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(2) performance of the contract is prohibited by a statute, (3) a condition precedent to the contract has not been fulfilled, or (4) there is no bona fide dispute.²⁹ Also, the arbitration agreement itself must rest upon sound contract principles.³⁰ Nevertheless, should a great portion of common law contract principles be cast away, abrogated or jeopardized with reference to the "main contract" to give effect to an arbitration clause which was not or might not have been intended to have any effect if no legally enforceable contract ever existed between the parties? To go further, should the arbitrators have jurisdiction in all cases to make or remake legally unenforceable agreements into binding contracts? It is true that there are many advantages to arbitration,³¹ especially in today's age of complex commercialism. Therefore expansion of the arbitrator's jurisdiction is, in many ways, a desirable end. But it is submitted that a party should not be held to have waived his right to a judicial determination of his contract unless it is clear that he *intended* to do so. In order to make the intention clear, lawyers must recognize the need for careful and precise draftsmanship of commercial contracts.

TIMOTHY G. IRELAND

LANDLORD'S FAILURE TO ACT AFTER GIVING NOTICE TO QUIT

A vague area still existing in the law of landlord and tenant is the status of a tenant holding over from a periodic term after having been given a timely and sufficient notice to quit. A question arising in this situation is whether the landlord, by failing to act in regard to the holding over, must give a second notice to quit in order to maintain an action of ejectment.

This question recently confronted the Superior Court of Pennsylvania in *Mack v. Fennell*.¹ Here the landlord, Mack, leased his premises to Fennell under a written lease for a term of one month which

²⁹174 N.E.2d at 465.

³⁰See note 8 supra.

³¹Arbitration has been described as an "easy, expeditious and inexpensive method of settling disputes, and as tending to prevent litigation." *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 399 (1875). For detailed analyses of the advantages of the arbitration process see Carlston, *Theory of the Arbitration Process*, 17 *Law & Contemp. Prob.* 631 (1952); Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 *Law & Contemp. Prob.* 698 (1952); Tausch, *Extrajudicial Settlement of Controversies*, 83 *U. Pa. L. Rev.* 147 (1934).

¹195 Pa. Super. 501, 171 A.2d 844 (1961).

provided for a tenancy from month to month thereafter, with either party having the power to terminate the lease by giving thirty days notice. After the tenant had occupied the premises for several years, the landlord gave notice on January 17, 1958, that the lease was to be terminated as of February 28, 1958. The tenant remained on the property after the expiration date. Subsequently, on November 29, 1958, pursuant to the provision in the lease, the landlord sought to confess judgment against the lessee so as to recover possession and the rent which had accrued during the holding over.

The lower court entered an order striking the confessed judgment. It took the position that the lease terminated on February 28, 1958, and that the landlord's claim thereafter was not for rent, but for damages for the holding over. It reasoned further that, under a strict construction, the power to confess judgment for rent did not extend to the recovery of speculative damages.²

The landlord appealed, and in a four to one decision the Superior Court, implying that a tenancy from month to month had arisen during the holding over, reversed the lower court's decision and held that the landlord could recover rent and could maintain ejectment. The landlord was permitted to recover the rent on the theory that he could elect to treat the holding over as a renewal of the lease for one month, and that he could collect the rent for that month and each succeeding month until judgment in ejectment was entered. The court did not mention the theory used in allowing the landlord to recover possession, since it considered that no problem was involved there.

The dissent took the view that the landlord could maintain ejectment on the basis of the right which accrued on March 1, but this right terminated the tenancy as of that date, so that thereafter the landlord could only recover damages for the trespassory holding over. The dissent further suggested that the landlord could have given new notice and maintained ejectment as of the later date and recovered rent for the interim period. Assuming, as the majority seems to have done, that a tenancy from period to period arose during the interim, the reasoning of the dissent is quite persuasive.

Doubtless, the landlord could have confessed judgment in ejectment and recovered the property immediately upon accrual of the right, pursuant to the notice, on March 1, 1958.³ The effect of notice to quit, if properly executed by the landlord, is to terminate the con-

²*Polis v. Russell*, 161 Pa. Super. 456, 55 A.2d 558 (1947).

³*Rice v. Atkinson*, 215 Mich. 371, 183 N.W. 762 (1921); See Annot., 19 A.L.R. 1405 (1922).

tract of lease and the relationship of landlord and tenant thereunder.⁴ While the former lease is terminated by the notice, the great weight of authority holds that the landlord still has an election either to evict the one holding over or to hold him as a tenant.⁵ It would be appropriate then to examine the circumstances which give rise to a tenancy under this doctrine, and to determine the manner in which that tenancy may thereafter be terminated.

During the interval between the expiration of the periodic tenancy caused by giving notice to quit, and the time that the landlord makes his election, it is generally held that the tenant becomes a tenant at sufferance or a hold over tenant.⁶ Such a tenancy is based upon the landlord's failure to eject the wrongful holder immediately after the expiration of the tenancy.⁷ This is an estate of indefinite duration from which a periodic tenancy may evolve.⁸

A periodic tenancy⁹ will arise from a tenancy at sufferance if the landlord has delayed in making his election, and has either expressly or impliedly consented to the tenant's remaining on the premises¹⁰ which is a question of fact to be decided by the jury.¹¹ Without the lessor's assent to the tenancy, the courts have held that no estate from

⁴*Stromberg v. Western Tel. Constr. Co.*, 86 Ill. App. 270 (1899).

⁵*Providence County Sav. Bank v. Hall*, 16 R.I. 154, 13 Atl. 122 (1888). For additional discussion and cases see 1 *American Law of Property* § 3.33 (Casner ed. 1952).

⁶At common law, a tenant at sufferance is "one who entered by a lawful demise or title, and after that has ceased, wrongfully continues in possession without the assent of the person next entitled." *Willis v. Harrell*, 45 S.E. 794, 118 Ga. 906 (1903). Thus, a tenant for life, for years, or a periodic tenant who holds over without the consent of his landlord after the estate is brought to an end is a tenant at sufferance. *Arnold Realty Co. v. William K. Toole Co.*, 46 R.I. 204, 125 Atl. 363 (1924).

⁷1 *Tiffany, Real Property* § 175 (3d ed. 1939). For additional discussion and cases see 51 *C.J.S. Landlord and Tenant* § 177 (1947).

A number of states have enacted statutes providing that where a tenant holds over or remains in possession after the expiration of his lease, he shall be deemed a tenant at sufferance. Annot., 152 A.L.R. 1395, 1398 (1944).

⁸*Crawford v. Jones*, 27 Ga. App. 448, 108 S.E. 807 (1921).

⁹"An estate from period to period is an estate which will continue for successive periods of a year or successive periods of a fraction of a year, unless it is terminated." *Restatement, Property* § 20 (1936).

Generally there are three methods by which a periodic tenancy is created: (1) express agreement that a periodic tenancy shall arise; (2) entry for an indefinite term with the reservation of a periodic rent; (3) holding over, with the consent of the landlord, by a lessee in possession after the expiration of a definite term. 1 *American Law of Property* §§ 3.23, 3.26 (Casner ed. 1952).

¹⁰*Auto Parts, Inc. v. Jack Smith Beverages, Inc.*, 309 Mich. 735, 16 N.W.2d 141 (1944); 2 *Powell, Real Property* § 254 (1950). 26 *Conn. B.J.* 103 (1952).

¹¹*Wilcox v. Montour Iron & Steel Co.*, 147 Pa. St. 540, 23 Atl. 840 (1892). See 1 *Tiffany, Real Property* § 182 (3d ed. 1939).

period to period may arise, and that the original lease is not revived by the mere holding over.¹²

The most obvious methods by which the landlord expressly consents to a tenancy are: to agree to treat the one holding over as a tenant;¹³ to withdraw a notice terminating the lease upon the tenant's request;¹⁴ to demand or bring suit against the tenant for rent;¹⁵ or, to accept rent from the wrongful holder after the termination of the lease.¹⁶ Since the landlord in the *Mack* case sought rent in arrears, this act, constituting express consent on the part of the landlord, might have had the effect of waiving the notice to quit and of continuing the original tenancy.

Implied consent by the landlord is a more difficult problem. Some courts have adopted the rule that where the landlord remains silent as to the holding over, this silence may be construed as an implied acquiescence or assent by the landlord to the tenancy.¹⁷ There is another theory closely associated with the idea that silence indicates assent. This is the view that implied consent by the landlord to the tenant's occupancy may be created through the landlord's failure to bring action against the tenant or by his apparent lack of objection to the tenant's holding over.¹⁸ This unreasonable delay in ousting the tenant will warrant an inference that the landlord has elected to hold the tenant for another term.¹⁹ In addition, various states have passed statutes holding that the mere giving of a statutory notice to quit

¹²See note 8 supra.

¹³*Arcade Invest. Co. v. Gieriet*, 99 Minn. 277, 109 N.W. 250 (1906); *Damascus Realty Corp. v. Fluss*, 133 Misc. 702, 233 N.Y. Supp. 291 (Sup. Ct. 1929); *Jawer v. Barner*, 273 Pa. 6, 116 Atl. 520 (1922); 1 *American Law of Property* § 3-33 (Casner ed. 1952). See Annot., 120 A.L.R. 560 (1939).

¹⁴*Supplee v. Timothy*, 124 Pa. 375, 16 Atl. 864 (1889).

¹⁵*Scott v. Beecher*, 91 Mich. 590, 52 N.W. 20 (1892); *Conway v. Starkweather*, 1 Denio 113 (N.Y. 1845); *Arnold Realty Co. v. William K. Toole Co.*, 46 R.I. 204, 125 Atl. 363 (1924).

¹⁶Although there are cases to the contrary, the weight of authority holds that the accepting by the landlord of rent accruing subsequent to the expiration of the notice to quit constitutes an admission of the tenancy and a waiver of the notice to quit. *Collins v. Cauty*, 60 Mass. (6 Cush.) 415 (1850); *Faraci v. Fassulo*, 212 Mich. 216, 180 N.W. 497 (1920); *Hobday v. Kane*, 114 Va. 398, 76 S.E. 902 (1913). See 1 *Tiffany, Real Property* § 183 (3d ed. 1939). For further discussion and cases see Annot., 156 A.L.R. 1310 (1945); 120 A.L.R. 560 (1939); 64 A.L.R. 309 (1929).

¹⁷In this situation the landlord's consent will be considered a tacit renewal of the lease, and if the original lease was for a periodic tenancy, the new lease will be on the same periodic basis. *Schilling v. Klein*, 41 Ill. App. 209 (1891); *Irvine v. Scott*, 85 Ky. 260, 3 S.W. 163 (1887); *Conway v. Starkweather*, 1 Denio 113 (N.Y. 1845); *Arnold Realty Co. v. William K. Toole Co.*, 46 R.I. 204, 125 Atl. 363 (1924).

¹⁸*Hobbs & Son v. Grand Trunk Ry.*, 93 Vt. 392, 108 Atl. 199 (1919).

¹⁹*Arnold Realty Co. v. William K. Toole Co.*, 46 R.I. 204, 125 Atl. 363 (1924).

the premises does not terminate the lease, the lease being terminated only if the notice is acted on.²⁰ Thus, in the *Mack* case, it would seem that the original periodic tenancy, if terminated, might have been revived during the landlord's delay of nine months in confessing judgment.

Since either a tenancy at sufferance or the original month to month tenancy might have existed during the period after the expiration of the notice to quit in the *Mack* case, the problem arises as to whether the landlord must give a second notice to quit before confessing judgment in ejectment. At common law a tenancy at sufferance may be terminated by the landlord at any time by maintaining an action in ejectment to recover possession of the premises.²¹ Generally no notice to quit is necessary,²² since a tenant at sufferance is a holder without right.²³ Periodic tenancies, such as those from month to month, which are to continue for successive periods can only be terminated by a notice to quit both at common law and by statute.²⁴ Inasmuch as the court in the *Mack* case intimated, and the circumstances indicated,

²⁰There has been a conflict as to the effect of the landlord's failure to act against a hold over tenant, but some states have passed statutes binding both parties to a tenancy where the tenant remains in possession for a period without action by the landlord. Ky. Rev. Stat. § 383.160 (1953); La. Civ. Code art. 2689 (Dart 1932); N.Y. Real Prop. Law § 228 (1951). These cases construe statutes of this nature: Phillips-Hollman Inc. v. Peerless Stages, 210 Cal. 253, 291 Pac. 178 (1930); Grand Cent. Pub. Mkt. v. Kojima, 11 Cal. App. 2d 712, 54 P.2d 786 (1936); Hoebel v. Raymond, 46 Idaho 55, 266 Pac. 433 (1928).

²¹*McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879 (1887); *Margosian v. Markarian*, 288 Mass. 197, 192 N.E. 612 (1934); *Guthmann v. Vallery*, 51 Neb. 824, 71 N.W. 734 (1897); *Standard Realty Co. v. Gates*, 99 N.J. Eq. 271, 132 Atl. 487 (1926).

²²*Ibid.*

²³In some states the necessity of a notice to quit in order to terminate a tenancy at sufferance is dependent upon the existence of a statute requiring notice. Under these statutes a timely and sufficient notice to quit must be given to a tenant at sufferance if the landlord is to be entitled to remedies against him. D.C. Code § 45-904 (1951); Ky. Rev. Stat. § 383.160 (1953); La. Civ. Code art. 2689 (Dart 1932); Mo. Rev. Stat. § 441.060 (1959); N.Y. Real Prop. § 228 (1951); Wis. Stat. § 234.03 (1957). Cases construing statutes of this type include: *Hall, v. Henninger*, 146 Iowa 230, 121 N.W. 6 (1909); *Auto Parts, Inc. v. Jack Smith Beverages, Inc.*, 309 Mich. 735, 16 N.W.2d 141 (1944); *Arnold Realty Co. v. William K. Toole, Co.*, 46 R.I. 204, 125 Atl. 363 (1924); *Hitshev v. Rosson*, 41 Wyo. 509, 287 Pac. 316 (1930). Some of these statutes have been modified so as to require a notice to be given only where the holding over has continued for a length of time after the expiration of the notice that an implication of assent by the landlord to the tenancy has been created. N.Y. Real Prop. § 228 (1951); Ky. Rev. Stat. § 383.160 (1953) (a tenant at sufferance has no right to a notice during the ninety days following the expiration of the term).

²⁴*Dillon v. Miller*, 207 Ark. 401, 180 S.W.2d 832 (1944); *Demerath v. Schennum*, 324 Ill. App. 584, 59 N.E.2d 384 (1945); *Gaidry's Trustees v. Cooke*, 301 Ky. 216, 191 S.W.2d 390 (1945); *Auto Parts, Inc. v. Jack Smith Beverages, Inc.*, 309 Mich. 735, 16 N.W.2d 141 (1944).

that the original month to month tenancy had revived by the holding over, it would seem that a second notice was necessary in order for the landlord to confess judgment in ejectment.

The existence of the periodic tenancy would not preclude the landlord's right to recover rent in arrears; on the contrary, its existence appears to be necessary to establish the rental value with sufficient certainty in order to confess judgment.²⁵ Thus, the estate necessary to sustain the power to confess judgment is the very thing which prevents the action of ejectment.

There is no argument against the landlord's right to recover in the *Mack* case if the proper theory is followed. Until the landlord elects to treat the holding over as a tenancy, he could confess judgment in ejectment without giving a second notice to quit, and in a separate action could recover damages²⁶ for the tenant's retention of the property. However, once the periodic estate evolved, the landlord was required to give a second notice to quit before confessing judgment in ejectment; whereas, no notice was necessary if he confessed judgment for rent in arrears. As pointed out in the dissent, the landlord treated the person holding over as a tenant from month to month to recover rent in arrears, and in the same suit treated her as a trespasser for his action in ejectment. This procedure violates the principle that once the landlord has decided to bind the one holding over as either a tenant or a trespasser, he cannot rescind such election.²⁷

RICHARD KELLY WHITE, JR.

²⁵The landlord may sue for rent only when he has elected to treat the holding over as a tenancy. See Annot., 32 A.L.R.2d 582 (1953).

²⁶The damages assessed for the failure of a tenant to surrender possession are to compensate or indemnify the landlord for having been deprived of the use of the premises. The damages recoverable in such cases are normally measured by the reasonable rental value of the property during the time that the person occupying retained possession. *Flournoy v. Everett*, 51 Cal. App. 406, 196 Pac. 916 (1921); *Martin v. Clegg*, 163 N.C. 528, 79 S.E. 1105 (1913). It will be noted that the stipulated rent does not control in so far as measuring rental value. There are other factors such as profits which might have been expected, the location of the property, or the season of the year which may have a bearing on rental value. *Buhman v. Nickels & Brown Bros.*, 7 Cal. App. 592, 95 Pac. 177 (1908); *Detroit v. Gleason*, 116 Mich. 564, 74 N.W. 880 (1898).

²⁷*Goldsborough v. Gable*, 140 Ill. 269, 29 N.E. 722 (1892); *Walgreen Co. v. Walton*, 16 Tenn. App. 213, 64 S.W.2d 44 (1932).