NOTES

Surrender of a Lease By Act and Operation of Law.—A surrender is the yielding up of an estate for life or years to the holder of the immediate estate in reversion or remainder wherein the estate for life or years is terminated.[1] As between the landlord and tenant a surrender can only be accomplished by the tenant giving up his term and the acceptance thereof by the landlord of such surrender, the term merging with the landlord's reversion and the rights and liabilities of the parties being determined as of the surrender.[2]

The Statute of Frauds[3] provides that no lease or interest in lands may be surrendered unless by deed or note in writing, signed by the party surrendering same, or by act and operation of law. Thus a surrender may be accomplished voluntarily, by express agreement which must be in writing, or involuntarily, by act and operation of law. When the landlord and tenant effect a voluntary surrender they may in the written agreement make special provisions as to the termination or continuance of their rights and obligations under the lease, and we are not confronted with any difficulties in determining the respective rights, obligations and liabilities of the parties.[4] However, the involuntary surrender, or surrender by act and operation of law, necessitates a determination of whether the surrender has been accomplished in fact, and if we find that it has, then it can be said that the relationship created by the lease no longer exists, and each party is relieved of his duties, and the benefits and obligations thereunder cease.

Involuntary surrenders are sometimes the result of acts that need no interpretation the acts being themselves, *per se,* surrenders. Where the landlord and tenant have made a new lease to take effect before the expiration of the original lease, a surrender by operation of law is effected, since the term demised by the new lease is necessarily inconsistent with the continuation of the term of the original lease.[5] If, however, the new lease is void, a surrender of the original

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[1] 2 Bl. Comm. 326; Reed v. Snowhill, 51 N.J.L. 162, 164, 16 Atl. 679 (E. & A. 1888); Heroy v. Reilly, 84 N.J.L. 671, 674, 87 Atl. 112 (E. & A. 1913).

[2] Hunt v. Gardner, 39 N.J.L. 530, 532 (Sup. Ct. 1877) (a surrender has the effect of putting an end to the lease, as well as ending the term. Such operation destroys the privity of contract between landlord and tenant as well as the privity of estate).

[3] C.S. 1910, p. 2610, §2.

[4] In Reed v. Snowhill, cited note 1, *supra,* (discussing the effect of a written agreement), the court states at page 164, "With this ending of the estate and interest in the lands goes also all the covenants in the lease which had not matured and become actionable during the continuance of the estate . . . the parties had by express agreement provided for a surrender of the lease . . . if the parties had desired anything else they should have so stipulated."

[5] In Lister etc., Works v. Selby, 68 N.J.Eq. 274, 53 Atl. 386 (Ch. 1904) Vice-Chancellor Stevens says: "It is well settled that 'if a lessee for life or years takes a new lease of him in reversion of the same thing in particular contained in the former lease for life or years, this is a surrender in law of the

lease would not result as no inconsistent estate arises.[6] A contract entered into between the landlord and tenant for the sale of the demised premises amounts to a surrender by operation of law, the tenant's possession being that of a vendee in possession, in the absence of contrary provisions in the contract of sale, and in equity the tenant would be regarded as the owner of the property.[7] Where the parties agree to a surrender of a lease upon a contemplated sale of the property by the landlord to the tenant, and the sale is never consummated, the lease is held still operative. Thus, in the case of *Stuart & Wood, Inc., v. Palisades Prop. & Oper. Corp*,[8] the court held that during the pendency of the sale the lease was in abeyance, and if the lease is surrendered conditionally the surrender does not take effect unless the condition is performed. The intention and acts which might give rise to a surrender being subordinate to the sale, they cannot stand when the sale falls.

Sometimes the parties believe that they are accomplishing a surrender but they find that in fact their relationship created by the lease still exists. They may enter into an oral agreement, after execution of a lease, and attempt to accomplish a surrender by agreeing that either party might terminate the lease in case of dissatisfaction, but such agreement is ineffectual and will not be enforced.[9] But if the tenant, in accordance with the oral agreement, acts in such manner consistent with the agreement and the landlord acquiesced therein, equity will relieve the tenant and enjoin the landlord from proceeding at law in an action for rent, the court holding in the case of *Stotesbury v. Vail*[10] that although such surrender would be invalid in law as violative of the Statute of Frauds, nevertheless, in equity it will be sustained, since it is clearly within the province of equity by its interference to prevent such injustice. It was not until the case of *Meeker*

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first lease' Shep. Touch. Ch. 17, p. 301; Tayl. Landlord & Tenant §512. The instances given in Sheppard are a new lease, taken for a longer period or a shorter term, or a new lease for the same term taken on a condition."

See LANDLORD & TENANT ACT, 3 C.S. 1910, p. 3075, §25, giving effect to under leases where the chief lease has been surrendered and a new lease entered into between chief landlord and under lessee's lessor.

[6] Stuart & Wood, Inc., v. Palisades Prop. & Oper. Corp., 109 N.J.Eq. 401, 407, 157 Atl. 659 (Ch. 1931).

[7] Craft v. Latourette, 62 N.J.Eq. 206, 49 Atl. 711 (Ch. 1901) (quoting Rose v. Watson, 10 H.L. 672, the court says "where the purchaser has paid purchase money, the vendor becomes a trustee for him of the legal estate, and he is in equity considered the owner of the estate").

[8] Cited note 6, *supra*.

[9] Den *ex. dem* Mayberry v. Johnson, 15 N.J.L. 116 (Sup. Ct. 1835); Friederman v. Parsons, 3 N.J.Misc. 473, 128 Atl. 788 (Sup. Ct. 1925).

[10] 13 N.J.Eq. 390 (1861) (the tenant in accordance with oral agreement surrendered the premises, gave his copy of lease to the landlord together with keys, and gave landlord entire control of premises. Landlord subsequently leased to another tenant and attempted to sue original tenant for deficiency in rent. Court issued injunction restraining landlord from proceeding at law to recover rent).

v. Spalsbury[11] that our law courts provided a general rule which would guide us in determining when a surrender arises by act and operation of law. In that case Mr. Justice Collins, stated:

> "When the minds of the parties to a lease concur in the common intent of relinquishing the relation of landlord and tenant, and *execute* this intent by *acts* which are tantamount to a stipulation to put an end thereto, there, at once, arises a surrender by act and operation of law." (italics ours.)

The rule has been followed and adopted by all our courts and is now well settled.[12]

In the application of the rule we must interpret the conduct of the parties and examine their acts, and if their acts are necessarily inconsistent with the continuing of the term, so that the term cannot continue to exist at the same time with the new relationship or estate created as a result of their acts, we then have a surrender by acts and operation of law accomplished. There must not only be an abandonment by the tenant but also an acceptance thereof by the landlord as a surrender. The rule seems a little broad in that it appears that the minds of the parties must concur in the intent, but it is important to notice that the court holds that the intent must be executed by acts. When we find that the conduct of the landlord and tenant accomplished such surrender, it is immaterial whether they intended a surrender or not, since any agreement to surrender unless in writing is violative of the Statute of Frauds,[13] and it follows that should they intend a surrender by agreement, not in writing, but by their conduct their acts fail or are not sufficient to accomplish it, a surrender by act and operation of law does not take place.[14] That there is a possibility of

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[11] 66 N.J.L. 60, 65, 48 Atl. 1026 (Sup. Ct. 1901).

[12] Jones v. Rushmore, 67 N.J.L. 157, 50 Atl. 587 (Sup. Ct. 1901); Miller v. Dennis, 68 N.J.L. 320, 53 Atl. 394 (E. & A. 1902); Home Coupon Exchange v. Goldfarb, 78 N.J.L. 146, 74 Atl. 143 (Sup. Ct. 1909); Sypherd v. Myers, 80 N.J.L. 321, 79 Atl. 340 (E. & A. 1910); Payne v. Hall, 82 N.J.L. 366, 83 Atl. 180 (Sup. Ct. 1912); O'Neill v. Pearse, 87 N.J.L. 382, 94 Atl. 312 (Sup. Ct. 1915), *aff'd.* 88 N.J.L. 733, 96 Atl. 1102 (E. & A. 1915); Banks v. Berliner, 95 N.J.L. 267, 113 Atl. 321 (Sup. Ct. 1920); Albrecht v. Thieme, 97 N.J.L. 103, 116 Atl. 276 (Sup. Ct. 1921), *aff'd.* 98 N.J.L. 249, 118 Atl. 926 (E. & A. 1922); Fink v. Bowne Co., 99 Atl. 926 (Ch. 1917); Stuart & Wood, Inc., v. Palisades Prop. & Oper. Corp., cited note 6, *supra;* Earlington Realty Co. v. Berkow, 3 N.J.Misc. 444, 128 Atl. 605 (Sup. Ct. 1925); Friederman v. Parsons, cited note 9, *supra;* Pomeranz v. Dunn, 9 N.J.Misc. 455, 154 Atl. 425 (Sup. Ct. 1931); Ellveeay News etc. Assn. v. Wagner Mkt. Co., 110 N.J.L. 577, 579, 166 Atl. 322 (Sup. Ct. 1932), *aff'd.* 112 N.J.L. 88 (E. & A. 1933).

[13] Den, *ex. dem* Mayberry v. Johnson, cited note 9, *supra;* Friederman v. Parsons, cited note 9, *supra;* Stotesbury v. Vail, cited note 10, *supra.*

[14] In Sypherd v. Myers, 80 N.J.L. 321, the Court of Errors and Appeals through Mr. Justice Garrison stated at page 325: " . . . the surrender is not the result of intention; the surrender is of law, and takes places independently of the intention that such should be the legal effect of the act done. . . The Statute of Frauds gives effect to the intention of the parties not reduced to

the rule becoming too broad is evidenced by the recent case of *Liskovsky v. Blau.*[15] In that case the trial court properly held that the release of a written lease must be in writing, but also held, and we think improperly, that if there was a surrender of the lease by operation of law the minds of the parties must meet. The Court of Errors and Appeals affirmed a directed verdict for the landlord stating that there was nothing in the record to indicate a surrender by operation of law but passes the trial court's statement without comment.

In determining whether or not a surrender has been accomplished some acts of the landlord and tenant are construed and passed on by the court as questions of law, other acts must, as questions of fact, be established by the jury before a surrender can be determined.[16] It is necessary to construe these acts with regard to the covenants in the lease and the rights conferred on each party by such covenants. If the lease gives the landlord the right to re-enter and relet on account of the tenant, in the event the tenant abandons the premises, then such acts on the part of the landlord cannot be interpreted as having the same effect as if such re-entry and reletting were not provided for in the lease. It is generally held that where the tenant relinquishes possession to his landlord and the landlord enters and occupies the premises for himself, by the acceptance of such abandonment, the acts of the parties are so inconsistent with the lease that a surrender by operation of law results.[17] But the tenant's relinquishment must be a permanent abandonment and the re-entry by the landlord for his own account. Their acts should be unequivocal, since it is the result of the acts, if it is inconsistent with the term, which is determinative of the surrender by operation of law.[18] The mere entry of the landlord

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writing, only when such intent is executed by the acts of the parties themselves. . ."

In Friederman v. Parsons, cited note 9, *supra,* the court held that a surrender of a lease by operation of law results from acts which imply mutual consent independently of the expressed intention of the parties that their acts shall have that effect.

[15] 114 N.J.L. 324, 176 Atl. 562 (E. & A. 1935).

[16] In Sypherd v. Myers, 80 N.J.L. 321, at page 325, Mr. Justice Garrison says: "Where the act relied on is equivocal, the fact that it is in execution of a common intent must be established, as other controverted questions of fact are established in courts of law, but where the intent is unequivocal, provided the act itself be established, a surrender by operation of law at once arises . . . the intention of the parties is deemed to be manifested by the acts they mutually perform, which may be either equivocal or conclusive; if the former a jury question is presented; if the latter, a court question only; but with the operation of law upon an unequivocal act, the intention of the parties has nothing whatsoever to do, hence such a case presents a question of law only."

[17] Jones v. Rushmore, 67 N.J.L. 157, 50 Atl. 587 (Sup. Ct. 1901); Banks v. Berliner, 95 N.J.L. 267, 113 Atl. 321 (Sup. Ct. 1920) (but where the tenant abandons under the lease and landlord re-enters for preservation of the property, and landlord's acts are such as to impute a refusal to accept the abandonment as a surrender then there is no surrender by operation of law).

[18] Sypherd v. Myers, cited note 14, *supra.*

to make necessary repairs for the preservation of the abandoned premises is not sufficient to amount to a surrender.[19] The acceptance of keys from the tenant[20] and the fact that the landlord endeavors unsuccessfully to relet the premises do not constitute acts sufficient in themselves to accomplish a surrender.[21]

Where there are express provisions in the lease giving the landlord a right to re-enter, in case of abandonment, and to relet the premises for and on behalf of the tenant, it is held that express consent by the tenant to the reletting is unnecessary, and the tenant can be held liable for any deficiency[22] since he has bound himself by express terms for such deficiency.[23] In the absence of such provisions in the lease, the acceptance of the keys, without objection by the landlord, and the re-entry by the landlord to make repairs and alterations not necessary for the preservation of the premises, and the subsequent reletting without the consent of the tenant have been held to be an acceptance of the surrender.[24] But where the tenant vacated the premises and turned over the keys to the landlord, and the landlord expressly stated that he would still hold the tenant for the rent, and then the landlord subsequently rented the premises to a third party,

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[19] Meeker v. Spalsbury, cited note 10, *supra*. Where under the lease the landlord reserved the right to re-enter and make repairs and alterations necessary for preservation thereof, and during the term the tenant abandoned, and subsequently the landlord re-entered and made extensive alterations and repairs, and remodeled the building beyond any necessity for preservation, it was held that such acts constituted an acceptance and a surrender by act and operation of law resulted.

[20] Lorenz v. McClosky, 5 N.J.Misc. 27, 135 Atl. 350 (Sup. Ct. 1926). The mere receipt of the keys and endeavoring to rent the premises demised does not constitute an acceptance of a surrender; but when the premises are used as a model apartment and exhibited to prospective purchasers to effect a sale of the property, and to applicants for other apartments to effect rentals, that is a use of the property for the landlord's own purposes inconsistent with the claim of continued relationship of landlord and tenant.

[21] O'Neill v. Pearse, 87 N.J.L. 382, 94 Atl. 312 (Sup. Ct. 1915), *aff'd.* 88 N.J.L. 733, 96 Atl. 1102 (E. & A. 1915) (but the court says that a more difficult problem would be raised if the evidence showed that the landlord attempted to relet for his own account); Banks v. Berliner, cited note 17, *supra.*

[22] Jones v. Rushmore, cited note 17, *supra.*

[23] Reed v. Snowhill, cited note 1, *supra;* Jones v. Rushmore, cited note 17, *supra;* Meeker v. Spalsbury, cited note 10, *supra* (where the provisions of the lease provided that the landlord could re-enter if the premises became vacant, and relet and apply the rent so received to the payment of rent due under the lease, it was held that the fact that landlord re-entered and relet to a third party for a period beyond the term of the original lease, standing alone, would not effectuate a surrender, for a reletting was expressly authorized if the premises became vacant); Payne v. Hall, 82 N.J.L. 366, 83 Atl. 180 (Sup. Ct. 1912) (where provisions of lease provided that landlord could relet and landlord did so relet but at a higher rent than that reserved in original lease, this did not effect a surrender).

[24] Fink v. Bowne Co., 99 Atl. 926 (Ch. 1917) (lease did not give landlord right to relet, but gave him right to re-enter to make repairs for preservation of building).

these acts were held in the case of *Albrecht v. Thieme*[25] not to be a surrender and the tenant was liable for the deficiency in rent. If the tenant has put a third person in possession of the demised premises and the landlord accepts rent from such person, with the assent of the original tenant, a surrender will not be implied or raised up,[26] nor will the fact that the landlord consented to an assignment of the lease by the tenant to a third party, with the proviso that the tenant was not to be relieved from any liability, be construed as a surrender[27].

Where the acts of the parties are not construed as a surrender, after the landlord has relet the premises subsequent to the tenant's abandonment, although it is held that the landlord may still recover from the tenant the deficiency in the rent, nevertheless, if the premises are relet at an increased rental the tenant will not be heard in an action to recover the increase from the landlord.[28] When the tenant admittedly abandons the premises, repudiates his lease, and no longer manifests an interest in the property, it seems unjust to say that the

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[25] 97 N.J.L. 103, 116 Atl. 276 (Sup. Ct. 1921), *aff'd.* 98 N.J.L. 249, 118 Atl. 926 (E. & A. 1922) (the act of the landlord alone does not amount to a surrender, the landlord refusing the tenant's request for a surrender. The tenant claimed an eviction but there was no actual eviction, since the tenant vacated of his own volition. The court said: "A tenant who has abandoned the premises cannot be actually disturbed in his possession. Where, however, the tenant has vacated and abandoned the premises, an eviction is constructive merely, and should, within reason of the rule, impose upon the landlord no penalty other than that of crediting the tenant with the sum so earned by the property during the term."

[26] Hunt v. Gardner, cited note 2, *supra*. In this case the tenant assigned his lease to a third party who went into possession, and the landlord accepted the assignee as a tenant and received rent from him. Such facts were held not sufficient to raise a surrender. Chief Justice Beasley said: "I think it may be safely said that to hold that a surrender in law will be implied or raised up from the fact that a tenant has put a third person in possession of the demised premises, and that the third person has been accepted as a tenant, is carrying the principle to the verge of mischief to titles by leasehold."; Decker v. Hartshorn, 60 N.J.L. 548, 38 Atl. 678 (E. & A. 1897) (the mere receipt of rent by the landlord from an undertenant does not evidence his assent to the abandonment of the premises by the original lessee, and is no proof of his acceptance of such under lessee as tenant).

[27] Earlington Realty Co. v. Berkow, 3 N.J.Misc. 444, 128 Atl. 605 (Sup. Ct. 1925). In this case the landlord consented to the assignment of lease by the tenant to a third party with the proviso, "that none of the parties to the original lease are relieved from any liability under said lease by this consent." The landlord remarked to the tenant at time of assent to assignment that he did not care who paid the rent so long as it was paid. The court held that it was impossible to extract a surrender and acceptance from this statement. There was no reasonable inference to justify a jury in concluding that it was the intention of the parties to terminate the original lease; Wallace v. Kennelly, 47 N.J.L. 242 (Sup. Ct. 1885) (assignment by tenant to a third party with consent of landlord may terminate the privity of estate, but it will not terminate the privity of contract in the original lease unless the acts of the parties are sufficient to indicate an abandonment of the lease with the old tenant and the substitution of the assignee in his place).

[28] Whitcomb v. Brant, 90 N.J.L. 245, 100 Atl. 175 (E. & A. 1916).

landlord must submit to the alternative of leaving his premises without a tenant or releasing the tenant from his obligation. Of course the act of the landlord in reletting inures to the benefit of the tenant, since his obligation for the rent would be reduced by the reletting, but to allow the tenant to set up such acts on the part of the landlord as showing an acceptance of surrender, or to allow the tenant to recover the increased rental, would be inequitable since the tenant by his very act of wrongful conduct has created the situation.

INJUNCTIONS FOR PROTECTION OF TRADE-MARKS AND TRADE NAMES.—The distinction between a trade-mark and a trade name is one extremely difficult to determine due to the synonymous use of the terms by our courts. A trade-mark is defined by Hopkins in his work *Trade-Marks, Trade Names and Unfair Competition*[1] as "A distinctive name, word, mark, emblem, symbol, or device, used in lawful commerce to indicate or authenticate the source from which come, or through which has passed, the chattel upon or to which it is applied or affixed". The same author attempts to distinguish this from a trade name by saying that "A trade-mark owes its existence to the fact that it is actually affixed to a vendible commodity. A trade name is more properly allied to the good-will of a business. However, a trade name may be attached to a vendible commodity."[2] This distinction, as is admitted by the author, is entirely inadequate. But, since the same rules of law are applicable to both, they will be discussed together.

The first legal recognition of trade names was in 1590,[3] but it was not until the nineteenth century that the property right in a trade-mark or trade name became firmly established. In the early cases the action was in case for damages based on fraud and deceit in fraudulently imitating the name or mark of the plaintiff so that the public was induced to believe that the goods of the defendant were those of the plaintiff.[4] The right of action was given not only to the trader imposed upon, but to the purchaser as well, on the theory that by being induced by the defendant to buy goods of inferior quality he had been defrauded.[5] The remedy at law being inadequate, however, equity soon

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[1] Section 3. Another good definition of trade-mark is given by Chief Justice Fuller in Elgin National Watch Co. v. Illinois Watch Co., 179 U.S. 665 (1900): "Trade mark means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade mark which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right for the same purpose."

[2] Section 4.

[3] Noted in case of Southern v. Howe, 79 Eng. Rep. 1243.

[4] Sykes v. Sykes, 107 Eng. Rep. 834 (K.B. 1824).

[5] For development of the history of production of trade marks and trade