAN, *supra* note 3, at § 16.301; *but see Williams v. Kaiser Aluminum & Chem. Sales, Inc.*, 396 F. Supp. 288 (N.D. Tex. 1975) ("There is some imprecision on the question of . . . reentry"). For a discussion of whether these conclusions are compelled by the conveyance theory of leasing or even consistent with it, see *infra* text accompanying notes 212-18.

constructive possession of the premises.¹⁴⁹ The legal entitlements attendant upon constructive possession, including the tenant's right to reenter,¹⁵⁰ form the basis for continuation of the privity of estate,¹⁵¹ and hence the obligation to pay the full rent.¹⁵²

There is one situation in which the landlord must sue for contract damages and cannot sue for reserved rent—when the landlord has merely contracted to lease but has not yet made a conveyance with a reservation of rent, thereby establishing privity of estate with the tenant. Such a contract to convey a leasehold conceptually resembles an ordinary executory sales contract and one might surmise that the recovery of contractual damages for its breach would be subject to the general rules for contract damages such as the rule of mitigation for avoidable losses. Because the general measure of damages in sales contracts is the difference between the agreed price and the market value of the thing to be sold, an injured landlord recovers only the loss of bargain due to the breach, not the whole price.¹⁵³

149. *Walsh v. E.G. Shinner & Co.*, 20 F.2d 586, 587 (3d Cir. 1927) (“premises . . . remain constructively in possession of the tenant”).

“[W]here there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass.” *Gillespie v. Dew*, 1 Stew. 229, 230 (Ala. 1827).

150. *See Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1945); *Welcome v. Hess*, 90 Cal. 507, 27 P. 369 (1891); *Lincoln Fireproof Warehouse Co. v. Greusel*, 19 Wis. 428, 224 N.W. 98 (1929).

151. If the abandoned premises were usurped by an adverse possessor, the tenant would be entitled to maintain ejectment and, in connection therewith, a trespass action for damages and for mesne profits to recoup lost possessory benefit. *See supra* text accompanying notes 95-98. The tenant's right to exclude others from the benefits of possession should have a theoretical market value which approaches the value of the benefits themselves. *See supra* note 62. In fact, the right to exclude others and recover mesne profits is what is meant by “title” insofar as possessory title to land can be recognized at all in persons not having actual possession of the land.

It is assumed, of course, that the landlord has taken no steps to reassert his own dominion and control over the premises and thus justify the assertion that he has accepted the proffered surrender. The kinds of facts which might properly justify such an assertion are considered elsewhere. *See supra* notes 125 & 148; *infra* text accompanying notes 212-18.

152. One may speculate whether the mitigation rule would apply if the landlord refused the proffered surrender and sues on the tenant's promise to pay rent instead of suing for the reserved rent itself. Historically, this election could seemingly be accomplished merely by suing in assumpsit rather than debt. *See* 2 H. TIFFANY, *supra* note 32, at § 913. Whether the landlord could limit the theory of recovery under modern rules of procedure is problematical. *See Winshall v. Ampco Auto Parks, Inc.*, 417 F. Supp. 334 (E.D. Mich. 1976); *Taylor v. DeBus*, 31 Ohio St. 468 (1877). Consider, however, the analogous possibility that a landlord may sue the lessee-assignor ex contractu after abandonment by a nonassuming assignee. *See Lincoln Fireproof Warehouse Co. v. Greusel*, 19 Wis. 428, 224 N.W. 98 (1929); *supra* note 107 and accompanying text.

153. *See supra* text accompanying notes 134-36.

Mitigation is thus the rule when the landlord and tenant have entered only a contract to lease rather than having made an actual lease.¹⁵⁴ Upon the tenant's breach of such a contract to lease, the landlord is expected to minimize the loss resulting from the breach, by either possessing or reletting.¹⁵⁵ By application of the same principle, which governs other sales contracts, the landlord cannot simply insist on payment of the full amount that was promised, but can recover only those damages which could not have been avoided by mitigation.¹⁵⁶ Because no title has been transferred to the tenant and no rent has yet been reserved, and because no possessory benefit has been received by the tenant via possession, there is no rent to be recouped by the landlord from the tenant.

By contrast, however, once the landlord and tenant make the lease itself and the tenant enters,¹⁵⁷ the view that the lease is a conveyance would imply that the landlord should be able to recover the full promised rent without mitigation as ordinary contract damages. Even with an ordinary contract of sale, the loss of bargain measure of damages is applicable only if the buyer has not accepted the thing sold.¹⁵⁸ Once the buyer has taken title, the seller becomes entitled to recover the entire price.¹⁵⁹ By parity of reasoning, under ordinary contract rules, the landlord should be able to recover the full promised rent as it accrues

154. *Arthur Treacher's Fish & Chips, Inc. v. Chillum Terrace, Ltd.*, 272 Md. 720, 327 A.2d 282 (1974); *Wright v. Baumann*, 239 Or. 410, 398 P.2d 119 (1965); R. SCHOSHINSKI, *supra* note 17, at 22-27, 689-90; Annot., 85 A.L.R.3d 514 (1978); Annot., 21 A.L.R.3d 534, 573-75 (1968). Depending upon the parties' real intention, an agreement looking to a future leasehold possession might be either a "contract to lease" or a lease of a future possessory interest, that is, leasehold to commence in futuro. *Motels of Md. v. Baltimore County*, 244 Md. 306, 311, 223 A.2d 609, 612 (1966); *Railway Express Agency v. Commissioner*, 307 Minn. 245, 246, 239 N.W.2d 245, 246 (1976). One court held that, in either event, there is no privity of estate in praesenti, and therefore, the measurement of damages is governed solely by contract principles and thereby limited to nonmitigable losses. *Arthur Treacher's Fish & Chips, Inc. v. Chillum Terrace, Ltd.* 272 Md. 720, 327 A.2d 282 (1974). This outcome, however, is technically questionable because recognizing the creation of a leasehold future interest—if an abrogation of the doctrine of *interesse termini*—should give the landlord a privity-of-estate basis to recover rent. *Imperial Water Co. v. Cameron* No. 8, 67 Cal. App. 591, 228 P. 678 (1924). See also *Greening v. Herres*, 165 Wash. 470, 5 P.2d 992 (1931); R. SCHOSHINSKI, *supra* note 17, at 23-24; *supra* note 53.

155. See *supra* note 154.

156. *Id.*

157. On the need for entry by the tenant to complete the conveyance, see *supra* note 53.

158. See U.C.C. § 2-709(a); RESTATEMENT OF CONTRACTS § 335 comment a, illustrations 3, 4 (1932); see also U.C.C. §§ 2-706, -708.

159. See *supra* note 158.

once there has been a conveyance of the leasehold to the tenant.¹⁶⁰

In summary, the rule permitting landlords to recover the full amount of rent even after the tenant has abandoned, though seemingly contrary to the usual contract rule, may be seen in terms of the traditional analysis to have two explanations. First, the landlord may not be suing for contract damages at all, but rather to recoup the rent that has been reserved. Second, the principles of ordinary contract law, applied to the conveyance of a leasehold, also would allow a full recovery without mitigation. Of course, both of these explanations require acceptance of the traditional conception of leases as conveyances and the fictional, though not necessarily concomitant assumption that landlords, in allowing premises to lie idle, do not in fact resume possession and thereby "accept the surrender." Both explanations thus depend on the appropriateness of that conception and fictional assumption.¹⁶¹

2. *Landlord's Acceptance of Surrender but not Mutual Rescission (Choice II)*. If the landlord accepts the surrender of the abandoning tenant's estate but not the rescission of the lease-contract, the right to reserved rent based on privity of estate would be extinguished.¹⁶² The landlord should still be able to recover damages for breach of the contract to pay rent.¹⁶³ This recovery, however, because it is damages and not rent, would be subject to the rule of mitigation and would compensate only for nonavoidable losses.¹⁶⁴

Because Choice II gives the tenant the benefit of mitigation, it is,

160. See *Bezar v. Flues*, 64 N.Y. 518 (1876); *supra* note 115.

161. See *infra* text accompanying notes 201-18.

162. *Lincoln Fireproof Warehouse Co. v. Greusel*, 199 Wis. 428, 224 N.W. 98 (1929); Annot., 70 A.L.R. 1102 (1931).

163. *Winshall v. Ampco Auto Parks, Inc.*, 417 F. Supp. 334 (E.D. Mich. 1976); *Novak v. Fontaine Furniture Co.*, 84 N.H. 93, 146 A. 525 (1929); *United States Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956); *McCormick*, *supra* note 116, at 216-21; *UpdeGraff*, *supra* note 125, at 79-82.

164. See *supra* note 163. See also *Condor Corp. v. Arlen Realty & Dev. Corp.*, 529 F. Supp. 87 (8th Cir. 1976), *cert. denied*, 429 U.S. 822 (1976); *Respini v. Porta*, 89 Cal. 464, 26 P. 967 (1891); *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953). The mitigation rule could be given effect directly or, analogizing to ordinary contract cases, by implication in the general measures of damages for executory exchange contracts, that is, the agreed rent less the fair rental value of the premises. *Randall v. Thompson Bros.*, 1 Tex. Civ. Cas. 1102 (Tex. Civ. App. 1881); *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916). See also *Yates v. Reid*, 36 Cal. 2d 385, 224 P.2d 8 (1950) (lease authorized reletting).

Of course, if the landlord were unable to make any alternative arrangements to cover the losses, then the damages would be equal to the rent. *B.K.K. Co. v. Schultz*, 7 Cal. App. 3d 786, 86 Cal. Rptr. 760 (1970). In the *Schultz* case, however, the court seemed to overlook the benefit deemed

from the tenant's point of view, clearly preferable to Choice I.¹⁶⁵ For practical reasons, however, Choice II would be the most sensible choice for the landlord as well, despite the application of the rule of mitigation.¹⁶⁶ By accepting the proffered surrender, the landlord regains the right to possession and thereby puts himself in a position to minimize his potential losses either by reletting or enjoying possession himself. Because he has accepted only the proffered surrender and not the contract rescission, the landlord still retains his contract right of recourse against the breaching tenant for losses which the landlord cannot avoid. Choice I theoretically gives the same contractual protection as Choice II, but as a practical matter the landlord's exposure to loss is much greater under Choice I. The collection of rent from a non-occupant can be difficult, expensive and problematic. Hence, Choice I would be less favorable than Choice II if there is a good chance that, by reletting or holding possession himself, the landlord can derive benefit from the premises.

Although Choice II often is more attractive than Choice I for the landlord, and almost always more attractive for the tenant,¹⁶⁷ there seems to be disagreement as to how or even whether the landlord can selectively terminate one part of the dual relation, by retaking possession or reletting, while leaving the other part intact. Several commentators and a few cases appear to accept the position that a landlord cannot accept a proffered surrender without terminating the whole lease arrangement and extinguishing all rights, including the right to contract damages with respect to future accruing rents.¹⁶⁸ Rather ironi-

to be received by a possessor by virtue of the possession. *See supra* text accompanying notes 61-64.

165. The advantage to the tenant of Choice II has been specifically cited as a reason for rejecting the rule applied in some cases, *see infra* text accompanying notes 167-78, which would prevent the landlord from opting for Choice II. *See Monger v. Lutterloh*, 195 N.C. 274, 277, 142 S.E. 12, 15 (1928); *Martin v. Siegley*, 123 Wash. 683, 685-88, 212 P. 1057, 1058-59 (1923).

166. A principal exception is if the landlord rents many units and has constant vacancies because of high turnover. *See infra* text accompanying notes 210-11.

167. The only advantage of Choice I to the tenant is that the right to resume possession would continue. This advantage is seldom of direct benefit to the tenant, although in a rare case the right to possession may give the tenant some collateral advantage. *See, e.g., Kulawitz v. Pacific Wood-ware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1945) (tenant continued to have the benefit, as condition precedent to rent obligation, of "essential" restrictive covenant by landlord; landlord's breach of the covenant discharged tenant's rent obligation). *See infra* note 182.

168. *E.g., Gardiner v. William S. Butler & Co.*, 245 U.S. 603 (1918); *tenBraak v. Waffle Shops*, 542 F.2d 919 (4th Cir. 1976); *Williamson v. Crossett*, 62 Ark. 393, 36 S.W. 27 (1896); *Vineyard Village-Georgia, Inc. v. Crum*, 136 Ga. App. 335, 221 S.E.2d 208 (1975); *Eidelman v. Walker &*

cally, this version of the law actually would discourage mitigation because it would penalize landlords who try to mitigate their damages by extinguishing their rights to recovery entirely.¹⁶⁹ Though the reason for imposing such a "both-or-neither" limitation on the landlord's choices is somewhat obscure, the notion perhaps derives from the historical rationale for allowing contract actions for rent in the first place: "[F]or better security of payment [of the rent] . . . the lessor should have his remedy of debt upon the reservation or action upon this collateral promise at his election."¹⁷⁰

If actions in contract (assumpsit) were extended to cases already covered by another action (debt) solely "for better security," then it is perhaps logical that the contract rights be interpreted, presumptively at least, to be merely coextensive with the secured rights. Any event which extinguishes the secured rights, for example, the reserved rent, should likewise extinguish the securing ones.¹⁷¹

Dunlop, Inc. 265 Md. 538, 290 A.2d 780 (1972); Taylan Realty Co. v. Student Book Exchange, Inc. 354 Mass. 777, 242 N.E.2d 877 (1968); Haycock v. Johnston, 97 Minn. 289, 106 N.W. 304 (1906); Saracena v. Preisler, 180 App. Div. 348, 167 N.Y.S. 871 (1917). See generally 2 M. FRIEDMAN, *supra* note 3, at 70; 3A G. THOMPSON, *supra* note 17, at § 1348; H. TIFFANY, *supra* note 32, at 1588. But see *infra* notes 178-81.

169. See Abraham v. Gheens, 205 Ky. 289, 265 S.W. 778 (1924); Haycock v. Johnson, 81 Minn. 49, 83 N.W. 494 (1900); Whitehorn v. Dickerson, 419 S.W.2d 713 (Mo. Ct. App. 1967). Another criticism is that this rule promotes the idleness, not the usefulness, of property. See Martin v. Siegley, 123 Wash. 683, 687, 212 P. 1057, 1058-59 (1923) (rejecting the rule and allowing the landlord to relet without "surrender of the landlord's rights [to contract damages] under the lease agreement").

170. Ames, *supra* note 43, at 378-79. "[T]he covenant to pay [rent] is an accessory one." Hall v. City of Baltimore, 252 Md. 416, 424, 250 A.2d 233, 238 (1969) (quoting Jersey Blvd. Corp. v. Lerner Stores Corp., 168 Md. 532, 539, 178 A. 707, 709 (1935)).

171. A constructional presumption that a surrender was intended to be accompanied by a mutual rescission of the contract in the form of Choice III makes eminently good sense where the surrender is voluntary and involves no breach by the tenant. See, e.g., Dills v. Stobie, 81 Ill. 202 (1876). Exactly the opposite presumption is indicated if the tenant has breached and the landlord needs better security. See Gordon v. Consolidated Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965).

Updegraff observed that the situation of abandonment followed by the landlord's reletting is "analogous to the situation found to exist in any case of assignment of a lease," that "the tenure between the landlord and the lessee is at an end, but the contractual obligation continues." Updegraff, *supra* note 163, at 79-80. See *supra* notes 102-08 and accompanying text. The distinction is merely that in reletting after abandonment, the old privity of estate is extinct and a new one is created. In an assignment, by contrast, the original privity of estate and its contract promise, given as security, can be seen to continue. To give substantive effects to such a distinction, however, yields an anomalous result: when the original tenant does not breach, the original tenant is held to the contract, and the landlord is given two possible debtors in the assignor and assignee, whereas when the original tenant breaches, he is allowed to go free.

Another speculation, perhaps more apt, is that exponents of the both-or-neither limitation simply have lost sight of the dual nature of the rent obligation and assume that the landlord only has one basis of recovery, a monistic lease, which must be stood upon or relinquished.¹⁷² Indeed, this kind of confusion¹⁷³ is evident not only in the both-or-neither cases, but also in others holding to the contrary that, without accepting the surrender or losing his remedy, the landlord may relet the premises to a second tenant, but only as self-appointed and wholly fictitious agent for the first.¹⁷⁴ Although this fictitious agency theory for allowing the landlord a recovery after reletting has held considerable

172. See, e.g., *Ten-Six Olive Co. v. Curby*, 208 F.2d 117, 121 (8th Cir. 1953) (“[A] surrender and acceptance of a lease terminates the liability of the tenant on all obligations under *the lease* not then accrued.”) (emphasis added); *Vineyard Village-Georgia v. Crum*, 136 Ga. App. 335, 337, 221 S.E.2d 208, 210 (1925) (“[Acceptance of a surrender] discharges the tenant from liability for future rents and a cancellation or rescission of the contract is thus effected by agreement of the parties, express or implied.”) (emphasis added). Sometimes a court will refuse to allow a recovery of rent on the grounds of surrender and refuse to consider the possibility of the survival of contract damages. See, e.g., *Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N.Y. 388, 56 N.E. 903 (1900); *Pelton v. Place*, 71 Vt. 430, 46 A. 63 (1899). See also *Haycock v. Johnson*, 81 Minn. 49, 83 N.W. 494 (1900); *Hensen v. B. & W. Fin. Co.*, 401 S.W.2d 261 (Tex. Civ. App. 1966); *Anderson v. Andy Darling Pontiac*, 257 Wis. 371, 43 N.W.2d 362 (1950). For a discussion of variations and cases, see *Kanter v. Safran*, 68 So. 2d 553, 557 (Fla. 1953).

For a recent case which kept the dual nature of the rent obligation in very clear focus, see *Winshall v. Ampco Auto Parks, Inc.*, 417 F. Supp. 334 (E.D. Mich. 1976), in which the court specifically rejected defendant’s attempt to confuse the issue by trying “to engraft the cumbersome doctrine of surrender onto the body of contract law.” *Id.* at 336. See also *Novak v. Fontaine Furniture Co.*, 84 N.H. 93, 146 A. 525 (1929); *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916).

173. There are other sorts of confusion as well. For example, it is the view in New York that a surrender of possession is not always a surrender of a “lease” or of the estate thereby created, and that acceptance of a surrender of possession is merely evidence of a surrender of the estate. *Kotler v. New York Bargain House, Inc.*, 242 N.Y. 28, 34, 150 N.E. 591, 593 (1926). Thus, even after reletting, the landlord may still recover “rent” as opposed to “damages” from the first tenant, provided only that the reletting was with the tenant’s consent. *Underhill v. Collins*, 132 N.Y. 269, 271, 30 N.E. 576, 577 (1892). This rent, however, is measured rather like damages. *Id.* at 272, 30 N.E. at 577. Moreover, whether this rent obligation survives the estate termination or not depends on the existence of a contract calling for such survival. *Michals v. Fishel*, 169 N.Y. 381, 62 N.E. 425 (1902). Thus, the rent obligation seems incontestably contractual in nature. If, on the other hand, the landlord takes possession by summary dispossession proceedings, the tenant’s liability is said to be “not for rent, but for damages.” *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928). See also *infra* note 197.

174. E.g., *Liberty Plan Co. v. Adwan*, 370 P.2d 928 (Okla. 1962). In *Ralph v. Deiley*, 293 Pa. 90, 141 A. 640 (1928), the court specifically recognized the dual nature of the lease, but then inexplicably stated that “privity of estate is divested when the lessee [merely] quits the premises” while acceptance of the surrender would terminate the privity of contract. *Id.* at 95, 141 A. at 643.

Incidentally, subsumed under “fictitious agency” cases are those holdings that ascribe the continuation of contract damages liability to the fact that the landlord in reletting is acting “for the account” or “for the benefit” of the tenant, whether or not the court actually uses the word

sway, the fiction upon which it rests is unnecessary and distracting¹⁷⁵ and has served mainly to produce confused opinions¹⁷⁶ and anomalous holdings.¹⁷⁷ There is no reason why a landlord who reenters after an abandonment, either resuming possession or reletting the premises, should be deemed to have accepted both the proffered surrender and the offer of mutual rescission.¹⁷⁸

In most jurisdictions there is no "both-or-neither" limitation on the landlord's choices, and Choice II is recognized as one of the landlord's possible responses to the tenant's abandonment, even if sometimes on the fictitious agency theory. There are two variants of the rule.¹⁷⁹ Under the first, the landlord may accept the surrender of the leasehold, thereby terminating the privity of estate without impairing the landlord's contract rights, provided notice is given to the tenant that this is the landlord's intention.¹⁸⁰ Under the second variant, the landlord's contract rights are preserved, provided only that the landlord demonstrate an intention to do so in dealing with the premises.¹⁸¹ Under

"agent." *E.g.*, *DeHart v. Allen*, 26 Cal. 2d 829, 832, 161 P.2d 453, 455 (1945); *Carpenter v. Riddle*, 527 P.2d 592, 594 (Okla. 1974).

175. *See Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928); 1 A.L.P., *supra* note 17, at § 3.99; 2 M. FRIEDMAN, *supra* note 3, at § 16.302. The agency theory is more than just an inapt fiction; it carries with it such excess baggage as the seemingly irrelevant question whether, without the tenant's consent, the landlord can act as the tenant's agent in reletting. *Compare Gray v. Kaufman Dairy & Ice Cream Co.*, 162 N.Y. 388, 56 N.E. 903 (1900) with *Underhill v. Collins*, 132 N.Y. 269, 30 N.E. 576 (1892).

176. *See supra* notes 172 & 174.

177. If the landlord relets as the tenant's agent, it would be anomalous to hold, as courts do, that the tenant has no right to any surplus which the landlord might gain by reletting. *E.g.*, *Whitcomb v. Brant*, 90 N.J.L. 245, 100 A. 175 (1917). *See Wanderer v. Plainfield Carton Corp.*, 40 Ill. App. 3d 552 (1976); *Eidelman v. Walker & Dunlop*, 265 Md. 538, 290 A.2d 780 (1972); *Maida v. Main Bldg.*, 473 S.W.2d 648 (Tex. Civ. App. 1971). It is quite an anomalous agent who does not have to account to its principal for the profits of the endeavors on the principal's behalf. *See* RESTATEMENT (SECOND) OF AGENCY § 427 (1958); F. MECHAM, *OUTLINES OF LAW OF AGENCY* 365 (4th ed. 1952); W. SEAVY, *HANDBOOK OF THE LAW OF AGENCY* 243-44 (1964).

178. *Winshall v. Ampco Auto Parks*, 417 F. Supp. 334 (E.D. Mich. 1976); *Novak v. Fontaine Furniture Co.*, 84 N.H. 93, 146 A. 526 (1929); *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916). *See supra* text accompanying notes 163-64. In *Gordon v. Consol. Sunray*, 195 Kan. 341, 346, 404 P.2d 949, 954 (1965), the court stated: "Acceptance of a surrender of a lease should not be presumed. The burden of proving it is on the lessee . . ."

179. The two variants are expressed in terms of the dual-relation conception of leases, although the cases themselves are often rationalized in other terms, such as the fictitious agency theory.

180. *E.g.*, *Von Schleinitz v. North Hotel Co.*, 323 Mo. 1110, 23 S.W.2d 64 (1929); *Liberty Plan Co. v. Adwan*, 370 P.2d 928 (Okla. 1962); *Karns v. Vestor Motor Co.*, 161 Tenn. 331, 30 S.W.2d 245 (1930). *See* 2 M. FRIEDMAN, *supra* note 3, at 675.

181. *E.g.*, *Sagamore Corp. v. Willcutt*, 120 Conn. 315, 180 A. 464 (1935); *Kanter v. Safran*, 68

either variant, the results are the same: the tenant's privity-of-estate duty to pay rent and right to possession are extinguished, while the tenant's liability for mitigated damages on the contractual promise to pay is preserved.¹⁸²

3. *Forfeiture by the Tenant.* Under the general common-law rule, absent provision for forfeiture in the lease, the tenant's right to possession for the term is not affected by the tenant's failure to pay the rent or to perform any other obligations under the lease.¹⁸³ That is, at common law, leases are nonforfeitable for breach, absent an express condition or limitation on the leasehold estate.¹⁸⁴ Nevertheless, landlords can and do provide for lease termination or reentry when tenants default. Moreover, it seems fair to say that, by custom if not law, forfeitable leaseholds are more the norm than the exception today even if courts abhor forfeiture and are alert to prevent or relieve against it.¹⁸⁵

Because forfeiture works by means of express conditions or limitations terminating the tenant's estate, the juridical effect of a forfeiture is, at very least, to extinguish the privity of estate.¹⁸⁶ The situation is

So. 2d 553 (Fla. 1953); *Hoke v. Williamson*, 98 Kan. 580, 158 P. 1115 (1916); *Novak v. Fontaine Furniture Co.*, 84 N.H. 93, 146 A. 525 (1929); *Ralph v. Deiley*, 293 Pa. 90, 141 A. 640 (1928).

182. See cases cited *supra* notes 180-81. Any contractual obligations of the landlord in relation to possession should, presumably, be discharged as a result of the tenant's material breach. *Amick v. Metropolitan Mortgage & Sec. Co.*, 453 P.2d 412 (Alaska 1969), *overruled on other grounds*, *Wickwire v. City & Borough of Juneau*, 557 P.2d 783 (Alaska 1976). See *Walker & Co. v. Harrison*, 347 Mich. 630, 81 N.W.2d 352 (1957); RESTATEMENT (SECOND) OF CONTRACTS §§ 241-243 (1981); RESTATEMENT OF CONTRACTS §§ 274, 397 (1932). Acceptance of the proffered surrender eliminates the tenant's property basis for continued possession, see *supra* text accompanying notes 47-56 & 72-82, and the remaining legal relationship of the parties rests solely in contract.

For a case illuminating this distinction, see *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1945). In *Kulawitz*, the tenant abandoned possession, but no acceptance of surrender or rescission occurred. The landlord then brought an action for rent while the tenant's possessory and contractual rights were both still in force. Although the tenant was in default on the rent, the tenant's continuing possessory interest prevented application of the usual contract consequences of a material breach. *Id.* See RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981); RESTATEMENT OF CONTRACTS §§ 309-310 (1932). Indeed, the continuing possessory interest supplied justification for discharge of the tenant under the lease when the landlord breached a counter-promise.

183. See *supra* text accompanying notes 72-82.

184. See *supra* note 76.

185. See generally R. SCHOSHINSKI, *supra* note 17, at 385-94; Humbach, *supra* note 77, at 266-332; *infra* text accompanying notes 295-313. Even with a forfeiture provision, the landlord's power to evict is seriously limited by equitable and other judicial protections.

186. *Hall v. Gould*, 13 N.Y. 127 (1855); *Oldershaw v. Holt*, 12 Ad. & E. 590, 113 Eng. Rep.

similar to cases of eviction¹⁸⁷ where, as previously mentioned, the privity of estate and the duty to pay rent arising out of it terminates.¹⁸⁸ In cases of wrongful eviction, the landlord loses not only the privity-of-estate right to reserved rent but also the contractual right to rent payments. The contract right to rent is lost because, by wrongfully evicting the tenant, the landlord has committed a breach¹⁸⁹ which would, on ordinary contract principles, discharge the tenant from further performance.¹⁹⁰

When a leasehold is forfeited on the grounds that the tenant has committed a material breach, however, the eviction by the landlord is justified rather than wrongful. Although a justified eviction terminates privity of estate and the attendant right to reserved rent, a justified eviction should not necessarily affect the tenant's contractual obligations under the lease. By acting pursuant to an appropriate provision for forfeiture in the lease, the landlord ought to be able to terminate the privity of estate without breaching any duty owed to the tenant. One might therefore expect that an eviction on forfeiture should not constitute a *per se* excuse or discharge of the tenant from the contract-based obligations under the lease. Although a forfeiture must extinguish the obligation for rent, it does not follow that the tenant's liability for contract damages necessarily should also be extinguished unless the parties agree to a release.¹⁹¹ Despite this reasoning, however, it is the general

935 (1840). *See* *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928); *Lincoln Fireproof Warehouse Co. v. Greusel*, 199 Wis. 428, 224 N.W. 98 (1929).

187. *See* *Kelley v. Von Herberg*, 184 Wash. 165, 50 P.2d 23 (1935); *supra* note 83.

188. *See supra* text accompanying notes 83-89.

189. For a discussion of the implied covenant of quiet enjoyment, *see supra* notes 31 & 84-85.

190. In order to excuse a tenant, the landlord's breach would have to be material. *See infra* notes 278 & 295. In the case of a contract to supply possession, however, one can scarcely imagine a more material breach than eviction from that very possession.

191. If the tenant breaches by abandoning possession and ceasing to pay the rent two possible characterizations may apply to the landlord's resumption of the tenant's estate: either forfeiture based upon the tenant's wrongful abandonment, or acceptance of a proffered surrender. There is only one necessary analytical difference between forfeiture after the tenant's abandonment and acceptance of the proffered surrender in such a case. The difference is that forfeiture must ostensibly be founded upon a forfeiture provision in the lease, or on a statute providing for forfeiture, *see supra* text accompanying notes 72-81, whereas the acceptance of a proffered surrender is thought of as an independent, post-lease transaction between the parties, for which no lease provision is required. The juridical effects on privity of estate and privity of contract could be and arguably should be the same for both, that is, the tenant's estate and reserved rent obligation are extinguished, but the tenant's contract obligations continue unimpaired. Nevertheless, because of the confused development of the law on surrenders, such as its fictitious agency theory, *see supra* notes 167-82 and accompanying text, and the general presumption that forfeiture also extinguishes con-

rule that a termination of the lease by the landlord's retaking of possession upon a forfeiture extinguishes all further obligations.¹⁹²

Fundamentally, the matter should be one of intention: the juridical effects of a forfeiture provision—whether the forfeiture extinguished privity of estate alone or the privities of estate and contract—should depend on the parties' intentions in creating the provision.¹⁹³ Thus, in one view, a forfeiture provision may be treated as an alternative duration provision for the overall arrangement, intended to apply to the parties' contractual relationship as well as to the leasehold estate itself. This interpretation would be appropriate in a case in which, for example, the lease provided that, on the tenant's breach, the lease would "determine and be utterly void"¹⁹⁴ or that it would "cease and come to an end as if that were the day originally fixed [t]herein for the expiration of the term [t]hereof."¹⁹⁵ Conversely, if the lease contains a contractual undertaking that expressly continues the tenant's liability—a so-called survival clause or lessee's covenant of indemnity—then liability for contract damages should survive forfeiture.¹⁹⁶ Why such a survival clause or covenant of indemnity should be necessary to preserve contract-damage liability is questionable,¹⁹⁷ though the issue is merely

tract rights, *see infra* notes 192-96 and accompanying text, the two have significantly different juridical effects. As a result, it matters considerably which response a landlord chooses after the tenant abandons. *See McCormick, supra* note 116.

192. 2 M. FRIEDMAN, *supra* note 3, at 669-70; Annot., 99 A.L.R. 42 (1935). *See* McArthur v. Kostek, 483 P.2d 1351 (Colo. Ct. App. 1971); Sutton v. Goodman, 194 Mass. 389 (1907).

193. *See* Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N.E. 820 (1893).

194. Jones v. Carter, 15 M. & W. 718, 153 Eng. Rep. 1040 (1846).

195. Rohrt v. Kelley Mfg. Co., 162 Tex. 534, 536, 349 S.W.2d 95, 96 (1961).

196. *E.g.*, William Filene's Sons v. Weed, 245 U.S. 597 (1918); Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97 (1928); Selts Inv. Co. v. Promoters of the Federated Nations, 197 Wis. 471, 222 N.W. 812 (1929). *See* 1 A.L.P., *supra* note 17, at § 3.97. *But see* Northern Ind. Steel Supply Co. v. Chrisman, 139 Ind. App. 27, 36-37, 204 N.E.2d 668, 673-74 (1965).

197. In Oldershaw v. Holt, 12 Ad. & E. 590, 113 Eng. Rep. 935 (1840), the court apparently was prepared to allow a recovery of any provable contract damages even though the obligation for reserved rent had terminated. Similarly, in Hall v. Gould, 13 N.Y. 127 (1855), the court upheld a judgment for damages rendered on a claim for rent, saying that, though the estate was at an end and rent, as such, could no longer accrue, liability nevertheless rested on covenant. These cases, however, seem to have no following, and *Hall v. Gould* seems to have been effectively limited to cases of reentry by ejectment action or without legal process. Summary dispossession proceedings are the more usual proceeding for recovering possession in New York and such proceedings are held to annul the relation of landlord and tenant except to the extent that there are covenants that expressly survive such proceedings. Michaels v. Fishel, 169 N.Y. 381, 62 N.E. 425 (1902); Gray v. Kaufman Dairy & Ice Cream Co., 162 N.Y. 388, 56 N.E. 903 (1900).

The more typical view, stated in Watson v. Merrill, 136 F. 359, 362 (8th Cir. 1905), is that resumption of possession by the landlord "necessarily constituted, in the absence of an express

one of correct interpretation, not of conception. Thus, the propriety of the usual interpretive presumption is not of direct concern to the present analysis. In any case, a draftsman can readily avoid the problem by explicitly clarifying intention.¹⁹⁸ The important point is that, after a forfeiture, any rent obligation which does survive, whether or not expressly provided for, can only be purely contractual¹⁹⁹ and is therefore subject to the rule of mitigation.²⁰⁰

4. *Evaluation of the Traditional and "Purely" Contractual Analyses.* In treating a lease as a contract of conveyance and applying ordinary contract principles to it, we have seen that when the tenant wrongfully abandons or breaches a condition of the lease two distinct possibilities emerge. First, the landlord may recover the full reserved rent without mitigating damages by choosing to stand on the conveyance and rejecting the tenant's attempt to force title back.²⁰¹ Second, the landlord will be expected to mitigate damages if he reacts to the tenant's breach by taking back title through an acceptance of the proffered surrender, or by a forfeiture.

Although the conveyance theory of leasing can explain the traditional outcomes in terms of a coherent conception of leasing transactions, such conceptual explanations do not justify those outcomes or, in particular, justify the rule that the landlord can recover the full rent without mitigation. To the contrary, the significant minority of courts

agreement to the contrary, a termination of the lease, and a release of the lessee from the payment of all the installments of rent he had promised to pay thereafter." One possible explanation of this interpretational bias towards total extinction of all further liability is that, having retaken the possession, it would be unfair to allow the landlord to have the premises' use as well as the agreed compensation for its use. See *Lamson Consol. Store Serv. Co. v. Bowland*, 114 F. 639, 641 (6th Cir. 1902). Nevertheless, this hardly explains the refusal to allow contract damages. See *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N.E. 820 (1893); *infra* note 214. Another possible reason for this rule is that, if the purpose of the contract liability is to provide "better security," then the contract liability should terminate whenever the secured obligation terminates. See *supra* text accompanying notes 170-77.

198. See *supra* note 196.

199. *Crawford Clothes, Inc. v. Levine*, 434 F.2d 399 (2d Cir. 1970); *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N.E. 820 (1892); *Fifty Assocs. v. Berger Dry Goods Co.*, 275 Mass. 509, 176 N.E. 643 (1931); *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97 (1928); *Selts Inv. Co. v. Promoters of Federated Nations*, 197 Wis. 476, 222 N.W. 812 (1929). See 2 H. TIFFANY, *supra* note 32, at 1494 n.75.

200. See *supra* note 199. See also *Satin v. Buckley*, 246 A.2d 778 (D.C. Ct. App. 1968); *Jordon v. Nickell*, 253 S.W.2d 237 (Ky. 1952); *Monger v. Lutterloh*, 195 N.C. 274, 142 S.E. 12 (1928).

201. Depending upon its wording, however, breach by the tenant of a conditional limitation may force title back on the landlord without his desiring it. See *supra* note 76.

that have refused in recent times to apply the no-mitigation rule have said in doing so that they were rejecting the conveyance theory and treating leases like other contracts.²⁰² But does rejection of the no-mitigation rule really require rejection of the conveyance theory, and more to the point, is a purely contract theory of leasing really better suited to support a general mitigation rule for leases than the traditional conveyance-cum-contract conception?²⁰³

Although the adoption of a mitigation rule for leases supposedly is an application of ordinary contract principles to leases, an examination of the mitigation-rule cases themselves often belies that claim. Many cases hold, for example, that in order to have any recovery, the landlord must affirmatively prove that reasonable efforts were made to relet the abandoned premises.²⁰⁴ That is, without an attempt to mitigate, no damages are recoverable at all. This “duty” to mitigate, backed up by a forfeiture, is not at all the rule applied to breaches of ordinary contracts.

Under the general measure of damages for breach of an executory contract for an exchange of values, the aggrieved party may usually recover at least the difference between the value to be provided by the breaching party and the fair market value of the aggrieved party’s own performance.²⁰⁵ This general measure of damages does not presuppose or require that the aggrieved party attempt to mitigate damages; that is, it does not create a “duty” of mitigation backed up by a forfeiture. Rather, it merely places the onus of securing a substituted per-

202. See e.g., *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968); *Bernstein v. Seglin*, 184 Neb. 673, 171 N.W.2d 247 (1969); *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977); *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. Civ. Ct. 1976); *Parkwood Realty Co. v. Marciano*, 77 Misc. 2d 690, 353 N.Y.S.2d 623 (N.Y. Civ. Ct. 1974); *Mar-Son, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289 (N.D. 1977); Annot., 21 A.L.R.3d 534, 565-70 (1968).

203. Despite the occasional attacks on the conveyance conception of leases, see, e.g., *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977); *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. Civ. Ct. 1976); *supra* notes 11 & 118, there is no case to my knowledge that purports to reject the conveyance theory for purposes of determining the tenant’s right to possession. Consequently, whatever courts may say, they are not adopting a contractual theory of leasing, at least not for all purposes. Such an attempt to mount two horses at the same time is perhaps conceptually unaesthetic but may be acceptable if justice compels it. But does justice compel it?

204. *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968) (part of cause of action); *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977) (same); *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. Civ. Ct. 1976) (same); *but cf.* *Hirsh v. Merchants Nat’l Bank & Trust Co.*, 166 Ind. App. 497, 336 N.E.2d 833 (1975) (tenant must prove possibility of mitigation); *Parkwood Realty Co. v. Marciano*, 77 Misc. 2d 690, 353 N.Y.S.2d 623, 626 (N.Y. Civ. Ct. 1974) (same).

205. See *supra* note 133.

formance on the aggrieved party.²⁰⁶

An employment contract probably is the kind of ordinary contract most closely resembling a lease. Like a lease, in its contract aspects, an employment contract involves a continuous interchange of values between the parties.²⁰⁷ The employee hires out his services over an agreed term much as a landlord, in contractual terms, hires out the use of his premises. Thus, a premature wrongful discharge of the employee compares with the premature abandonment by a tenant of the use of the premises hired for a term from the landlord. Quite interestingly, the usual contract rule for employment contract cases closely parallels the traditional no-mitigation rule for leases: the wrongfully discharged employee is allowed to recover the present value of the full contract wage, without mitigation, unless the employer sustains the burden of proving facts of mitigation, such as substitute income which was or reasonably could have been earned.²⁰⁸ If this ordinary contract rule were applied to leases, a landlord could at least recover the difference between the rent and fair rental value, and perhaps the full rent, even if the landlord made no effort to mitigate damages.²⁰⁹

Likewise, the cases rejecting the no-mitigation rule for leases do not always seem to take adequate account of another ordinary contract rule, sometimes referred to as the "lost volume" seller rule. This rule applies to cases in which, after a breach, the aggrieved promisee cannot truly prevent ensuing loss by making a substitute contract with another party. This results when the "substitute" contract would have been available to the promisee even if the first contract had not been

206. "The rule of mitigation may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party [The defendant] had the burden of proving that the plaintiff did not use reasonable diligence in procuring a substitute" *Apex Mining Co. v. Chicago Copper & Chem. Co.*, 306 F.2d 725, 731 (8th Cir. 1962).

207. Under the Louisiana Civil Code, as a matter of comparison, leases and employment contracts are treated in the same Title ("Of Lease") as alternative types of synallagmatic contracts for hire. *See* LA. CIV. CODE ANN., arts. 2669, 2673-75 (1952). *See also* *Whitaker v. Hawley*, 25 Kan. 674, 687 (1881); *Williston*, *supra* note 30; *supra* note 48.

208. *E.g.*, *Parker v. Twentieth Century-Fox Corp.*, 3 Cal. 3d 176, 474 P.2d 689, 89 Cal. Rptr. 737 (1970); *Crillo v. Curtola*, 91 Cal. App. 2d 263, 204 P.2d 941 (1949); *Krehbiel v. Goering*, 179 Kan. 55, 293 P.2d 255 (1956); *Spurk v. Civil Serv. Bd.*, 231 Minn. 183, 42 N.W.2d 720 (1950). *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 comment c (1981); *D. DOBBS*, *supra* note 73, at § 12.25; *C. McCORMICK*, *supra* note 133, at 627-28; *Farnsworth*, *supra* note 133, at 1195. The rule has been criticized, *see, e.g.*, *C. McCORMICK*, *supra* note 133, at 628, but it has held firm nevertheless.

209. *See* *Whitehorn v. Dickenson*, 419 S.W.2d 713 (Mo. Ct. App. 1967) (Tennessee law) (dictum supporting proposition although adhering to no-mitigation rule).

breached. Were it not for the breach, the promisee could have had the advantage of both contracts. The breach of one of the contracts, however, irretrievably deprives the promisee of the advantage of that contract. Because, in such cases, the second contract does not truly mitigate the loss from breach of the first one, the rule of mitigation ordinarily would not require the promisee's recovery to be reduced by any amounts received under the second contract.²¹⁰

Similarly, a landlord of a multi-unit building in which there nearly always is a number of empty units might never be able to mitigate damages by reletting a breaching tenant's apartment. If the landlord did relet the breaching tenant's apartment while there are other vacancies, the landlord might thereby lose a chance to lease one of the other vacant apartments. It does not, however, generally appear from the cases rejecting the no-mitigation rule that the landlord becomes entitled to the full rent simply by showing other vacancies.²¹¹

Thus, many of the results in cases requiring mitigation, though professedly based upon ordinary contract law, seem to deviate freely from it. A rather special contract law has been invented if contract theory is to account for the results. These results would, however, in most practical situations, fit rather nicely under the traditional conveyance theory of leasing. All that is required is to recognize the reality that when the tenant acts to relinquish his claim to possess the premises, the possession in fact usually is resumed by the landlord. The landlord may not want the possession, but it is hard to believe that in most cases the landlord does not in fact accept the possession. Certainly, landlords do not under such circumstances regard the right of possession as up for grabs, available to anyone who wishes to take occupancy.²¹² Most landlords would act firmly and decisively to exclude any squatters who

210. See RESTATEMENT (SECOND) OF CONTRACTS §§ 347 comment f, 350, comment d (1981); C. McCORMICK, *supra* note 133, at § 41; J. MURRAY, *supra* note 114, at 462-63; Farnsworth, *supra* note 133, at 1195-98. See also *Neri v. Retail Marine Corp.*, 30 N.Y.2d 293, 285 N.E.2d 311, 334 N.Y.S.2d 165 (1972); U.C.C. § 2-708(2); .

211. The idea was specifically rejected in *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 763, 773 (1977), in which the court said that the landlord must treat the apartment in question as if it were one of his vacant stock. See, e.g., *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 528 P.2d 637 (1974) (number of units the landlord has for rent is taken into account in determining reasonableness of effort to relet). See also *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. Civ. Ct. 1976); MD. REAL PROP. CODE ANN. § 8-207 (1981).

212. This notion is reminiscent of the old rule of general occupancy which applied to life estates *pur autre vie* ("to A for the life of B"). If the life tenant died before the *cestui que vie*, nobody had an automatic right to possession, and the rule was that "[h]e that first can hap it, shall

may appear, and this exclusion-oriented frame of mind, plus control de facto exercised by the landlord, constitutes possession.

If the landlord does not make reasonable efforts to relet or otherwise take advantage of the potential benefits of resumed possession, then the landlord has only himself to blame for the premises' low yield.²¹³ In any event, as a possessor excluding others from the premises' benefit or yield, the landlord ought to be deemed to be receiving, and perhaps also spurning, the benefits of possession.²¹⁴ Privity of estate would, of course, be extinguished on such a view. Therefore, the landlord's only possibility of recovery would be on a contract basis for the difference between fair rental value which he is deemed to have received and the rent agreed to in the lease. Thus, implicitly, the rule of mitigation would apply to such recovery.²¹⁵ Consonant with the conveyance conception of leases, the burden would be on the landlord, as a seller, to show that the claimed losses were not mitigatable; that is, that the fair rental value of the premises was less than the rent agreed upon in the broken lease.²¹⁶ Further, because the repossessed premises would be "the landlord's," they would properly be treatable as a part of his vacant stock for purposes of determining whether mitigation is possible.²¹⁷

Admittedly, the view that a landlord does resume possession in fact after abandonment is a departure from one of the traditional assump-

enjoy out the term." See H. CHALLIS, *supra* note 37, at 359; R. MEGARRY & H. WADE, *supra* note 21, at 103-04. See also 1 A.L.P., *supra* note 17, at § 226.

213. Compare *supra* note 151 with *supra* text accompanying notes 144-46. See Wright v. Kilgo, 212 Ga. 712, 95 S.E.2d 7 (1956); Sanden v. Hanson, 201 N.W.2d 404 (N.D. 1972); Frisco Joe's, Inc. v. Peay, 558 P.2d 1327 (Utah 1977); Richter v. Fassett, 253 Wis. 101, 33 N.W.2d 230 (1948).

214. See *supra* notes 125 & 151. Though the landlord may be receiving the benefits of possession, it must be remembered that he is nevertheless being deprived of the benefits of his bargain. Those benefits include not merely the difference between the agreed rent and the fair rental value of the premises, but also the value of the freedom from the risks of possession. See *supra* note 100. Accordingly, even after applying the conveyance theory in the fashion described in the text, the landlord seemingly should still be entitled to a contractual recovery of the fair rental value differential plus costs, including lost rent during a reasonable vacancy period pending reletting, arising from the need to relet—costs whose risk were supposedly shifted under the original lease.

215. See *supra* note 137.

216. D. DOBBS, *supra* note 73, at § 12.6. See Davis v. Wilson, 261 Or. 137, 493 P.2d 31 (1972) (citing 3 S. WILLISTON, SALES § 582 (1948) on the burden of a seller of goods to prove the general measure of damages). The case implicitly treats a lease as a conveyance although recognizing that the rule of mitigation applies—thereby reaching the result of cases like those cited *supra* note 204, without resort to a novel contract theory rationale.

217. See *supra* note 211.

tions of the conveyance theory.²¹⁸ The particular assumption departed from is, however, one of fact, not concept; it is merely a question of interpreting actual intent to retake dominion and control, based upon the evidence of conduct. Moreover, the departure appears likely to conform better with the usual facts under modern conditions and patterns of behavior. In any event, such a departure certainly is less than that required by the adoption of a contract theory of leasing. Despite frequent assertions to the contrary, few of the desired results in abandonment cases could be better rationalized by conceiving of leases purely as contracts, at least not by reference to ordinary contract law. If, however, leases are treated as conveyances in the traditional conception, for which and concerning which contracts are made, ordinary contract law applied to the resulting conveyance-cum-contract readily provides a conceptual account for the rule of mitigation.

B. The Problem of Services

The typical lease of space in a multi-unit building is not merely an exchange of rent for possession. Rather, it is an exchange of rent for possession-plus-services.²¹⁹ Services that are expected to accompany possession usually include maintenance and repairs of the physical facility, but can also include such items as utilities, central heat, doormen, or even saunas and pools, depending upon the circumstances and the parties' agreement. As an original question, the services part of the exchange may or may not have been conveniently fit into a purely conveyance theory of lease rights and duties.²²⁰ Nevertheless, until very

218. See *supra* note 148. Perhaps one reason for holding that de facto resumptions of possession are not acceptances of proffered surrenders, see *supra* notes 125 & 148, is the desire to avoid depriving the landlord of all rights against the defaulting tenant, on the assumption that acceptance of surrender would extinguish the landlord's contract rights to rent. See *supra* text accompanying notes 167-82.

219. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978). See also *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 418 N.Y.S.2d 310, 391 N.E.2d 1288, *cert. denied*, 444 U.S. 992 (1979). See generally *Quinn & Phillips*, *supra* note 11, at 225-39.

220. The idea of affirmative duties as a part of property interests is hardly unknown. There are, for example, the duties with respect to hazardous conditions, which are imposed in favor of invitees, passers-by, and others, on persons who possess land. See W. PROSSER, *TORTS* 351-99 (4th ed. 1971). In addition, there are the affirmative duties attaching in the form of so-called real covenants or equitable servitudes. *E.g.*, *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 783 (1938); 2 A.L.P., *supra* note 17, at §§ 9.16, .36. Perhaps more on point is the implied covenant or obligation of the tenant to make ordinary repairs in order to

recently, no general obligation on the landlord to provide services beyond bare possession has been understood to arise from the conveyance of the possessory interest itself.²²¹

In theory, at least, it should be no cause of serious concern that the conveyance aspect of a lease transaction does not protect the tenant's service-related expectations. If the parties to a lease are not satisfied with the law-imposed details of their legal relationship, they can always modify those details. By contractual agreement, the basic landlord-tenant relation created in a conveyance can be shaped and molded to fit the requirements of virtually any imaginable exchange relation involving a temporary interest in real estate.²²² For two important reasons, however, the possibility of contracting has not proved a panacea for perceived deficiencies in the basic conveyance-created relation. First, parties—especially residential tenants—very often do not or realistically cannot bargain for the contractual protections they need in order to have a legal right to the benefits that they expect to receive under the lease. Second, even when the desired contractual protections are successfully bargained for, such protections may be rendered practically nugatory by the long-held rule that a tenant in possession must pay the full rent whether or not the landlord performs the contractual obligations to provide services under the lease. This rule for leases, superficially at variance with ordinary contract law,²²³ is sometimes referred to as the doctrine of “independence of covenants” in leases.²²⁴

1. Failure of Tenants to Negotiate for Desired Protections. As a matter of common law, the landlord traditionally had no law-imposed general obligation to put or maintain the leased premises in any particular

prevent permissive waste. *See infra* note 226 and accompanying text. Because the rights and duties arising out of privity of estate were essentially law-imposed incidents of a voluntarily assumed status relationship, it may be guessed that they were intentionally made no more onerous or detailed than was required by the status relationship—between possessor and the reversioner, or incorporeal-interest, holder.

221. *See infra* text accompanying notes 225-29.

222. The law-implied rights and duties under a lease are almost never mandatory and almost always yield to a contrary agreement of the parties. *See* *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919, 925 n.8 (4th Cir. 1976); *M. Karam & Sons Mercantile Co. v. Serrano*, 51 Ariz. 397, 77 P.2d 447 (1938); *Bovin v. Galitzka*, 250 N.Y. 228, 165 N.E. 273 (1929).

223. *See infra* text accompanying note 269.

224. *E.g.*, *Thomson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 39 N.E. 7 (1894); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. 1978); *Rock County Sav. & Trust Co. v. Yost's, Inc.*, 36 Wis. 2d 360, 153 N.W.2d 594 (1967); J. MURRAY, *supra* note 114, at § 183; 6 S. WILLISTON, *supra* note 24, at § 890.

condition.²²⁵ To the contrary, consonant with the conveyance theory that the tenant is owner of a temporary interest in land, the tenant has been the one required to make ordinary repairs.²²⁶ The failure to make such repairs would be actionable by the landlord and is referred to as "permissive waste."²²⁷ Of course, it would be theoretically possible for the landlord to assume contractually the responsibility for keeping the

225. *E.g.*, *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 206 (D.C. Cir. 1974); *Smithfield Improvement Co. v. Coley-Bardin*, 156 N.C. 225, 72 S.E. 312 (1911). *Accord* *Lawler v. Capital City Life Ins. Co.*, 68 F.2d 438 (D.C. Cir. 1933); *Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 52 (D. Del. 1945); *Service Oil Co. v. White*, 218 Kan. 87, 542 P.2d 652 (1975); *Hart v. Windsor*, 12 M. & W. 68, 152 Eng. Rep. 114 (1843); *Paradine v. Jane*, Aley 26, 82 Eng. Rep. 897 (1647). *See generally* 1 A.L.P., *supra* note 17, at § 3.45; 2 M. FRIEDMAN, *supra* note 3, at 392-93; 2 R. POWELL, *supra* note 3, at § 225. Over time, exceptions were grafted on to the general rule, such as making the landlord responsible for common areas and facilities, *see, e.g.*, *Primus v. Bellevue Apartments*, 241 Iowa 1055, 44 N.W.2d 347 (1950); *Charlow v. Blankenship*, 80 W. Va. 200, 92 S.E. 318 (1917); 2 M. FRIEDMAN, *supra* note 3, at 406-07, for the fitness of particular facilities which the landlord contracted to provide, *see, e.g.*, *Woolford v. Electric Appliances, Inc.*, 24 Cal. App. 385, 75 P.2d 112 (1938), or for the condition of furnished premises leased for short terms, *see infra* note 240. There was, however, no general warranty of habitability or fitness, and primary responsibility for the condition of the premises was left to the tenant, like any other owner of an interest in land. "[F]raud apart, there is no law against letting a tumbledown house." *Robbins v. Jones*, 15 C.B. (N.S.) 221, 240, 143 Eng. Rep. 768, 776 (1863).

226. *E.g.*, *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974); *Thomas v. Roper*, 162 Conn. 343, 294 A.2d 321 (1972); 1 A.L.P., *supra* note 17, at § 3.78; 5 A.L.P., *supra* note 17, at § 20.12; R. POWELL, *supra* note 3, at ¶ 640; R. SCHOSHINSKI, *supra* note 17, at 269-77. For a description of the types of repairs required of the tenant, *see cases cited supra*. *See also* discussion in *Suydam v. Jackson*, 54 N.Y. 450, 454 (1873):

[T]he implied covenant or obligation of a lessee growing out of the relation of landlord and tenant [is], "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee . . ." If a window in a dwelling should blow in, the tenant could not permit it to remain out and the storms to beat in and greatly injure the premises without liability for permissive waste; and if a shingle or board on the roof should blow off or become out of repair, the tenant could not permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability. He being present, a slight effort and expense on his part could save a great loss; and hence the law justly casts the burden upon him.

Id.

The court concluded, however, that "the Lessee was not bound to make substantial, lasting or general repairs, but only such ordinary repairs as were necessary to prevent waste and decay of the premises." *Id.*

227. *Suydam v. Jackson*, 54 N.Y. 450, 454 (1873). *See also supra* note 51. Technically, the common law did not authorize any remedy for waste in the case of tenants for years. The remedy was first provided by the Statute of Marlbridge, 52 Hen. 3, ch. 23, § 2 (1267), subsequently expanded by the Statute of Gloucester, 6 Edw. 1, ch. 5 (1278). Both were repealed, Repeal Act, 42 Vict., ch. 59 (1879), though not before their substance became a part of American law. *See supra* notes 81 & 226.

premises in repair.²²⁸ Traditionally, however, the landlord may refuse such responsibility and, in a tight housing market, the tenant might have no option but to deal on the terms which the landlord offers.²²⁹ In any case, the tenant often may not possess the legal knowledge necessary to realize the need for contractual modifications of his conveyance-based rights and duties.

Because tenants so often fail to negotiate for desired protections, the traditional rule that the landlord is generally not responsible for the condition of the premises has caused much consternation among those concerned about the plight of tenants. Injustice is perceived to result from the application of the rule. For present purposes, however, the difficult issues of ultimate justice can be side-stepped by making a simple, relatively noncontroversial assumption: When parties act deliberately and without compulsion to modify their legal rights and duties vis-a-vis each other, so that each intentionally leads the other to expect a benefit enforceable at law, justice requires the legal protection of the expectations thus intentionally created.²³⁰

By defining justice in this narrow way for this narrow purpose, it is possible to avoid such virtual imponderables as, for example, whether a tenant has a "human right" to a decent home or the landlord has a "natural right" to dispose of his property on whatever terms he

228. *E.g.*, *Moldenhauer v. Krynski*, 62 Ill. App. 2d 382, 210 N.E.2d 809 (1965); *supra* note 222. Landlord covenants to repair are discussed at length in 2 M. FRIEDMAN, *supra* note 3, at 428-42.

229. *See Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 495 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 625, 517 P.2d 1168, 1173, 111 Cal. Rptr. 704, 709-10 (1974). This discussion should not be taken to imply that a tight housing market or the landlord's bargaining position are the sole reasons why tenants may have no option but to deal on the landlord's terms. It may simply be that the transaction costs of truly negotiated leases are too high for anybody to feel justified in incurring them. For further discussion of this point, see *Humbach*, *supra* note 77, at 304-08. Nor is it suggested that one should uncritically accept the notion that the terms of "adhesion" leases offered by landlords are necessarily much different than those that might be contained in freely negotiated leases. *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 84-85 (2d ed. 1977). Even a monopolist, if he wishes to maximize profits, must be responsive to the market. Some tenants, at least, may prefer to live in cheaper "tumble-down" housing and use the money saved for other purposes. *See Teller v. McCoy*, 253 S.E.2d 114, 131-33 (W. Va. 1978) (Neeley, J., concurring in part and dissenting in part).

230. The word "intentionally" refers here to an objectively manifested intention, not to a purely subjective intention. That is, a person ought to be held responsible for the expectations which he should realize that he is creating in others, not merely those which, subjectively but secretly, the person may want to create. *See Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D. N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913); *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954). *See also* RESTATEMENT OF CONTRACTS § 223 (1932); 3 A. CORBIN, *supra* note 104, at § 538.

pleases.²³¹ It is sufficient to say that a person is justly entitled to a decent home if someone else, in exchange for an agreed quid pro quo, has willingly undertaken to provide it.²³² What, then, accounts for the perception of injustice in the traditional application of the common law landlord-tenant conception? The foregoing suggests that the injustice comes from the unredressed disappointment of tenants' reasonable expectations; that is, expectations that tenants reasonably form on the basis of the intentions which landlords objectively manifest in the course of making leases.²³³

In the factual context of a typical residential lease, the tenant may reasonably suppose that the landlord, and not the tenant, will be the one responsible for making and keeping the premises suitable for the intended purpose. Widespread customary patterns, the particular landlord's normal mode of operation, and practical necessity all tend to make landlord responsibility the more reasonable expectation. The tenants, especially in multi-unit buildings, cannot as a practical matter assume responsibility for the supply of heat, operation of the elevators,

231. Calling these questions "virtual imponderables" does not mean that they should not be pondered, nor that the implied issues of distributive justice and the just distribution of resources cannot be at least tentatively resolved. It is certain, however, that such questions and issues require quite fundamental value judgments. Because the implementation of any tentative resolution will likely have serious adverse effects, the value judgments involved may be quite controversial.

For example, assume that every tenant is seen to have a moral right to a decent home. It would not follow that landlords should be forced to bear a special burden, in effect a special tax, to subsidize such a right. In any event, such a determination would be better made by processes normally thought of as political rather than legal in the traditional sense. Happily, for purposes of the present description of landlord-tenant law, it is not necessary to enter into this thicket. It is assumed that some other mechanism must be relied upon to provide a social distributive scheme which is adequate to permit everyone to afford a decent home. Correspondingly, it is assumed that the relevant function of landlord-tenant law is not to redistribute wealth, but rather to assure that those who have bargained for a decent home get what they bargained for.

232. Another issue, which is being deliberately postponed, *see infra* text accompanying notes 245-61, is what might be called the "paternalism" issue: whether the state should require that all agreements on particular subjects must contain particular terms. For example, should all product sales mandatorily include warranties of quality, or should all residential landlords, if they wish to lease at all, be required to supply "decent" housing? The paternalism issue is really a policy determination of whether the freedom of contract should be restricted so that people may not enter into arrangements which, in the real, imperfect market world, they may find acceptable but to which, in an ideal, perfect market they would not likely assent. The answer is an emphatic "sometimes." *See Teller v. McCoy*, 253 S.E.2d 114, 131-33 (W. Va. 1978) (Neeley, J., concurring in part and dissenting in part); Calabresi & Melamed, *Property, Liability and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1968). *See also infra* text accompanying notes 245-61 (suggestions in relation to the landlord-tenant context).

233. *See supra* note 230.

conditions in common areas and so on.²³⁴ Practicality requires that responsibility for these matters be centralized, and the landlord is the most logical, perhaps the only logical point of centralization. Hence, the almost inevitable expectation is that the landlord will assume the responsibility. Even as to those facilities for which the tenant conceivably could assume responsibility, for example, the plumbing fixtures inside the tenant's apartment, the virtually universal custom—and probably greater economy—of landlords having responsibility for these matters, generates the expectation that the landlord will take the responsibility. Doubtless these expectations of landlord responsibility are in fact subjective expectations of both tenant and landlord in almost every case. The landlord and tenant both expect the landlord to take care of these things. If the landlord does not perform as expected, the reasonable lease-created expectations of the tenant are disappointed, and there is “injustice.”²³⁵

The disappointment of such intentionally²³⁶ created expectations of the residential tenant, however, is more than mere injustice. On any reasonable interpretation of a typical residential lease, in light of the usual circumstances, such disappointment would appear to be a pure and simple breach of contract. Ordinarily, it is not even necessary to view the contract merely as a contract implied in fact. As a matter of interpretation, a lease of an “apartment” or a lease “for residential purposes” means a space which has been and will continue to be appropriately outfitted for living—that it will be “livable.”²³⁷

234. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077-78 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *accord Green v. Superior Court*, 10 Cal. 3d 616, 624-25; 517 P.2d 1168, 1173; 111 Cal. Rptr. 704, 709 (1974); *Kamarath v. Bennett*, 568 S.W.2d 658, 660 (Tex. 1978).

235. *See supra* note 234. *See also Liverpool City Council v. Irwin*, [1976] Q.B. 319.

236. The reference is, of course, to objectively manifested intention. *See supra* note 230.

237. *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970); *accord Green v. Superior Court*, 10 Cal. 3d 616, 623, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 708 (1974); *Kamarath v. Bennett*, 568 S.W.2d 658, 661 (Tex. 1978).

The fact that premises are leased for some particular purpose known to both parties does not necessarily mean that the landlord is intended to be the one who should put and maintain the premises in a condition suitable for that purpose. For example, an empty storefront leased for use as a restaurant does not necessarily connote an intention that the landlord is obligated to install or maintain expensive refrigeration, stoves, decoration, or other such items. *See Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D. Del. 1945). Ultimately, the proper interpretation of intention must be found in the words used and the surrounding circumstances. The circumstances of residential leasing are usually conducive, it is submitted, to the interpretation stated in the text.

Over the last decade or so, courts²³⁸—sometimes with assistance from legislatures²³⁹—began to recognize the interpretational relevance of these factual realities, and began to impose responsibility on landlords for the condition of residential premises. This new responsibility of landlords has become generally known as the “implied warranty of habitability.”²⁴⁰ In defining the precise performance requirements of the implied warranty of habitability, two basic approaches have been taken: One, as outlined above, is to view the warranty as part and parcel of the actual objective understanding of the parties as interpreted in light of the circumstances.²⁴¹ The other is to treat the warranty as an implied undertaking to meet the requirements of the applicable housing code.²⁴² That is, it is taken to be a reasonable expectation of the tenant that the landlord is offering the lease on terms which would not violate the law.²⁴³

The actual understanding approach arguably is preferable since it presumably incorporates the material housing code requirements as a minimum expectation while explicitly offering the flexibility to impose such further requirements which the circumstances of leasing may im-

238. *See, e.g.,* *Javins v. First Nat'l. Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

239. *See, e.g.,* MICH. COMP. LAWS ANN. § 554.139 (1979); N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1980); WASH. REV. CODE ANN. § 59.18.060 (Supp. 1982). *See also* UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104(a)(2).

240. *See supra* notes 238-39. Earlier, an implied warranty of habitability had been recognized as applicable to short-term leases of furnished dwellings. *See, e.g.,* *Ingalls v. Hobbs*, 156 Mass. 348, 31 N.E. 286 (1892); *Pines v. Persson*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); *Smith v. Marrable*, 11 M & W. 5, 152 Eng. Rep. 693 (1843).

241. *E.g.,* *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978).

242. *E.g.,* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

243. As part of its rationale in *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 362, 280 N.E.2d 208, 214-15 (1972), the court observed that “the parties . . . would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provided for it.” *Id.* (quoting *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 544-45, 165 N.E.2d 286, 290-91 (1960)).

ply.²⁴⁴ Under either approach, however, the implied warranty of habitability is not a departure from the common-law conception of leasing transactions, but is rather a necessary consequence of it. It is true that for residential premises the implied warranty reverses the traditional presumption that the tenant, not the landlord, has primary responsibility for the premises' condition,²⁴⁵ but that presumption is, after all, fundamentally only a presumption of intention, an issue of fact. It is thus quite proper to reverse the presumption where such a reversal is necessary to a realistic interpretation—in the modern context—of the conveyance-cum-contract comprising the lease. Leases should be recognized to contain an undertaking as to the character of that which is conveyed, not because such an undertaking “ought to be” assumed by the landlord, but because it is actually assumed, or understood to be assumed, by persons offering leases of residential premises. The conception of the landlord-tenant relationship need not change, but the facts to which it is applied must be recognized to have changed.

Although the contractual basis for the implied warranty of habitability is analytically plausible, there is much to be said for rooting the warranty of habitability not in contract, but rather in tort. Phrased differently, there is good reason for seeing the warranty not as an objectively intended promissory undertaking, but rather as a duty that inheres in the landlord-tenant relationship itself as an integral part of privity of estate. For one thing, such a tort conception of the warranty would free it from any possible questions concerning the applicability of the limitations on contract remedies, such as the requirement that special damages be foreseeable²⁴⁶ or that the plaintiff be in privity of contract with the landlord.²⁴⁷

It appears that at least some courts are willing to treat the warranty of habitability as though its breach constitutes a tort, for example, by

244. See *Mease v. Fox*, 200 N.W.2d 791, 796-97 (Iowa 1972); *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970).

245. See *supra* notes 225-27 and accompanying text.

246. *Hadley v. Baxendale*, 9 Exch. 341 (1854). See *Moldenhauer v. Krynski*, 62 Ill. App. 2d 382, 210 N.E.2d 809 (1965); *Cooper v. Roose*, 151 Ohio St. 316, 85 N.E.2d 545 (1949). *But see* *Reitmeyer v. Spreacher*, 431 Pa. 284, 243 A.2d 395 (1968); RESTATEMENT (SECOND) OF TORTS § 357 (1965).

247. See *W. PROSSER*, *supra* note 220, at 622-27. See also *Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 118 Cal. Rptr. 741 (Dist. Ct. App. 1975); *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959). The *Uccello* case permitted recovery by the tenant's neighbor, who was clearly not in privity of contract with the landlord, for injuries inflicted by a dog belonging to the tenant.

allowing punitive damages.²⁴⁸ General legal principles provide ample grounds for doing so. It frequently occurs that parties who have entered into a legal relationship find themselves subject to certain duties not voluntarily assumed, even though the relationship itself was quite voluntary. For example, in the property relationship of bailment, the bailee owes a duty of ordinary care in relation to the bailed goods simply by virtue of the fact that he is in possession of goods belonging to another.²⁴⁹ Similarly, in the landlord-tenant relationship the law has long imposed an obligation on the tenant not to commit waste—an obligation which exists purely as an incident of the privity of estate itself.²⁵⁰

Comparably, in the case of the warranty of habitability, the justification for imposing the duty on the landlord may be found in his conduct relative to others—specifically, in the landlord's act of putting residential space into the hands of persons who experience shows are often unable to keep it habitable themselves.²⁵¹ That is, the duty may be founded, in accord with general principles, on the landlord's position to control hazards or losses to others in relation to whom he acts. As such, the duty may be seen as an extension of the duties of care and maintenance placed on persons in control of land²⁵² and, perhaps even more closely, as an extension of the duties of care imposed on landlords of premises leased for admission to the public.²⁵³ The history of founding

248. See, e.g., *Kipsborough Realty Corp. v. Goodbetter*, 81 Misc. 2d 1054, 367 N.Y.S.2d 916 (N.Y. Civ. Ct. 1975); cases cited *supra* note 247. See also *Ackarey v. Carbonaro*, 320 Mass. 537, 70 N.E.2d 418 (1946); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

Conduct violating the implied warranty of habitability may itself be a tort, such as a failure to use due care, if injury ensues. See *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 628 (1973). A strong argument can be made, however, that the implied warranty should be law-imposed—as a non-waivable tort duty—only in cases of personal injury or property damage, and not in cases which merely involved so-called “economic” (loss of bargain) losses. Cf. U.C.C. § 2-719(3) (1973).

249. R. BROWN, *supra* note 111, at 252-70; W. PROSSER, *supra* note 220, at § 92.

250. See *supra* notes 51 & 227.

251. See *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971) (warranty of habitability is imposed by law because of the relationship of the parties, the nature of the transaction, and the surrounding circumstances). Cf. *Evans v. Otis Elevator Co.*, 403 Pa. 13, 168 A.2d 573 (1961) (“It is not the contract *per se* which creates the duty; it is the law which imposes the duty because of the nature of the undertaking in the contract”). Prosser observed that in the analogous context of warranties implied in sales of chattels “the obligation is imposed upon the seller [landlord], not because he has assumed it voluntarily, but because the law attaches such consequences to his conduct, irrespective of any agreement. . . .” W. PROSSER, *supra* note 220, at 635.

252. See *supra* note 220.

253. E.g., *Spain v. Kelland*, 93 Ariz. 172, 379 P.2d 149 (1963); *Fitchett v. Buchanan*, 2 Wash. App. 965, 472 P.2d 623 (1970); W. PROSSER, *supra* note 220, at § 63.

affirmative tort duties as a part of the undertaking in voluntarily assumed relationships is a long one.²⁵⁴

Treating the landlord's duties in relation to habitability as tort, or law-imposed, duties arising out of the privity of estate itself is in no way at odds with the contractual explanation for the implied warranty of habitability. Holding that the warranty ordinarily is dually based, both in contract and in conduct relative to others, comports quite comfortably with the traditional dual conception of the landlord-tenant relation and the overlapping bases of the basic rights and duties of that relation.²⁵⁵

Moreover, to regard the warranty as being based on the conveyance as well as in contract avoids technical battle with another potential difficulty posed by a purely contractual theory: How can the law deal with the disclaimers of responsibility for the premises' condition that may be routinely expected in any lease which, from the landlord's perspective, has been competently drawn? If the implied warranty of habitability is predicated solely on contract, that is, on the actual, although perhaps unexpressed, objective consent of the landlord, it is hard to say that the warranty exists when the lease expressly disclaims landlord responsibility for the condition of the premises, in general or in particular.²⁵⁶ There are good arguments for a policy refusing to give effect to such disclaimers. In a world of standard-form leases, the implied warranty of habitability could be effectively repealed by private legislation.²⁵⁷ Further, it might be assumed that tenants in an ideal (perfect) market would not assent to such disclaimers; thus, they should be protected from effectively doing so out of real world exigency.²⁵⁸

254. See *supra* note 251; Ames, *supra* note 24, at 3-6.

The argument that actions on warranties of quality were originally founded in tort law, see W. PROSSER, *supra* note 220, at 634-35, and therefore still may have a tort "flavor," see Ackarey v. Carbonaro, 320 Mass. 537, 70 N.E.2d 418 (1946) ("[a]n action of tort, as well as an action of contract, may be maintained upon a false warranty"), seems to carry little weight in itself. The modern landlord's duty of quality is called a "warranty" probably because of a semantic accident rather than because of a choice conscious of history. In any event, virtually all modern contract actions would, at an earlier time, have procedurally sounded in tort.

255. See *supra* text accompanying notes 20-29.

256. See *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978) (recognizing express waivability); RESTATEMENT (SECOND) OF PROPERTY § 5.1 (1977) (same).

257. *Fair v. Negley*, 390 A.2d 240 (Pa. Super. 1978); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978); *supra* note 222. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

258. *Teller v. McCoy*, 253 S.E.2d 114, 130-31 (W. Va. 1978). See W. PROSSER, *supra* note 220, at 442-43; Calabresi & Melamed, *supra* note 232, at 1111-15.

One plausible contractual justification for ignoring the disclaimers, at least in a case that does not involve a deliberate slumlord "milking" his building, is to treat routinely printed disclaimers as disingenuous and contrary to the actual practice, performance expectations, and ostensible intentions of the landlord.²⁵⁹ Although this approach may encounter analytical difficulties with the parol evidence rule, exceptions to that rule are available, possibly along the lines of fraud.²⁶⁰ Nevertheless, by viewing the warranty of habitability as founded on the relationship that results from the conveyance transaction, that is, as a normal law-imposed incident of privity of estate, there is no need for any conceptual embarrassment when finding the warranty "implied" in the very agreement which expressly disclaims it. Rather than insisting that, contrary to all evidence, the landlord has assented to its creation, the law remains free, as a matter of policy, to disallow the disclaimer.²⁶¹

2. *The Independence of Covenants in Leases*

Placing the responsibility for the premises' condition on the landlord goes only part of the way in preventing the injustice of disappointed tenant expectations. There still remain the problems posed by the doctrine of "independence of covenants," a doctrine which traditionally has meant that the tenant's obligation to pay rent is not affected by the landlord's breach of the duty to supply services.²⁶² Courts that recog-

259. The question might be treated as one purely of interpreting inconsistent manifestations of intent, *see* *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968), or of unconscionability, *see* *Tai On Luck Corp. v. Cirota*, 35 A.D.2d 380, 216 N.Y.S.2d 438 (1970); *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y. Civ. Ct. 1976); *Seabrook v. Commuter Hous.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (N.Y. Civ. Ct. 1972); *Fair v. Negley*, 390 A.2d 240 (Pa. Super. 1978); N.Y. REAL PROP. LAW § 234-c (McKinney Supp. 1980); RESTATEMENT (SECOND) OF PROPERTY § 5.6 (1978).

260. *Lusk Corp. v. Burgess*, 85 Ariz. 90, 332 P.2d 493 (1958); *Sabo v. Delman*, 3 N.Y.2d 155, 143 N.E.2d 906, 164 N.Y.S.2d 714 (1957); *International Milling Co. v. Hachmeister, Inc.*, 380 Pa. 407, 110 A.2d 186 (1955); *Green River Valley Found. v. Foster*, 78 Wash. 2d 245, 473 P.2d 844 (1970) (Finley, J., concurring).

261. *See* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.) (disclaimer disallowed, referring to statutory [law-imposed] basis of the duties), *cert. denied*, 400 U.S. 925 (1970); *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973) (same).

It should be observed that when the law insists that parties to particular types of contractual relationships have agreed in certain ways, contrary to their actual agreement, the law has in fact imposed the duties in question by virtue of the type of relationship. It serves no purpose to insist that such duties are contractual duties rather than tort duties, except perhaps to confuse the issue.

262. *See, e.g.,* *Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D. Del. 1945); *Frazier v. Riley*, 215 Ala. 517, 111 So. 10 (1926); *Interstate Restaurants v. Halsa Corp.*, 309 A.2d

nize the implied warranty of habitability have characteristically also held that the obligation to pay rent is dependent on the landlord's performance under the warranty.²⁶³ In so holding, courts usually have said that they are treating leases as ordinary contracts.²⁶⁴ In reality, however, they are not,²⁶⁵ for if leases were treated as ordinary contracts, the obligation to pay rent usually would still be independent of the landlord's performance of the service obligations.²⁶⁶ Quite surprisingly, a reconsideration of the traditional dual-relationship conception of leases, the lease as a conveyance-cum-contract, reveals that the effective dependence of lease obligations is not necessarily excluded by, and indeed, is seemingly required by the common law conception. Before discussing the implications of a pure contractual theory of leasing and the interesting implications of the dual-relationship conception, the problem of independence of covenants under the conception of leases as generally understood at common law must be examined.

It is the hypothesis of the preceding subsection that tenants often cannot, or at least do not, bargain for the contractual protections needed in order to have a legal right to the services that they expect to receive under a lease. Even if the tenant does succeed in obtaining a lease covenant to provide services from the landlord, the doctrine of independence of covenants may frustrate the objective of securing the services. If a landlord breaches the covenant, then the tenant will have an action for damages.²⁶⁷ Except in the most egregious cases, however,

108 (D.C. Ct. App. 1972); *Stone v. Sullivan*, 300 Mass. 450, 15 N.E.2d 476 (1938); *Duncan Dev. Co. v. Duncan Hardware*, 34 N.J. Super. 293, 112 A.2d 274 (1955); *Dittman v. McFadden*, 159 Okla. 262, 15 P.2d 139 (1932); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522 (Tex. Civ. App. 1930); 3 A. CORBIN, *supra* note 104, at § 686; 6 S. WILLISTON, *supra* note 24, at §§ 890-901; Annot., 28 A.L.R.2d 446 (1953).

263. *See supra* cases cited at note 238.

264. *E.g.*, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *King v. Moorehead*, 495 S.W.2d 65, (Mo. Ct. App. 1973); *Pugh v. Holmes*, 384 A.2d 1234 (Pa. Super. 1978); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978).

265. *See infra* text accompanying notes 278-95.

266. *See infra* text accompanying notes 285-87.

267. *See, e.g.*, *Rosen v. Needleman*, 83 So.2d 113 (Fla. 1955); *Selz v. Stafford*, 284 Ill. 610, 120 N.E. 462 (1918); *Duncan Dev. Co. v. Duncan Hardware*, 34 N.J. Super. 293, 112 A.2d 274 (1955); *Pryor v. Foster*, 130 N.Y. 171, 29 N.E. 123 (1891); *Dittman v. McFadden*, 159 Okla. 262, 15 P.2d 139 (1932); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522 (Tex. Civ. App. 1930). *See also* Annot., 28 A.L.R.2d 446, 453-56 (1953).

Generally, the damages recoverable are the cost of making repairs or diminution in rental value. *E.g.*, *Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D. Del. 1945); *Rosen v. Needleman*, 80 So. 2d 113 (Fla. 1955); *Cook v. Soule*, 56 N.Y. 420 (1874); *Jersey Silk & Lace Stores v. Best Silk Shops*, 134 Misc. 315, 235 N.Y.S. 277 (City Ct. N.Y. 1929). *See also* 2 M.

the damages will usually be less than the expenses of the lawsuit. In any case, the tenant really wants the services, not damages. If the services involve, for example, expensive repairs, the landlord may prefer, instead of the certain cost of performance, to take the relatively insubstantial risk that the tenant will sue. Since it may be presumed that the tenant typically will not sue and will simply endure the lack of services or vacate, this strategy often can succeed in enabling the landlord to evade his services obligations.

By contrast, permitting tenants to withhold rents in cases of landlord defaults appears to be a very efficient means of inducing landlords to perform their obligations under leases. The landlord's interest in leasing transactions is almost always purely pecuniary. Landlords are in the business of leasing for the rents that leases produce, and therefore have an important incentive to eliminate any situation that interferes with the inflow of rents. If the interference is the landlord's own non-performance, then the landlord has a compelling incentive to perform. Thus, when the law allows the landlord to recover the full rent irrespective of the landlord's performance, the tenant is deprived of a powerful weapon for inducing the landlord to perform.²⁶⁸

An apparent solution to the problem of landlord defaults in providing services is the application in such cases of a general principle of ordinary contract law: You do not have to pay for what you do not get. This general principle finds expression in the ordinary contract rule that performance obligations under contracts are usually "dependent."²⁶⁹ Applying this contract rule to leases, the argument goes, ten-

FRIEDMAN, *supra* note 3, at 434-35; Annot., 28 A.L.R.2d 446 (1953). The possibility of proceeding in small claims court would of course reduce litigation costs, but even so, damage actions are at their best poor substitutes for performance and poor incentives for providing it.

Injunctive relief could provide a specific, albeit delayed, performance if the court would be willing to order it. *See Continental & Vogue Health Studies v. Abra Corp.*, 369 Mich. 561, 120 N.W.2d 835 (1963). Even if the desired injunction were granted and followed, however, the result would, as a practical matter, hardly satisfy the tenant's objective in bargaining for the landlord's promise to repair.

268. Landlords have long been aware of the corresponding efficacy of dispossession in inducing performance of tenants' obligations under leases. For an extensive discussion of this subject, see Humbach, *supra* note 77, at 258-68.

269. *K & G Constr. Co. v. Harris*, 223 Md. 305, 164 A.2d 451 (1960); *Palmer v. Fox*, 274 Mich. 252, 264 N.W. 361 (1936); *Morgan v. Singley*, 560 S.W.2d 746 (Tex. Civ. App. 1977). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 251-52, 237-38 (1981); RESTATEMENT OF CONTRACTS §§ 266 comments a & b, 274 (1932). *See also* J. CALAMARI & J. PERILLO, *supra* note 119, at 405-12; Farnsworth, *supra* note 119, at 253-59. The statement in the text is an extreme simplification of the contract doctrines of conditions and is meant only to express their spirit. A more elaborate

ants would not only be protected from the injustice of paying for unprovided services, but would also possess a potent weapon in securing such services. Elimination of the rule of independence of covenants would eliminate the main legal impediment to tenants' use of the rent weapon to secure services.

The existence of the doctrine of independence of covenants for leases is not, of course, the reason for the traditional rule that tenants' obligations to pay rent are not conditioned on landlords' prior due performance.²⁷⁰ The doctrine is merely a way of describing the rule. Indeed, to say that the covenants or promises in leases are independent obscures a situation which, under the traditional dual-relationship conception, is more complicated.

Because in the traditional analysis a lease is seen not merely as a contract, but as a conveyance-cum-contract, rent is due not merely because it is promised, but because it is reserved.²⁷¹ Thus, even if the tenant's *promise* to pay rent were dependent on performance by the

exposition of the applicable contract doctrines, as they might be hypothetically applied to a purely contractual leasing transaction, is set forth *infra* text accompanying notes 278-95. Certainly, however, the courts that purport to treat leases as ordinary contracts seem to have in mind an oversimplified and novel version of contract law, rather than the actual law of contracts as generally understood. *See, e.g.,* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). "Under contract principles . . . the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations. . . . In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the . . . breach of the landlord's warranty [of habitability]." *Id.* *See also* *Pugh v. Holmes*, 253 Pa. Super. 76, 384 A.2d 1234 (1978); 1 A.L.P., *supra* note 17, at § 3.11, at 202; *cf.* *Farnsworth, supra* note 119, at 257 ("many courts have begun to apply the concept of constructive conditions even to leases").

As a matter of ordinary contract law, a promise or covenant may be or become independent under certain circumstances such as when the agreed return has been substantially performed, *see* *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); RESTATEMENT (SECOND) OF CONTRACTS § 237 comment d (1981); RESTATEMENT OF CONTRACTS § 274 (1932); *infra* note 278, where the contract is aleatory, *see* *Southern Sur. Co. v. MacMillan Co.*, 58 F.2d 541 (10th Cir. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 379 (1981), RESTATEMENT OF CONTRACTS §§ 292, 293 (1932); or where the promisor continues to accept the benefits of the contract from the other party after the other party has committed a material breach, *see* *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766 (1919); RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981); RESTATEMENT OF CONTRACTS § 298 (1932). This last qualification upon the doctrine of the dependency of contractual promises is highly pertinent to the contractual analysis of lease defaults, and is discussed *infra* text accompanying notes 278-95.

270. *Cf.* *Green v. Superior Court*, 10 Cal. 3d 616, 634, 517 P.2d 1168, 1180, 111 Cal. Rptr. 704, 716 (1974) ("These [prior] decisions, however, rested primarily upon the ancient property doctrine of 'independent covenants'"); R. SCHOSHINSKI, *supra* note 17, at 377.

271. *See supra* text accompanying notes 57-71.

landlord—that is, even if the tenant's promise to perform were discharged by the landlord's breach²⁷²—the tenant would still, under the dual-relationship conception, have a privity-of-estate liability to pay reserved rent. This privity-of-estate liability, which results from the landlord's reservation in leasing, has nothing to do with promises, contract duties,²⁷³ or the “independence” thereof. Unless the landlord's failure to perform amounts to an eviction, there is no extinguishment of the privity of estate and, therefore, no extinguishment of the attendant reserved-rent liability.²⁷⁴

There are, to be sure, circumstances in which the landlord's failure to perform may result in a rent-extinguishing eviction; namely, where the landlord's breach of duty is so severe as to cause the premises to become untenable, causing the tenant to abandon. An abandonment “forced” in this manner will be treated as an eviction,²⁷⁵ and is denominated a “constructive” eviction to distinguish it from a direct physical, or “actual” eviction. Like an actual eviction, a constructive eviction suspends the obligation to pay rent because the possession upon which the rent is predicated no longer exists.²⁷⁶ Thus, the doctrine of con-

272. Cf. *O.W. Grun Roofing & Constr. Co. v. Cope*, 529 S.W.2d 258 (Tex. Civ. App. 1975); RESTATEMENT (SECOND) OF CONTRACTS §§ 237, 241-42, 225(2) (1981); RESTATEMENT OF CONTRACTS §§ 274, 397 (1932). See *supra* note 269; *infra* note 278 and accompanying text.

273. See *supra* text accompanying notes 57-71. Professor Siegel argues that “in fact, the independence of lease covenants results from . . . the [contract] doctrine of substantial performance.” Siegel, *supra* note 11, at 664. See also *infra* note 278. This contention does not appear to be historically accurate inasmuch as it ignores the significance of the much older view that, apart from contractual promises, the tenant is liable for reserved rent. See *supra* text accompanying notes 57-71. Nor does it seem technically accurate, since many landlord failures to provide services are certainly of sufficient magnitude to constitute a failure of substantial performance in the nature of a material breach. See *infra* notes 278 & 295. Professor Siegel apparently was confused by the constructive “real covenant” to pay reserved rent and was thus led to overlook the traditional common-law view that the obligation to pay reserved rent, though supported by covenant, is not founded in covenant. See Siegel, *supra* note 11, at 650 n.5; *supra* notes 21, 67 & 69.

274. Technically, the liability is not extinguished by eviction. The liability ceases to arise after eviction because the tenant without possession does not receive benefits out of which rents belonging to the landlord can be rendered. See *supra* text accompanying notes 57-71. Reentry by an evicted tenant should cause liability for future-accruing rents to resume. *Talbot v. Citizens Nat'l Bank*, 389 F.2d 207 (7th Cir. 1968); *Martin v. Martin*, 7 Md. 368 (1855).

275. *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Tallman v. Murphy*, 120 N.Y. 345, 24 N.E. 716 (1890); *Dyett v. Pendleton*, 8 Cow. 727 (N.Y. 1826); see *Barash v. Pennsylvania Station Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649 (1970); see also *infra* note 295. See generally 1 A.L.P., *supra* note 17, at § 3.51; Bennett, *The Modern Lease—An Estate in Land or a Contract*, 16 TEX. L. REV. 7, 63-73 (1937); Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DE PAUL L. REV. 69 (1951).

276. See *supra* note 275; and text accompanying notes 83-85.

structive eviction constitutes a major exception to the general rule of independence of covenants in leases, even under the traditional conveyance-cum-contract conception. If the tenant does not abandon possession after the landlord's default, however, no constructive eviction occurs and the conveyance-based obligation to pay the reserved rent remains unimpaired.²⁷⁷ This requirement of abandonment makes the doctrine of constructive eviction an unsatisfactory device for securing landlord services. The general rule remains that the landlord's breaches do not per se affect the occupying tenant's obligation to pay rent.

Although the conveyance theory of leasing is sometimes seen as the villain preventing tenants from withholding rent from defaulting landlords, it would appear on analysis that the same independence of covenants would also be required by a purely contractual theory of leasing. That is, even if leases were treated as ordinary contracts, the tenant's promise to pay rent would still be independent—at least insofar as it is independent under the traditional conveyance-cum-contract view. Consider in purely contractual terms the case of a simple lease in which the only promises are as follows:

Tenant's Promise
Pay Rent

Landlord's Promises
Allow Occupancy
Supply Services

The tenant has a single performance obligation in a given rent period in exchange for which the landlord has two separate performance obligations.

Suppose the landlord fails to supply services and that this failure is a material breach.²⁷⁸ Under ordinary contract analysis, the tenant

277. See *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 5 (1930); *supra* note 275. But see *Charles E. Burt, Inc. v. Seven Grant Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959).

278. Under ordinary contract law, only a material breach has the effect of discharging the other party's obligation to perform. See *Plotnick v. Pennsylvania Smelting & Ref. Co.*, 194 F.2d 859 (3d Cir. 1952); *Walker & Co. v. Harrison*, 347 Mich. 630, 81 N.W.2d 352 (1957); *Plante v. Jacobs*, 10 Wis. 2d 567, 103 N.W.2d 296 (1960); RESTATEMENT (SECOND) OF CONTRACTS §§ 237, 242 (1981); RESTATEMENT OF CONTRACTS §§ 274, 397, 313 comment c (1932); A. CORBIN, *supra* note 104, at § 946. This requirement of a material breach for discharge is sometimes referred to as the doctrine of "substantial performance," that is, a substantial performance by one party suffices to trigger the duty of performance of the other. Farnsworth, *supra* note 119, at 226-72, 287-88. Arguably, and possibly historically, see *Green v. Superior Court*, 10 Cal. 3d 616, 634, 517 P.2d 1168, 1180, 111 Cal. Rptr. 704, 716 (1974); J. MURRAY, *supra* note 114, at § 183, the landlords'

would have two alternatives.²⁷⁹ The tenant may either rescind the lease and regard it as terminated for purposes of performance, if not for purposes of remedies.²⁸⁰ Alternatively, the tenant may accept the landlord's partial but deficient performance of allowing occupancy without supplying the services.²⁸¹

failure to provide services would not necessarily be viewed as a material breach, and hence not discharge the tenants from their performance obligation. See RESTATEMENT OF CONTRACTS §§ 268(2), 269, 274(1) (1932); A. CORBIN, *supra* note 104, at § 946; Siegel, *supra* note 11, at 663-66, discussed *supra* note 273. For purposes of this discussion, however, it will be assumed that a landlord's failure to provide agreed services is a material breach. See *Teller v. McCoy*, 253 S.E.2d 114, 126 (W. Va. 1978); *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942).

279. See *Cities Serv. Helix, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976); *Grady-Gould Watershed Improvement Dist. v. Transamerica Ins. Co.*, 570 F.2d 720 (8th Cir. 1978); *Southern Pipe Coating Co. v. Spear & Wood Mfg. Co.*, 235 Ark. 1021, 363 S.W.2d 912 (1963); *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766 (1919); *Dunn v. Steubing*, 120 N.Y. 232, 24 N.E. 315 (1890); *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E.2d 763 (1980); *Towery v. Carolina Dairy*, 237 N.C. 544, 375 S.E.2d 254 (1953); *Longenecker v. Brommer*, 59 Wash. 2d 552, 368 P.2d 900 (1962); RESTATEMENT (SECOND) OF CONTRACTS §§ 309 comments a-d, 313, 317 (1932). See generally J. CALAMARI & J. PERILLO, *supra* note 119, at §§ 11-22(a), 11-37; A. CORBIN, *supra* note 104, at § 946; *supra* notes 119-20 and accompanying text.

280. See *supra* note 279. Some contracts commentators argue that the word "cancel" is preferable to the word "rescind" in this context. See, e.g., J. CALAMARI & J. PERILLO, *supra* note 119, at 758; A. CORBIN, *supra* note 104, at § 1236; Farnsworth, *supra* note 119, at 282. The term "rescind," however, is amply supported by usage, e.g., *Pelletier v. Masse*, 49 R.I. 408, 143 A. 609 (1928); *Longenecker v. Brommer*, 59 Wash. 2d 552, 368 P.2d 900 (1962), and will be used here.

281. See authorities cited *supra* note 279; See also *infra* note 282.

The last proposition assumes that the landlord has not repudiated the lease. See *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E.2d 763 (1980); RESTATEMENT OF CONTRACTS § 317 (1932); A. CORBIN, *supra* note 104, at § 954; *supra* note 119. The effect of a repudiation is to make a total breach of a partial breach and thereby to disable the other party from treating a total breach as partial in order to keep the contract alive for purposes of performance. In other words, under ordinary contract rules a repudiation by the landlord would deprive the tenant of the choice of not rescinding and accepting the deficient performance. As a matter of ordinary contract law, however, it is not clear exactly how a partial repudiation should be treated. See A. CORBIN, *supra* note 104, at § 972. A court in one case involving a partial repudiation refused to treat the partial repudiation as a total breach. See *Johnstone v. Milling*, 16 Q.B.D. 460 (1886). The contract at issue in *Milling* was, however, a lease and, for that reason, the case may not shed direct light on ordinary contract law. Moreover, as pointed out by Corbin in his extensive discussion of the case, the reasoning of the court, which required the other party's assent for a repudiation, was out of harmony with modern trends of the law of anticipatory repudiation. A. CORBIN, *supra* note 104, at § 972.

It would appear to make little sense to hold that landlords' anticipatory repudiations, even of a material part of their obligations, should oblige tenants to regard the breach as total, provided at least that there is no repudiation of the tenants' occupancy rights. Such a holding would deprive the tenant of the choice of treating the lease as on-going and remaining in possession. If ordinary contract law were to compel such result, and a literal reading of RESTATEMENT (SECOND) OF CONTRACTS §§ 250, 253 (1981) and RESTATEMENT OF CONTRACTS §§ 317(2), 318(a) (1932), sug-

If the tenant rescinds the lease, the tenant's contractual obligation for future-accruing rents would of course be terminated.²⁸² In this sense, under ordinary contract law, the rent promise would be dependent on the landlord's promise to supply services. But in electing to rescind the lease, the tenant would have to relinquish occupancy. The tenant could not, under ordinary contract law, rescind the lease as to the tenant's rent obligation while keeping the lease alive for purposes of the landlord's occupancy obligation.²⁸³ If the tenant wishes to retain occupancy, then the tenant cannot rescind the lease.²⁸⁴

When the tenant elects the second alternative, accepting the deficient performance which the landlord offers (occupancy without services), the tenant would be seen, under ordinary contract principles, to have waived the discharge for the tenant's performance.²⁸⁵ This "excusing the nonoccurrence of a condition" precedent²⁸⁶ can occur whenever a promisor's performance is conditioned on two or more other perform-

gests that it may, then this is certainly one instance where the conveyance theory of leasing would be more advantageous to tenants than a pure contract theory.

282. *Coughlin v. Blair*, 41 Cal. 2d 587, 262 P.2d 305 (1953); *Palmer v. Fox*, 274 Mich. 252, 264 N.W. 361 (1936); RESTATEMENT OF CONTRACTS §§ 313(1), 397 (1932).

283. *Specialities Dev. Corp. v. C-O Two Fire Equip. Co.*, 207 F.2d 753, 756 (3d Cir. 1953) ("[O]ne against whom a material breach is committed must make up his mind what he is going to do about it."). See *Venz v. State Auto. Ins. Co.*, 217 Iowa 662, 251 N.W. 27 (1933); *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766 (1919); RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981); RESTATEMENT OF CONTRACTS §§ 298, 309, 317(2) (1932); A. CORBIN, *supra* note 104, at § 755.

284. Two recent construction contract cases seem to hold that when a subcontractor commits a material breach, the contractor may withhold progress payments even though the contractor continues to accept the subcontractor's defective performance. See *K & G Constr. Co. v. Harris*, 223 Md. 305, 164 A.2d 451 (1960); *Morgan v. Singley*, 560 S.W.2d 746 (Tex. Civ. App. 1977). Both of these cases, however, ignore the principle of "Acceptance as Excusing the Non-Occurrence of a Condition," RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981). See *infra* note 285 and text accompanying notes 285-91. Both appear therefore to be at odds per incuriam with ordinary contract law. See RESTATEMENT (SECOND) OF CONTRACTS § 246, illustration 1 (1981). The principle is easily overlooked even by persons keenly aware of it. *E.g.*, Farnsworth, *supra* note 119, at 285 n.174, 295-302.

285. See *supra* note 283. "[A disappointed promisee] has power to recreate his former duty . . . nearly always by continuing to render his own performance or by receiving further performance from the other party, with knowledge that the condition has not been performed." A. CORBIN, *supra* note 104, at § 755. Accord RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981); RESTATEMENT OF CONTRACTS § 309 (1951). See generally Farnsworth, *supra* note 119, at 295-302.

286. See RESTATEMENT (SECOND) OF CONTRACTS § 246 (1981); RESTATEMENT OF CONTRACTS § 298(1) (1932). The same principle may also be referred to as "waiver of the right of rescission," see *Longenecker v. Brommer*, 59 Wash. 2d 552, 368 P.2d 900 (1962), "waiver by continuing to perform or accept performance," see *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E.2d 763

ances and the promisor elects to accept a deficient performance rather than treat the deficiency as grounds for rescission.²⁸⁷ Of course, waiver of the discharge of performance should not constitute a waiver of the promise to perform.²⁸⁸ The tenant thus could still recover contract damages for the failure to supply the services.²⁸⁹ The crucial point is, however, that even if leases were treated as ordinary contracts, the promises in leases would nevertheless be independent—tenants in oc-

(1980), or "waiver of the material breach," *see* *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306, 1313 n.16 (Ct. Cl. 1976).

287. *See supra* notes 279 & 283. Excuse of conditions precedent after their nonoccurrence should not be confused with the generally discredited Sergeant Williams' Third Rule: "Where a covenant goes only to part of the consideration on both sides and breach of such covenant can be paid for in damages, it is an independent covenant." *Pordage v. Cole*, 1 Wms. Sound 319, 85 Eng. Rep. 449 (1669) (Reporter's Note).

The acceptance of the deficient performance must be elected in order to have the effect of excusing the condition. If *X* promises to paint *Y*'s house and then *X* quits after painting only two sides, *Y* will not be deemed to have accepted the deficient performance merely because he does not return *X*'s paint and labor. *See* *Cawley v. Weiner*, 236 N.Y. 357, 140 N.E. 724 (1923); RESTATEMENT (SECOND) OF CONTRACTS § 246(2) (1981); RESTATEMENT OF CONTRACTS § 298(2) (1932). A promisee has no choice but to accept a defective performance which is attached to his land or chattels. It may be said, of course, that the leasehold is "land or chattels" of the tenant so that, by parity of reasoning, the tenant's mere retention of possession should not be deemed an excuse of condition or waiver of discharge. This argument, however, presupposes that a lease is a conveyance and not a mere contract, and such an argument would lead the analysis, if not the result, in an entirely different, and presumably quite traditional, direction. *See* RESTATEMENT OF CONTRACTS §§ 309 illustration 1, 400 (1932). The suitability of analyzing the problem along these lines is discussed *infra* at text accompanying notes 296-313.

In a contract calling for performance in installments, a less-than-substantial performance of an installment may justify the other party in withholding a payment without justifying declaring the contract at an end. *See* RESTATEMENT OF CONTRACTS § 269 (1932); A. CORBIN, *supra* note 104, at § 708. Nevertheless, even if the delay in the landlord's performance of his service obligations became so great as to excuse the other party altogether from his duty, *see* RESTATEMENT OF CONTRACTS § 269 comment a (1932), essentially a question of the materiality of the breach, *id.*, the duty would still be subject to re-creation under the principles referred to in note 285 *supra*. *See* RESTATEMENT OF CONTRACTS § 309 illustration 2 (1932). Therefore, the so-called independence of covenants in leases most emphatically cannot be regarded as simply a result of the doctrine of substantial performance, as has been alleged. *See* *Siegel, supra* note 11 at 664; *supra* note 273.

288. *See* *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306 (Ct. Cl. 1976); *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766 (1919); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522 (Tex. Civ. App. 1930); J. CALAMARI & J. PERILLO, *supra* note 119, at § 11-39; A CORBIN, *supra* note 104, at § 766; *see also* *Lydner v. S.S. Kresge Co.*, 329 Mich. 359, 45 N.W.2d 319 (1951); *Thompson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 39 N.E. 7 (1894); RESTATEMENT OF CONTRACTS §§ 317(2), 327 (1932); *but see* *Richard Paul, Inc. v. Union Improvement Co.*, 59 F. Supp. 252 (D. Del. 1945) (holding that by taking possession and paying the rent, the tenant waived the breach in relation to consequential damages (lost profits) but not for general damages).

289. *See supra* note 267 and accompanying text.

cupancy would still be obligated to pay rent, despite the landlord's breach, just as they have been obligated under the traditional lines of cases.²⁹⁰ Only if the tenant rescinds based upon the landlord's material breach, that is, only if the tenant abandons occupancy, would ordinary contract law provide for extinguishment of the rent obligation.²⁹¹

Thus, in treating the tenant's rent obligation as effectively independent of the landlord's promises, it appears that courts have been treating leases as ordinary contracts.²⁹² Even the abandonment requirement for constructive eviction²⁹³ coincides with ordinary contract rules. A discharge, based on the landlord's material breach of a contractually dependent obligation to pay rent, would require the tenant to relinquish occupancy just as the doctrine of constructive eviction. Constructive eviction is, in effect, the conveyance-theory counterpart of rescission

290. The possibilities of counterclaim and recoupment of setoff, *see infra* note 297 and accompanying text, make it unlikely that a landlord in material breach would ever actually recover the full rent from a properly represented tenant. Moreover, a tenant might anticipate the effects of these procedural devices by withholding all or part of the rents due and, as a result of the landlord's breach, never have to pay—or in a real sense, owe—the full amount of rents provided for in the lease. *See infra* text accompanying notes 290-313. The fact remains, however, that based on ordinary contract law, a tenant who retains possession continues to be substantively liable for the full rent. The procedural dependence of the landlord's recovery on his own performance has nothing to do with the dependence of covenants as a substantive matter.

Nor is such procedural dependence of liabilities in any way a unique feature of ordinary contract law. Such dependence of liabilities, through counterclaim, recoupment, or setoff, appears to apply equally under the traditional dual-relationship conception of a lease as both a contract and a conveyance. The matter is discussed in greater detail *infra* text accompanying notes 296-313.

291. Corbin recognized the clumsiness of contract theories in dealing with problems of this type: "It is obvious that in cases in which a breach occurred in the course of performance a just solution cannot be reached by sole dependence on the methodology of conditions, whether they be described as express, implied or constructive." A. CORBIN, *supra* note 104, at 163. This thoughtful reflection is in stark contrast to the facile insouciance with which some have tried to import half-truth contract notions into the law of landlord and tenant.

292. This statement does not mean that, overall, leases are treated as ordinary contracts. If they were, for example, the landlord's obligation to allow occupancy would likewise be eventually excused by the tenant's chronic failure to pay rent. *See* RESTATEMENT OF CONTRACTS §§ 274-76, 269 comment a (1932); *cf.* Plotnick v. Pennsylvania Smelting & Ref. Co., 194 F.2d 859 (3d Cir. 1952); Harton v. Hildebrand, 230 Pa. 335, 79 A. 571 (1911); Pelletier v. Masse, 49 R.I. 408, 143 A. 609 (1928). *See also* Farnsworth, *supra* note 119, at 290-95. To the contrary, under the conveyance theory, the tenant is entitled to possession irrespective of payment of rent or other defaults. *See supra* text accompanying notes 72-76. This discrepancy is not surprising since the very reason for creating and the continuing effect of the conveyance theory of leasing is to enhance the protection given to tenants in their possession over the protection which would be afforded by mere contractual interests. *See supra* note 34 & 36 and accompanying text.

293. *See supra* notes 275-77 and accompanying text.

after a material breach.²⁹⁴ Both extinguish the rent obligation, but a failure to abandon possession prevents both constructive eviction and rescission for material breach.²⁹⁵

3. *Making Lease Obligations Effectively Dependent*

From the standpoint of policy, it hardly matters whether the so-called "independence of lease covenants" results from the operation of the conveyance theory, the rules of contract, or both. It nevertheless must disappoint the expectations of most tenants if the full obligation for rent continues even while the landlord is providing considerably less than the rent was supposed to pay for. Because purporting to treat leases as ordinary contracts does not provide a suitable analytical framework for making lease covenants dependent, the question arises

294. See Bennett, *supra* note 275, at 63-73; Lasar, *Landlord and Tenant Reform*, 35 N.Y.U. L. Rev. 1279 (1960). See also *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1945). In *Kulawitz*, the court used an essentially contractual analysis in discussing the landlord's material breach of a lease covenant, but concluded with the assertion that a "constructive eviction" was the result of such breach. *Id.*

295. On a contract theory, any material breach, not merely those breaches which render the premises untenable, should justify rescission. On the other hand, it is sometimes said that abandonment can be justified on a constructive eviction theory only if the landlord's defaults have resulted in untenability. See, e.g., *Thomas v. Roper*, 162 Conn. 343, 294 A.2d 321 (1972); *Masser v. London Operating Co.*, 106 Fla. 474, 145 So. 79 (1932); *Dittman v. McFadden*, 159 Okla. 262, 15 P.2d 139 (1932). See also *Net Realty Holding Trust v. Nelson*, 33 Conn. Super. 22, 358 A.2d 365 (1976); *First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 286 N.W.2d 360 (1980). See generally Bennett, *supra* note 275, at 63-73. This apparent lack of correspondency between rescission and constructive eviction might, however, be of relatively little significance. Because occupancy of tenantable premises is the main advantage bargained for by the tenant, if the tenant receives this, everything else is more or less incidental. Thus, no breach by the landlord would be material when the tenant still is in occupancy of tenantable premises. Nevertheless, there remains the possibility of finding material breaches, short of untenability, in leases in which the services component is a comparatively large part of the value promised to the tenant, especially if the landlord's breach is willful. See *O.W. Grun Roofing Constr. Co. v. Cope*, 529 S.W.2d 258 (Tex. Civ. App. 1975); RESTATEMENT (SECOND) OF CONTRACTS §§ 241, 242 (1981); RESTATEMENT OF CONTRACTS § 275(e) (1932). Thus, a purely contractual theory of leasing might expand somewhat the number of cases in which a tenant could abandon occupancy and thereby avoid the obligation for further rent. See *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 467 (1942) (landlord's breach of covenant not to lease nearby premises to competitor of tenant); *University Club v. Deakin*, 265 Ill. 257, 106 N.E. 790 (1914) (same); *Hiatt Inv. Co. v. Buehler*, 255 Mo. App. 151, 16 S.W.2d 219 (1929) (same). It should not, however, be overlooked that such expansion seems to work equally well within the traditional conveyance-cum-contract conception of leases. In any event, such considerations do not affect the main point of the present discussion: A purely contractual theory of leasing would not permit extinguishment of the tenant's rent obligation if the tenant retains possession, and thus a contract theory would not in that respect represent an advance over the traditional conveyance-cum-contract conception of leasing.

whether any analytical basis for such dependence can ever be found or whether the dependence of lease covenants must be treated as simply *sui generis*. Reflecting upon the larger principles of landlord-tenant law, it appears that a *sui generis* approach is not necessary. The dependency of lease obligations, in practical effect, can be rationalized analytically by treating the lease as fundamentally a conveyance to the tenant of an interest in property.

Even under the traditional lines of conveyance-theory cases, there have been ways for the tenant to avoid paying the full rent when the landlord fails to meet the obligations to the tenant. Remember that the tenant has an action against the landlord to recover damages for the landlord's breach.²⁹⁶ Moreover, depending upon local practice, the tenant can also assert such rights by set-off, recoupment or counterclaim in the very action in which the landlord seeks to recover rent.²⁹⁷ As a consequence, although the tenant may technically be obligated to pay the full rent irrespective of the landlord's breaches, the breaching landlord would ordinarily not, as a procedural matter, be able to recover more than a net amount; that is, the overdue rent minus a deduction for the damages sustained by the tenant.²⁹⁸ This procedural dependence of liabilities, even under the conveyance theory, detracts much from the substantive independence of covenants.

Procedural dependence of liabilities alone does not, however, make the substantive independence of covenants entirely irrelevant. Problems can still arise if the tenant withholds rent and the breaching landlord responds by suing not for rent but for possession, by relying on a statute²⁹⁹ or a forfeiture provision³⁰⁰ in the lease. Even if the tenant counterclaimed for damages in such a suit, the result might be that

296. See *supra* notes 267 & 288.

297. *E.g.*, *Frazier v. Riley*, 215 Ala. 517, 111 So. 10 (1926); *Selz v. Stafford*, 284 Ill. 610, 120 N.E. 462 (1918); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Thompson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 39 N.E. 7 (1894); *Cooke v. Soule*, 56 N.Y. 420 (1874); *Dittman v. McFadden*, 159 Okla. 262, 15 P.2d 139 (1932); *Graham Hotel Co. v. Garrett*, 33 S.W.2d 522 (Tex. Civ. App. 1930); *Teller v. McCoy*, 253 S.E.2d 114 (W. Va. 1978). See also R. SCHOSHINSKI, *supra* note 17, at 114 n.60; Siegel, *supra* note 11, at 666-70; Annot., 28 A.L.R.2d 446, 476-79 (1953). It may occur, however, that a court, in its discretion, will defer trying the counterclaim, thereby resulting in an initial judgment against the tenant for the full rent. See *Chelsea Hotel Co. v. Gelles*, 129 N.J.L. 102, 28 A.2d 172 (1942).

298. See *supra* note 297.

299. See *supra* note 79.

300. See *supra* text accompanying notes 74-78.

the tenant would leave the court with a handful of money but no place to live. If, under the lease or an applicable statute, the tenant could not present offsetting claims in dispossession proceedings,³⁰¹ the tenant might be evicted for failing to pay an amount that the landlord could never lawfully collect anyway. In ordering the eviction despite the landlord's breach and attendant liability, the court would be resolving only half the controversy. One would not expect that deciding only half a controversy would produce a just result.

One way to avoid this problem is by resort to fictions. It has been held, for example, that there is no failure to pay rents when the tenant has "paid them by sustaining damages as the result of [the landlord's] failure to repair."³⁰² Other cases, similar in approach, simply give substantive significance to the procedural dependence of liabilities by fiat, holding that the tenant's rent obligations are deemed met, for purposes of forfeiture, once the tenant pays at least the actual net liability to the landlord.³⁰³ It would be satisfying, however, to find a rationale for allowing tenants in occupancy to withhold rents without resorting to fictions or fiats. Somewhat surprisingly, the traditional common-law conveyance conception of leasing transactions seems not merely to permit, but perhaps even to require the conclusion that the tenant's net

301. See *Interstate Restatements v. Halsa Corp.*, 300 A.2d 108 (D.C. Ct. App. 1972); *Johnson v. Haynes*, 330 S.W.2d 109 (Ky. 1959). Compare *Reaume v. Brennan*, 299 Mich. 305, 300 N.W. 97 (1941) with *Rome v. Walker*, 38 Mich. App. 458, 196 N.W.2d 850 (1972). See also *Siegel*, *supra* note 11, at 668-70. There is no constitutional requirement that the tenant be permitted to present such offsetting claims in eviction proceedings. See *Lindsey v. Normat*, 405 U.S. 56 (1972).

302. See *Ashmore v. Hays*, 159 Ark. 234, 240, 252 S.W. 11, 12 (1923); accord *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

303. This method of dealing with a landlord's breaches does not seem at odds with the common-law conception of reserved rents, that is, that rent is a reserved property right entitling the landlord to a portion of benefits which inure initially to the tenant and that such reserved benefits may be "recouped" from the tenant in the recuperatory action of debt. See *supra* text accompanying notes 57-71. The parties could always expressly make the tenant's obligation to pay the reserved rents subject to an express condition of performance by the landlord. *Budget Way Cleaners & Laundry v. Simon*, 311 P.2d 591 (Cal. App. 1957); 6 S. WILLISTON, *supra* note 24, at § 890A. Additionally, the rationale may be given that, in modern circumstances, such a limitation on the recoverability of reserved rents must be implied in fact as the proper interpretation of the parties' reasonable expectations. See *Brady v. Brady*, 140 Md. 403, 408, 117 A. 882, 884-85 (1922). The trouble with this implied contract theory is that it makes dependency of lease obligations vulnerable to express language of the lease prohibiting the tenant from suspending or withholding any part of the rent. If, however, the lease is regarded as a conveyance, an analytical basis exists for achieving the desired result despite such express language. See *infra* text accompanying notes 304-13.

liability to the landlord is all that must be paid for the tenant to retain possession.

Because the traditional conception views the tenant as having a property right to possession,³⁰⁴ enforcement of a forfeiture for nonpayment means that a property right, in this case the tenant's estate, must be terminated. Forfeiture by a leasehold tenant is not, in other words, a case of merely refusing to enforce a contract at the behest of the party (the tenant) in default.³⁰⁵ This distinction between property rights and contract rights appears to be substantively important. The difference lies in the different treatment of express conditions on mere contractual rights when compared with the treatment of conditions³⁰⁶ on estates in land. The difference may be summarized as follows: An express condition on a contractual right must be *strictly* or literally complied with or the contract right is forfeited.³⁰⁷ By contrast, conditions on estates do

304. See *supra* text accompanying notes 47-56.

305. As a contract matter, eviction for nonpayment of rent would be the concurrent-conditions counterpart of rent withholding for nonprovision of services or occupancy. See *supra* notes 269 & 278 and accompanying text. Of course, in cases of rent withholding, the tenant's nonperformance is generally precipitated by the landlord's breach in failing to provide services, that is, both parties have at least partially failed to perform. In cases of bilateral breach, ordinary contract law would generally hold the fault to lie with the party (here the landlord) who committed the first material breach. Farnsworth, *supra* note 119, at 285-86. As previously demonstrated, however, if the nonbreaching party decides to continue accepting benefits under the partially breached contract, that nonbreaching party waives the excuse for his own nonperformance; therefore, in a purely contractual treatment of leases, the landlord's initial breach would be, for present purposes, irrelevant. See *supra* text accompanying notes 278-91. The tenant's nonpayment would count as the first material breach and, hence, the tenant's occupancy rights would be susceptible to forfeiture.

306. Conditions on the leasehold estate must be express because conditions that the tenant perform are not implied in leases. See *supra* text accompanying notes 72-82. Accordingly, the comparison in the text is between express conditions in contracts and express conditions on estates.

Although the discussion in the text is in terms of "conditions" as distinguished from conditional limitations, see *supra* note 76, the discussion should equally apply, under traditional rules, to relief of forfeitures occasioned under the conditional limitation device. See *Erskine v. Board of Regents*, 170 Neb. 660, 104 N.W.2d 285 (1961); *Hare v. Elms*, 1 Q.B. 604 (1893); *Taylor v. Knight*, 22 Eng. Rep. 208 (Ch. 1725); 3 J. STORY, *EQUITY JURISPRUDENCE* § 1736 (14th ed. 1918); 2 W. WALSH, *supra* note 76, at § 193; but see *First Nat'l Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968); Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins*, 20 U. CHI. L. REV. 215, 225-29 (1953); Humbach, *supra* note 77, at 290-91.

Statutory forfeiture may also be relieved. Such relief is ultimately a matter of statutory interpretation, however, and is therefore not directly germane to the common-law conception of leases or the analytical workings of the common law rules. See R. SCHOSHINSKI, *supra* note 17, at 394-99.

307. *E.g.*, *Luttinger v. Rosen*, 164 Conn. 45, 316 A.2d 757 (1972); *Metz v. Heflin*, 235 Md. 550,

not generally result in forfeiture so long as either (1) there is substantial compliance with the condition,³⁰⁸ or (2) the failure of compliance, especially in cases of payment conditions, is fully compensable and compensated.³⁰⁹ The latter basis for relieving forfeitures of estates is, of course, merely a special case of substantial compliance.³¹⁰

To be sure, courts dislike forfeitures of both estate and contract rights, and have resorted to a number of devices, such as strict interpre-

201 A.2d 802 (1964) (a condition "means what it literally says"); *Gray v. Gardner*, 17 Mass. 188 (1821); *Kindervater v. Motorists Casualty Ins. Co.*, 120 N.J.L. 373, 199 A. 606 (1938); 5 S. WILLISTON, *supra* note 24, at § 675; *Ballantine, Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329, 341-52 (1921).

308. *E.g.*, *Lasiter v. Town of Oxford*, 234 F.2d 217 (4th Cir. 1956); *Stewart v. Weaver*, 264 Ala. 236, 87 So. 2d 548 (1956); *Ersine v. Board of Regents*, 170 Neb. 660, 104 N.W.2d 285 (1968); *Brooks v. Kimball County*, 127 Neb. 645, 256 N.W. 501 (1934); *Rose v. Hawley*, 118 N.Y. 502, 23 N.E. 904 (1890); *St. Clara College v. City of Madison*, 250 Wis. 538, 27 N.W.2d 745 (1947). *See also Fowler v. Coates*, 201 N.Y. 257, 94 N.E. 987 (1911).

309. *See, e.g.*, *Noyes v. Anderson*, 124 N.Y. 175, 26 N.E. 319 (1891); *Henry v. Tupper*, 29 Vt. 358 (1857); *Donnelly v. Eastes*, 94 Wis. 390, 69 N.W. 157 (1896). *See also* cases cited *infra* note 313 which, though involving lease forfeitures, invoke the estate character of leaseholds in reaching their results. Leaseholds are, of course, far more likely than freehold estates to carry forfeiture possibilities based upon conditions of payment because leaseholds normally are conveyed in exchange for rents while freeholds are not. Therefore, it is to be expected that the rules concerning forfeitability of estates would most often find application in the leasehold context.

Apparently, it was by easy analogy to the rules applicable to mortgages that equity began relieving against payment-default forfeitures of leasehold estates. *Sanders v. Pope*, 33 Eng. Rep. 108 (Ch. 1806); *Northcote v. Duke*, 27 Eng. Rep. 330 (Ch. 1765); *Hack v. Leonard*, 88 Eng. Rep. 335 (Ch. 1724); *see also Wafer v. Mocato*, 88 Eng. Rep. 348 (Ch. 1724). The theory seems to have been that payment-default forfeitures were intended "as a mere security," *see Cedrom Coal Co. v. Moss*, 230 Ala. 32, 39, 159 So. 225, 227 (1935); 1 A.L.P., *supra* note 17, at § 3.96, and that the secured party received what he bargained for once the secured payment was made. *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385, 394, 88 N.W. 300, 302-03 (1901). Consonant with the view that payment-default forfeitures are intended as security, occasional dicta to the effect that relief is not available for willful defaults, *e.g.*, *Molyneaux v. Town House*, 195 A.2d 744 (D.C. Ct. App. 1963); *Noyes v. Anderson*, 124 N.Y. 175, 26 N.E. 319 (1891); *but cf. Henry v. Tupper*, 29 Vt. 358 (1857), should probably not be read to mean anything more than that general equitable principles apply. *Molyneaux v. Town House*, 195 A.2d 744 (D.C. Ct. App. 1963); *see also Smith v. Warren Petroleum Corp.*, 126 A.2d 152 (D.C. Mun. App. 1956); *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144 (D.C. Mun. App. 1947). Rent withholding by a tenant as a response to landlord defaults, though a technical breach of the tenant's duties, hardly seems to be the sort of aggravated nonperformance to which the willful-default concept is directed.

310. Interestingly, the treatment of express conditions on estates, though quite different from that of express contractual conditions, appears to be quite close to the treatment of constructive, implied-in-law conditions in contracts, namely, both are subject to a substantial performance test as contrasted with the literal compliance test applicable to express contractual conditions. *See Wilson v. Galt*, 18 Ill. 431, 437 (1857); *supra* note 278. For a striking comparison of express conditions on estates and express contractual conditions, see the very lease-like facts of the "license" case, *Kama Rippa Music v. Schekeryk*, 510 F.2d 837, 843-44 (2d Cir. 1975).

tation, waiver, and estoppel, for avoiding forfeitures.³¹¹ These avoidance devices obscure the contours of forfeiture enforceability overall and, hence, make it difficult to compare directly the difference in treatment of express contractual conditions with conditions on estates. Nevertheless, the clear difference in the points of departure for the two kinds of conditions is illuminating. It seems fair to conclude that, on the whole, having a property right to possession almost certainly places the tenant in a significantly more favorable position with respect to forfeiture than if leases were viewed as purely contractual. That is, the tenant is better off as owner than as a mere promisee of occupancy.³¹²

In view of the traditional reticence to enforce forfeitures of estates despite a degree of noncompliance with an express condition, it may be concluded that rent-withholding seldom if ever should ipso facto result in an eviction from possession. For even when the nonpayment of rent is expressly made an event of forfeiture under the lease, relief from the forfeiture would be available under traditional property principles if the tenant is willing to pay whatever net amount is due the

311. *See, e.g.*, *Thomas J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 308 F.2d 655 (6th Cir. 1962) (strict construction; contract); *Board of Comm'rs v. Russell*, 174 F.2d 778 (10th Cir. 1949) (strict construction; estate); *Southern Sur. Co. v. MacMillan Co.*, 58 F.2d 541 (10th Cir. 1932) (strict construction; contract); *Jeffries v. State ex rel. Woodruff County*, 216 Ark. 657, 226 S.W.2d 810 (1950) (waiver and estoppel; estate); *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908) (waiver; contract); *Berryman v. Shumaker*, 67 Tex. 312, 3 S.W. 46, (1887) (waiver; estate); *Santa Clara College v. City of Madison*, 250 Wis. 538, 27 N.W.2d 745 (1947) (strict construction; estate); *Carop v City of Casper*, 66 Wyo. 437, 213 P.2d 263 (1950) (same). *See Dunham, supra* note 306, at 225-29; Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940).

312. There appears to be some convergence of the treatment of contractual and estate conditions as courts move to mitigate, in a wider range of cases, the harshness of unambiguous but draconian express conditions in contracts. *See, e.g.*, *Burger King Corp. v. Family Dining*, 426 F. Supp. 485 (E.D. Pa. 1977), *aff'd*, 566 F.2d 1168 (3d Cir. 1977); *Wortman v. Jessen*, 183 Neb. 274, 159 N.W.2d 564 (1968). A broad reading of the Second Restatement of Contracts would make the convergence practically complete, assuming such a broad reading truly restates the law. The Restatement would excuse any condition which is not "a material part of the agreed exchange" if the condition would cause "disproportionate forfeiture." RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981). By contrast, the First Restatement would relieve only an "extreme [instead of a merely "disproportionate"] forfeiture or penalty." RESTATEMENT OF CONTRACTS § 302(a) (1932) (emphasis added). Nevertheless, the treatment of express contractual conditions does not seem to have yet merged with the doctrine of substantial performance applicable to constructive, implied-in-law conditions. *Kama Rippa Music v. Schekeryk*, 510 F.2d 837, 843-44 (2d Cir. 1975); *Della Ratta, Inc. v. American Better Community Dev.*, 38 Md. App. 119, 132-40, 380 A.2d 627, 636-39 (1977); *Farnsworth, supra* note 119, at 267. *See supra* notes 278 & 310. Accordingly, forfeitures by express contractual conditions appear more likely to be enforced than forfeitures under express conditions on estates.

landlord.³¹³

By viewing leases as conveyance-cum-contract transactions, and applying the usual property, contract, and procedural principles to that traditional conception, it can be seen that: (1) the landlord in default cannot recover the full rent but only, at most, the amount of rent minus the damages sustained by the tenant, and (2) no forfeiture for nonpayment of the full rent should be enforced if payment by the tenant of all net liabilities is made, thus compensating the landlord in full.

That is to say, under the traditional rules, lease obligations are effectively dependent. It is true that under the conveyance-cum-contract analysis, as under "purely" contractual analysis, the tenant's *gross* rent obligation would technically still be regarded as owing despite breaches by the landlord. This technical gross-rent obligation usually should have no ultimate significance, however, because only the net amount due after deduction of damages should be recoverable or the predicate of an enforceable forfeiture. Accordingly, to be consistent with the view that a lease is a conveyance and not merely an ordinary contract, the tenant's duty to pay rent must be held, as a practical matter, conditional on the performance by the landlord of the landlord's obligations. Holdings to the contrary appear to be a misapplication of the traditional rules.

V. DOES THE CONVEYANCE THEORY HAVE A PLACE?

The traditional common-law conception of leases as conveyances recently has been viewed by courts and commentators as an obstacle to reform.³¹⁴ A contract theory of leasing has been suggested as preferable.³¹⁵ Within the common-law conception of leasing, however, three

313. *E.g.*, *Humphrey v. Humphrey*, 254 Ala. 395, 48 So. 2d 424 (1950); *Cedrom Coal Co. v. Moss*, 230 Ala. 32, 159 So. 225 (1935); *Thompson v. Coe*, 96 Conn. 644, 115 A. 219 (1921); *Branmar Theatre Co. v. Branmar, Inc.*, 264 A.2d 526 (Del. Ch. 1970); *Famous Permanent Wave Shops, Inc. v. Smith*, 302 Ill. App. 178, 23 N.E.2d 767 (1939); *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922); *Income Properties Inv. Co. v. Trefethen*, 155 Wash. 493, 284 P. 782 (1939); 1 A.L.P. § 3.96. The matter of relief from forfeitures is discussed at length in *Humbach*, *supra* note 77, at 266-88.

A variation of the approach described in the text is for the tenant to seek an injunction against the landlord's maintenance of dispossession proceedings, pending resolution of the parties' money disputes. *See Thompson-Houston Elec. Co. v. Durant Land Improvement Co.*, 144 N.Y. 34, 39 N.E. 7 (1894).

314. *See supra* notes 11, 115-18 & 238 and text accompanying notes 11-14, 115-18, 229-30 & 268-69.

315. *See supra* note 314.

important reforms can be understood and analytically accounted for.³¹⁶ Moreover, it has been demonstrated that contract principles, at least ordinary contract principles, may be even less conducive to the desired reforms than the traditional conveyance-cum-contract conception.³¹⁷

Resort to a contract theory of leasing can be criticized for its flawed understanding of contract law and for its nonrecognition of certain factual realities and interpretational consequences which would rationalize results under the conveyance approach. Nevertheless, the question may be raised: What purpose is served in retaining an essentially conveyance conception of leasing transactions? Why not simply regard leases as a type of contract and create for leases a special contract law which avoids application of certain ordinary contract rules that are antagonistic to modern policy objectives?

To be sure, the choice of a conceptual paradigm for leases has no real ontological foundation; it cannot be said that leases are "really" conveyances, in their essence, as distinguished from pure contracts. Nor can it be said that leases are really, in their essence, contracts. Leases have no verifiable reality of this sort, beyond what courts and legislatures choose to posit.

The choice made by common-law courts, at least since the late fifteenth century, has been to conceive of leases as fundamentally conveyances of property.³¹⁸ The rationale for this choice—to better protect the tenant's possession³¹⁹—was essentially functional. Further, this functional rationale for the conveyance conception still seems to be applicable. No one suggests that the tenant's possessory right be demoted to an ordinary contract right terminable on payment of damages,³²⁰

316. The three are: (i) limiting aggrieved landlords' recoveries by deduction of mitigatable damages, *see supra* text accompanying notes 212-18, (ii) making landlords responsible for the condition of residential premises, *see supra* text accompanying notes 225-61, and (iii) achieving practical dependence of lease obligations so as to permit rent withholding by a tenant in occupancy when the landlord defaults, *see supra* text accompanying notes 295-313.

317. *See supra* text accompanying notes 201-12, 245-61 & 278-95.

318. *See supra* note 15 and text accompanying notes 23-56.

319. *See supra* note 15 and text accompanying notes 32-37.

320. *Compare* *Golde Clothes Shop v. Loew's Buffalo Theatres*, 236 N.Y. 465, 141 N.E. 917 (1923) (ejectment by tenant against landlord) *with* *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913) (license contract provides only a revocable permission) *and* RESTATEMENT OF PROPERTY § 519 comment b (1944) (same).

It is the tenant's specifically enforceable superior claim to possession for a prescribed duration that makes the tenant an "owner" and the lease a "conveyance." *See supra* note 15 and text accompanying notes 23-56. To extract the conveyance component and leave the lease a mere "continuous interchange of values," *see supra* note 48, it seemingly would be necessary to confine

relatively unprotected as against third parties,³²¹ and probably more susceptible to forfeiture for breach of express conditions.³²² It is true that the protection of possession is not the urgent issue that it once was in landlord-tenant law, having been eclipsed by concerns more pressing. This fact should be taken, however, as evidence of the success of the conveyance conception rather than of its obsolescence.³²³

Function thus remains the most compelling basis for viewing leases as conveyances. Strong arguments of convenience suggest that the law should provide the possibility of creating specifically enforceable temporary entitlements to the exclusive control of areas of land, volumes of space, and fixtures. There is a place for legal interests in land, space and fixtures which are less ephemeral than a license and less enduring than a fee simple. Leases are used to fill that place.

Though leases function as devices for allocating control of land, space, and fixtures, they would not, of course, have to be conceived of as conveyances. A kind of contractually based, specifically enforceable license could be devised which would serve the purposes and provide the protections sought and achieved in leasing transactions.³²⁴ If the characteristics of such a device were assembled into a conception, however, it is doubtful that the result would be functionally distinguishable from the common-law conception of conveyance. Insofar as leases are intended by their parties as devices for allocating exclusive control of land, space, and fixtures, courts will tend to carry out that intention. Thus, even if the conveyance model were rejected as a guide, its functional similarity to leasing, as a control allocating device, would cause it to be replicated, or nearly so, in point of fact. To deny that leases are conveyances in such circumstances, and to insist on labelling them as mere contracts, is logomachy.³²⁵

the dispossessed tenant to the substitutionary remedy of damages. For so long as the law commits itself to preserve the tenant's possession in specie, the landlord in leasing does more than just promise possession; possession is conveyed.

321. See *supra* notes 32 & 96-98 and accompanying text.

322. See *supra* text accompanying notes 304-12.

323. The problems of habitability and securing landlords' services in general have received most of the recent attention, but courts are probably more alert than ever to preserve tenants' possession as well. See, e.g., *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (seminal case on retaliatory eviction); *Sy Jack Realty Co. v. Pergament Syosset Corp.*, 27 N.Y.2d 449, 267 N.E.2d 462, 318 N.Y.S.2d 720 (1971) (preserving renewal rights); see also *Humbach*, *supra* note 77, at 274-333; *supra* text accompanying notes 295-313.

324. See *supra* notes 30-31.

325. See *supra* note 320.

A consistent conception of comparable interests and transactions is no mere aesthetic concern. It is practically indispensable to the even application and predictability of the law. It is true that the implications and dictates of conceptions should never supplant the exogenously determined purposes and policies of the law. Ultimately, only the latter are legitimate bases for decisions. Nevertheless, as embodiments of purpose and policy, conceptions have more than met the test of utility as convenient bases for deciding new cases falling within the law's interstices. Moreover, without the logical coherence which conceptions supply, law could be little more than a hodgepodge of ad hoc do's and don'ts. The taxonomic framework of conceptions and doctrine is practically indispensable to the goal of treating similar cases similarly, distinctive cases distinctively and, in general, achieving equality under the law.

Thus, at an ontological level, the choice of conceptual paradigm, conveyance or contract, may be trivial. As a matter of practical methodology, however, it could hardly be more critical. To be sure, logical purity in law is not an end in itself; but chaos is the opposite of coherence and the enemy of justice. Therefore, the coherent development of law, especially in areas needing change, is more than worth the effort. Retaining the common-law conception of leasing, especially in cases introducing reform, remains the best way to assure the coherent development of law.