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CONTRACTS-AGREEMENTS FOR LEASING DEPARTMENTS IN RETAIL STORES

CONTRACTS—AGREEMENTS FOR LEASING DEPARTMENTS IN RETAIL STORES—An important merchandising device, largely developed within the last fifteen years, is the "leasing" of certain departments by proprietors of retail stores to outsiders who agree to operate them as integral units of the owner's business. It has been estimated that more than sixty per cent of department stores and more than forty-eight per cent of specialty stores had leased departments in 1930, with the average number of such departments per store in each class at 4.6 and 2.5 respectively.[1]

I.

Any one or more of several reasons may be responsible for a particular retailer "farming out" a portion of his business. He may be unable to secure the necessary capital for establishing a desired department; he may be unable to obtain an adequately trained subordinate to manage the proposed line; his business may not warrant, or he may be unwilling to assume, the risk of venturing into a new line whose success is not assured; he may be too far from the fashion market which dominates the contemplated line, for example millinery, to be able himself to anticipate the changing demands of the consumer; or the particular department may not in itself be sufficiently important to justify the store owner's devoting to it the time necessary for successful operation, and yet it is a service which customers will expect and which can attract them to other sections of the store.

There has accordingly developed a typical arrangement whereby the retail proprietor "leases" or "licenses"[2] one or more particular departments of his business to an independent individual or firm, most often a syndicate operating a chain of related departments in a number of stores. The "lessee" assumes quite full control over the merchandising activities of the department, through its personal representative in the store, but deals with the public under the firm name of the "lessor"; and the "lessor" retains supervisory control over the department in certain important respects necessary to assure integrated operation.

Of course this typical arrangement is not without its peculiar economic advantages to the usual department lessee, particularly to the syndicate type of organization. It offers an established clientele immediately available upon opening the department; a department store

[1] TEELE, DEPARTMENT LEASING IN DEPARTMENT STORES, c. 2 (Harv. Bus. School Study No. 4; 20 Baker Foundation, No. 7, 1933).

[2] The terms most frequently used in describing the parties are those suggesting the landlord and tenant relationship, though the courts have by no means always found that to be the actual legal situation. When the words "lessor" and "lessee" are used in this comment they will not indicate any legal significance unless the context clearly indicates otherwise.

has ordinarily greater drawing power than a store carrying the restricted lines in which the lessee specializes. The arrangement is flexible: errors such as selection of location within the store can be rectified in a relatively short time. In addition, the attention of the personnel of the leasing organization can be concentrated on a few of the retailing functions, with resultant economies not unlike those obtained by the chain store method.

Enumeration of these advantages has undoubtedly already suggested natural conflicts in the interests of the two parties which may at times become quite acute. Since the usual lease is relatively short—five years or less—and since the lessee is unable to develop any good will for itself, and a profitable department may be lost on relatively short notice at the store owner's pleasure, the department operator is anxious to make immediately as much profit as possible; thus the tendency is to have relatively little regard for the long-time interests of the store and its reputation, of primary concern to the lessor. This clash may be heightened by the customary payment, in whole or in part, of the lessee's department manager on a commission basis. Further, the policies and supervision of the store, to which the lessee must conform, may make impossible a profit to the department. The store sacrifices a certain amount of centralized control which may be detrimental to its organization and the morale of the personnel.[3]

Such practical business considerations as these must be kept uppermost in mind by the legal counsel who is preparing for his client—be he store owner or department lessee—a leasing agreement which will effectively protect his client's interests in the several situations which may arise.

2.

Before discussing the legal problems involved, it may be well to examine somewhat in detail the provisions which may be expected to be found in the typical leasing agreement. The space to be occupied by the department is carefully set forth, perhaps accompanied by a diagrammed floor-plan; power in the lessor to change the location under certain conditions may be reserved, with allowance for partial abatement in rent, expense of moving, or even option of lessee to move out if dissatisfied. The term of the lease may not be expected to exceed five years, though renewal provisions may make extensions possible. The space is let for the express purpose of retailing a carefully

[3] Valuable non-legal treatments of department leasing agreements as merchandising devices, from the viewpoint of efficient operation of the store or leasing syndicate, may be found in BUSH, DEPARTMENT LEASING IN RETAIL STORES (Dept. of Commerce, Bureau of Foreign and Domestic Commerce, 1926), and in TEELE, DEPARTMENT LEASING IN DEPARTMENT STORES (Harv. Bus. School Study No. 4; 20 Baker Foundation, No. 7, 1933).

enumerated line of goods only, with covenant of lessee to sell no others and covenant of lessor not to compete. Strict provisions against assignment by the lessee are almost certainly to be found, except perhaps assignment to a corporation formed by the lessee. The rental reserved is usually a percentage of the gross sales[4] of the department, generally payable monthly like regular rent and probably with a guaranty of an annual minimum.[5] All receipts from sales are generally required to pass through a cashier furnished by the store.

A substantial degree of supervisory control over the operation of the leased department is retained by the lessor. Department employees are required to comply with general store regulations for all employees; more important, the lessor reserves the right to approve and discharge any department employees in his own discretion. Final word in disputes between the department merchant and customers is generally exercised by the lessor, expenses to be usually borne by the department. And right of approval of all credit sales may be vested in the lessor.

The store usually agrees to furnish certain general services, such as heat, light, water, telephone, janitor, elevators, stationery, wrapping and delivery of merchandise sold (though delivery may be paid for by the lessee, or limited to a local area, or both). The store may agree to receive merchandise addressed to the lessee, with limitations on its liability for injury thereto, but lessee to do its own unpacking. General use of the store's advertising department may be expected to be made available to the lessee. Existing fixtures in the department may be taken over by the lessee, or he may furnish his own. The lessor usually agrees to render weekly or monthly statements of moneys and credits received on behalf of the lessee and paid out or charged to its account.

The lessee is given general control over the management of the department subject to the exceptions seen above and subject to a general covenant to conduct the business in conformity with the policy of the store. The department will conduct the retail end of its business always in the name of the lessor, but will make contracts for merchandise, help, and the like in its own name. It usually agrees to expend a small percentage of its gross annual sales in advertising, to be approved by the lessor. A flexible minimum in the size of the sales force, to be paid by lessee, may be stipulated. The lessee agrees to insure the property in the department, pay all taxes and liens thereon, keep premises in repair, comply with governmental regulations of

[4] More rarely the rental may be based on *net* sales.

[5] One court has held that payments to meet the guaranty, if the percentage of the monthly sales is proportionately insufficient, need not be made until the end of the annual period. Wm. Cohan Shoe Corp. v. Hickson, Inc., 286 Mass. 513 190 N. E. 735 (1934).

sanitation, etc. There may also be a stipulation as to the quality of merchandise to be carried and the general level of prices at which it is to be sold.

Other terms may provide for rights of the parties upon partial or total destruction of the premises; access of the lessee to the building outside of store hours; access of the store management to the leased space; covenant of the lessee to indemnify lessor for the latter's liability to third persons resulting from acts of the lessee and its agents; maintenance of employers' liability insurance; apportionment of expense of store's charge accounts; operation of a premium trading-stamp plan; non-liability of the store for injury to persons and property of the department resulting from causes other than the negligence of the lessor; right of the store to conduct bargain sales in goods of the department's line, with latter's rights of participation.[6]

It must be evident that the number and variety of provisions in the leasing agreement are limited only by the wants and needs of the parties and by counsel's foresight and imagination of contingencies which may require protection of clients' interests. Providing against every possible contingency by express stipulation in the leasing agreement is certainly by far the cheapest and most effective method of safeguarding clients' interests. In view of the large number of leasing agreements in use, and the relatively small number of reported decisions of cases which have involved their disputed interpretation and enforcement, it may be concluded that the legal profession has performed its function in these regards reasonably well and embodied the agreed terms in careful draftsmanship. Nevertheless, certain legal questions may arise despite provision against them; and every problem cannot be anticipated. It is to a consideration of some of these situations that the remainder of this comment will be devoted.

3.

From a legal standpoint, the first problem raised by the so-called leasing agreement is its classification. Where settlement of the particular dispute before the court may be helped or determined by classifying the agreement as either a lease or license, several of the courts have made efforts to place it in one of these categories. It must be

[6] Some sample agreements may be found in R. H. White Co. v. J. H. Remick & Co., 198 Mass. 41, 84 N. E. 113 (1908); Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (1902); Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1038 (1913); Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., (Tex. Civ. App. 1922) 241 S. W. 267, modified (Tex. Com. App. 1923) 252 S. W. 1048; Knaur v. Jones, (Tex. Com. App. 1928) 5 S. W. (2d) 491; and in BUSH, DEPARTMENT LEASING IN RETAIL STORES (Dept. of Commerce, Bureau of Foreign and Domestic Commerce, 1926).

evident that much of the language used in the typical agreement is indicative of the landlord and tenant relationship. It is common to designate the parties as "lessor" and "lessee"; "rent" is often the term applied to the compensation of the store; rights of "entry" and "re-entry," "abatement" of the rent upon destruction of the "premises," and other lease terms may be found. On the other hand, an occasional agreement may use exclusively the terms "licensor" and "licensee." By ordinary rules of construction this language is entitled to some weight as indicating the intent of the parties, which helps determine actually what legal type of agreement has been made.[7] The use of one set of terms or another is by no means controlling, however. More important is the presence or absence of the legal ingredients of lease or license. Emphasis has accordingly been placed on whether or not exclusive possession of the premises to be occupied has been given the department operator. Recognizing that rights of entry by the lessor and others may be expressly and impliedly reserved and the tenant's "exclusive" possession still deemed to exist,[8] some of the courts have found this to be the situation for all practical purposes in the leasing agreement.[9] Others have laid hold of the store owner's right to control entry to the building outside business hours by retention of the keys, and his general right of entry to the department for supervisory purposes, as precluding the possibility of an exclusive right of possession in the usual sense, and have thus refused to find a lease.[10] For courts which have been impressed by ability to find in the agreement some important attribute of a lease, such as exclusive possession, it has been easy, by accepted principles of landlord and tenant law,[11] to go further and identify as a reservation of rent the usual payment of the store proprietor by a percentage of the gross sales with minimum guaranty.[12] Also, the exact description of the area to be occupied by the department, generally found in the agreement, has been emphasized as satisfying the criterion of definiteness of space for a lease,[13] despite the lessor's reserved right to change this location.[14] If the court has

[7] 1 TIFFANY, LANDLORD AND TENANT 171-172 (1912); 35 C. J. 1146 ff. (1924).

[8] 1 TIFFANY, LANDLORD AND TENANT, § 3 (1912); Morrill v. Mackman, 24 Mich. 279 (1872); Jordan v. Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 (1902).

[9] In re Owl Drug Co., (D. C. Nev. 1935) 12 F. Supp. 439; Meers v. Munsch-Protzman Co., 217 App. Div. 541, 217 N. Y. S. 256 (1926).

[10] Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1038 (1913).

[11] See 1 TIFFANY, LANDLORD AND TENANT, §§ 7, 173 (1912).

[12] In re Owl Drug Co., (D. C. Nev. 1935) 12 F. Supp. 439; Meers v. Munsch-Protzman Co., 217 App. Div. 541, 217 N. Y. S. 256 (1926).

[13] Meers v. Munsch-Protzman Co., 217 App. Div. 541, 217 N. Y. S. 256 (1926).

[14] In re Owl Drug Co., (D. C. Nev. 1935), 12 F. Supp. 439.

been desirous of classifying the agreement, inability to spell out a lease may result in a finding of license.

There have likewise been attempts to pigeonhole the leasing agreements as a partnership or joint adventure.[15] It is possible to distinguish the cases which have done so on some one or more facts in the particular agreement not found in the typical arrangement, viz.: the absence of an absolute minimum guaranty of the percentage of sales due the store for use of the space, from which it may theoretically be possible to construe a sharing by the store in the department's losses if the actual amount received under the percentage is less than the reasonable value for use of the space plus services rendered;[16] or an express provision for sharing of profits and losses as such, plus agreement of the parties to operate the business jointly, which are clear indicia of the partnership relation.[17] The courts which have held no partnership exists under the typical agreement have laid emphasis on the fact that the minimum guaranty of a specific amount of "rental" due the store precludes any sharing of the losses by the store, and at least any sharing of the profits as such.[18]

In the only reported decisions in which the point was raised, the courts had little difficulty in disposing of the contention that the relationship of employer and employee existed.[19]

[15] The contention that the department leasing agreement between two corporations is invalid because it constitutes a partnership [6 FLETCHER, CYCLOPEDIA CORPORATIONS, § 2520 (1931)] or because it involves a merger of the corporate identity of one or both of the parties [6 FLETCHER, CYCLOPEDIA CORPORATIONS, § 2514 (1931)] and hence is ultra vires, was rejected in the only case in which it was raised. Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., (Tex. Civ. App. 1922) 241 S. W. 267, modified (Tex. Com. App. 1923) 252 S. W. 1048. The court found that the agreement did not provide for a partnership nor did it take the substantial management of the corporate lessee away from the control of its own officers and agents. Modern corporate authority appears to support this general position as it would be applied to the typical department leasing agreement. See 6 FLETCHER, CYCLOPEDIA CORPORATIONS, §§ 2514, 2520 (1931); Guerinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714 (1902); White Star Line v. Star Line of Steamers, 141 Mich. 604, 105 N. W. 135 (1905); McTigue v. Arctic Ice Cream Supply Co., 20 Cal. App. 708, 130 P. 165 (1912).

[16] Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1038 (1913); Knaur v. Jones, (Tex. Com. App. 1928) 5 S. W. (2d) 491. However, a showing that the profits and losses were to be shared in some other capacity than that of principals in the business, e.g., as compensation to one for services rendered or as rent, may extinguish the weight of this factor.

[17] Leber v. Dietz, 22 Misc. 524, 49 N. Y. S. 1002 (1898).

[18] In re Owl Drug Co., (D. C. Nev. 1935) 12 F. Supp. 439; Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., (Tex. Civ. App. 1922) 241 S. W. 267, modified (Tex. Com. App. 1923) 252 S. W. 1048.

[19] Knaur v. Jones, (Tex. Com. App. 1928) 5 S. W. (2d) 491; Lord v. Spielman, 29 App. Div. 292, 51 N. Y. S. 534 (1898).

It is apparent that many of the provisions of these agreements are foreign to the normal lease; likewise, it is not easy to fit them within the usual concepts of partnership. Some of the decisions have evidently recognized this difficulty, the unique character of this modern type of arrangement, when they have referred to it as a "quasi-partnership" or have said, "It is true that the agreement is in a certain sense a lease, but it is more than that";[20] or, having held a lease or partnership to exist, have nevertheless gone on to decide the case on the peculiar nature of the relationship, contrary to some legal rule normally following from the classification made.[21] It is submitted that this suggests the much more rational approach—to treat these leasing agreements as sui generis. This will allow reasonable interpretation and enforcement of the agreements, and will enable them to serve adequately the modern business needs they are aimed to meet. By this method of attack, ability to classify the agreement under any one of the several possible legal categories should at best be important only from the standpoint of comparative analogy.[22] The lack of uniform treatment in the few existing decisions which have faced these problems should allow a fresh approach to the leasing agreements and preclude any feeling of restraint by reason of stare decisis.

4.

Ordinarily, neither party to a leasing agreement will want it to be assignable by the other without his consent. This is to be expected from the close cooperative nature of the agreement, dependent largely upon mutual personal confidence for its success. Accordingly, the written agreement will almost certainly cover the rights in this regard; and even if the point has not been adequately covered, the courts will apply recognized principles relating to the assignability of personal service contracts[23] and will hold the leasing agreement quite completely[24]

[20] Milwaukee Boston Store v. Katz, 153 Wis. 492 at 520, 140 N. W. 1038 (1913).

[21] Gerould Co. v. Arnold Constable & Co., (C. C. A. 1st, 1933) 65 F. (2d) 444; Marcelle, Inc. v. Sol & S. Marcus Co., 274 Mass. 469, 175 N. E. 83, 74 A. L. R. 1013 at 1018 (1931).

[22] Compare the following statement of the court in Milwaukee Boston Store v. Katz, 153 Wis. 492 at 526, 140 N. W. 1038 (1913): "A large number of cases are cited by the defendants showing that the receipt of rent by a landlord after a breach constitutes a waiver thereof. For reasons already stated these cases have only a partial or qualified application, since the relations between the parties are not solely that of landlord and tenant."

[23] 2 WILLISTON, CONTRACTS, § 411 (1920); 5 C. J. 879-882 (1916).

[24] Marcelle, Inc. v. Sol & S. Marcus Co., 274 Mass. 469, 175 N. E. 83 (1931), where the court recognized that a lease covenant against assignment does not preclude subletting [see annotation 74 A. L. R. 1018 (1931)], but nevertheless overrode such

non-assignable,[25] contrary to the result which would obtain if the agreement were treated as an ordinary lease containing no covenant against assignment.[26]

In general, then, any effort of either party to transfer a substantial portion of its rights under the agreement constitutes a breach which may go to the entire contract.[27] This includes, in addition to the common transfer by either party to a third person,[28] a transfer of assets to a trustee for the benefit of creditors.[29] Under the usual rule as to leases, the covenant against assignment does not preclude transfers from the lessee by operation of law.[30] Though there has been no decision on a similar point involving a leasing agreement, it may be questioned whether this rule would or should be applied because of the personal character of the arrangement. The general rule that the covenant against assignment in the ordinary lease does not preclude subletting[31] has been held to be overridden by the non-assignability of the department leasing agreement due to the peculiar nature of the relationship.[32]

The non-consenting lessor has been allowed to enjoin the assignee from occupation under a void assignment.[33] The damages recoverable for breach by unlawful assignment may be expected to be governed by the ordinary rules applicable to breach of contract.[34]

Closely related, though not strictly a breach by unlawful assignment, are the damages recoverable for anticipatory breach due to bankruptcy. The accepted federal court rule is that claims of a landlord for damages by reason of anticipatory breach of a lease caused by the

a type of covenant in the department leasing agreement and held it non-assignable in any degree because of its nature.

[25] Gerould Co. v. Arnold Constable & Co., (C. C. A. 1st, 1933) 65 F. (2d) 444; Marcelle, Inc. v. Sol. & S. Marcus Co., 274 Mass. 469, 175 N. E. 83, 74 A. L. R. 1013 (1931); Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (1902).

[26] 1 TIFFANY, LANDLORD AND TENANT, § 152 (a) (1912).

[27] An unlawful assignment may however be waived. Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (1902).

[28] Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (1902).

[29] Ibid.

[30] 1 TIFFANY, LANDLORD AND TENANT, § 152 (f) (1912).

[31] See annotation, 74 A. L. R. 1018 (1931).

[32] See note 24, supra.

[33] Gerould Co. v. Arnold Constable & Co., (C. C. A. 1st, 1933) 65 F. (2d) 444. Compare with authority which gives an ordinary landlord an injuction against the tenant's breaking his covenant not to assign. 1 TIFFANY, LANDLORD AND TENANT, § 152 (k) (1912).

[34] R. H. White Co. v. J. H. Remick & Co., 198 Mass. 41, 84 N. E. 113 (1908), but compare with the suggestion of the court in Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801 (1894), that a different rule for leases should apply, discussed below in the text in connection with notes 55, 56, 57, and 58.

tenant's bankruptcy are not provable.[35] This rule has been recently applied to a department leasing agreement after the court had classified it as a lease.[36] However, the serious consequences of the rule may be avoided by lessor's counsel by the insertion in the agreement of a liquidated damages clause of the proper type.[37]

5.

It is clear that when the leasing agreement has been terminated by reason of breach or otherwise, the store owner is entitled to recover possession of the department space, and specific relief is available to him to obtain it.[38] And by analogous landlord and tenant law, a lessee may be enjoined from breaking his covenant not to sublet, and a lessor may have an injunction against occupation under a void sublease or assignment.[39] There would seem to be little quarrel with this result, which is a mere enforcement of the landowner's general rights as such.

However, when the parties are reversed, and it is the department operator who is seeking possession on the basis of his rights under the leasing agreement, the problem may be quite different. It may involve a virtual specific performance of the agreement by enforcement of its most essential provision. The New York court has awarded the operator of a soda fountain in a drug store an injunction against threatened ouster, he having been in possession under an agreement and having partly performed the same.[40] On the other hand, this court has refused to give a department operator, under a typical agreement, specific performance thereof against the department store on the familiar equitable ground of the difficulty of supervision by the court.[41] It may be possible to explain the soda fountain case in that on its facts the case did not involve many of the usual cross covenants of the parties which may be expected to make supervision by the court quite difficult. But the court's notion that there existed all the necessary ingredients of a lease may also explain the result: under ordinary landlord and tenant

[35] Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320, 54 S. Ct. 385 (1934); Quinn v. Jaloff, (C. C. A. 9th, 1934) 71 F. (2d) 707; In re Owl Drug Co., (D. C. Nev. 1935) 12 F. Supp. 439. [Bankruptcy Act, 30 Stat. L. 562, § 63a (1), 11 U. S. C. § 103 (a) (1).]

[36] In re Owl Drug Co., (D. C. Nev. 1935) 12 F. Supp. 439.

[37] Of the type, for example, found in William Filene's Sons Co. v. Weed, 245 U. S. 597, 38 S. Ct. 211 (1918), though *not* that type found in Manhattan Properties, Inc. v. Irving Trust Co., 291 U. S. 320, 54 S. Ct. 385 (1934).

[38] Gerould Co. v. Arnold Constable & Co., (C. C. A. 1st, 1933) 65 F. (2d) 444; Milwaukee Boston Store v. Katz, 153 Wis. 492, 140 N. W. 1038 (1913).

[39] 1 TIFFANY, LANDLORD AND TENANT, § 152 (k) (1912).

[40] Meers v. Munsch-Protzman Co., 217 App. Div. 541, 217 N. Y. S. 256 (1926).

[41] Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408 (1898).

law the tenant may bring ejectment against the lessor, even though he has not made an entry,[42] and he may have equitable relief in the nature of specific performance when the legal remedy is deemed inadequate.[43] The general rule is otherwise in the case of an ordinary license. If we are to reason by analogy, however, it is submitted that this particular problem is more nearly analogous to the specific enforcement of a partnership agreement and hence this kind of relief ought not be given.[44] The extreme difficulty of supervising a relationship which, as has been seen, is most personal and therefore dependent for its success upon mutual confidence and cooperation is a solid ground of objection to compelling the store to give to the lessee possession of the leased space or to permit him to remain in control thereof.[45]

A different type of question arises when the department lessee breaches the agreement by abandoning possession before the term is completed. The damages recoverable by the store may be altered by a duty of the store to mitigate by reletting or finding alternative uses for the abandoned area. In the only case found involving the point under a leasing agreement, the store was allowed to leave the department space vacant for the rest of the period and recover the full rent due, though it had to allow for the value of use of window space taken over.[46] This position finds some support in the analogous landlord and tenant law.[47] Many courts have upheld express covenants by the ordinary tenant to continue to be liable for rent despite termination of the lease, and, if the lessor is authorized to relet, it has been held he must make reasonable efforts to do so and can only hold the tenant for the deficiency.[48] The situation must suggest that the only smart thing for the parties to do is to cover all contingencies fully and explicitly in the agreement. But, even in the absence of this foresight, it is submitted that the courts ought to apply the ordinary contract rules of mitigation of damages[49] and require the store to make reasonable efforts to find a new occupant or a new use for the premises.

[42] 1 TIFFANY, LANDLORD AND TENANT 8-9 (1912); 36 C. J. 54 (1924).

[43] Mattingly's Exr. v. Brents, 155 Ky. 570, 159 S. W. 1157 (1913); 36 C. J. 54-55, 82 (1924).

[44] See 58 C. J. 1055-1056 (1932); MECHEM, PARTNERSHIP, § 119 (1920).

[45] But see discussion, infra (text in connection with footnotes 65 and 66), of a case providing reasonable indirect pressure inducing specific performance.

[46] Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801 (1894).

[47] See 1 TIFFANY, LANDLORD AND TENANT, § 182 (h) (1912). The law on this point is somewhat complicated by the danger of forfeiture or surrender of the lease in some jurisdictions, with corresponding cessation of liability for rent, whenever the landlord relets.

[48] 1 TIFFANY, LANDLORD AND TENANT, §§ 182 (h), 182 (j) (1912).

[49] MCCORMICK, DAMAGES, § 33 et seq. (1935); 3 WILLISTON, CONTRACTS, § 1353 (1920).

As to the general measure of recovery by the store upon abandonment, it would likewise seem that the usual formula for breach of an ordinary contract ought to apply: an attempt to place the lessor as nearly as possible in the condition in which he would have been if the breach had not occurred.[50] Making due allowances for the qualifying principles of mitigation, the rule of *Hadley v. Baxendale*, and other rules of damages, the store owner then ought not necessarily to be limited to recovery of the minimum guaranty of "rent." He should also receive as compensation the reasonably expected sums in excess of that amount, as evidenced by the condition and trend of the department's business during the preceding periods; and he should be paid for any other injuries proximately caused by the abandonment which can meet the ordinary damages tests.[51]

No precise rule can be formulated by which to determine whether any partial ouster by the store of the department's possession is sufficient to constitute a breach of the entire agreement so as to give the lessee the right to terminate or, in terms of the landlord and tenant law, whether an eviction has taken place. One department leasing case has declared that the covering up of three-fourths of the department's show window space by the store's show cases constituted an act of eviction.[52] On the other hand, use of the show windows of the department after the latter's abandonment has been held not to be an eviction.[53] Though the comparison with examples of eviction in strict leases may be somewhat useful, it would seem that here again the better approach would be along general contract lines. Has the lessor so far interfered with the lessee's carrying out of his agreement, or has the lessor's conduct so far constituted a failure to carry out his agreement, as to constitute substantial frustration of the undertaking or an intent not to carry out the agreement? Either would normally give the department lessee the right to sue for damages for breach of the entire contract or to rescind.[54]

There has been some confusion of language as to the measure of recovery in this situation. One court has suggested that there may

[50] McCORMICK, DAMAGES, § 137 (1935).

[51] Compare Wheat v. Watson, 57 Ala. 581 (1877), where, the rent being payable in a portion of the crops raised, the landlord was allowed his expense of cultivation occasioned by tenant's abandonment in addition to recovery of his portion of the crop as rent.

[52] Herpolsheimer v. Funke, 1 Neb. (Unof. Rep.) 471, 95 N. W. 688 (1901).

[53] Ogus, Rabinovich & Ogus Co. v. Foley Bros. Dry Goods Co., (Tex Civ. App. 1922) 241 S. W. 267, modified (Tex. Com. App. 1923) 252 S. W. 1048. On the nature of eviction, see 2 TIFFANY, LANDLORD AND TENANT, § 184 et seq. (1912).

[54] Damages for entire breach, 2 WILLISTON, CONTRACTS § 866 (1920), 3 ibid, § 1290; recission, 3 ibid, § 1467.

be a difference depending on whether the agreement be considered an ordinary contract or a lease. If it be considered a contract, the damages for breach are the "value of the agreement to the plaintiff at the time of its breach," whereas if it is a lease the damages would be the difference in the rent reserved and the value of the use of the premises.[55] It is not clear that there is any real difference between these statements of theories, nor has any other authority been found by the writer which suggests any difference in recovery in the two situations. Moreover, the distinction must appear illusory when it is recognized that a substantial number of jurisdictions allow recovery of anticipated profits by the lessee under an ordinary lease if reasonably contemplated by the parties.[56] This in essence was the recovery allowed to the lessee by two courts in department leasing cases.[57] It appears to be the reasonable rule to apply to a department leasing agreement; for profits are ordinarily anticipated by the department operator, and unless it is shown that under the particular circumstances he would probably not have made any, he ought to recover them.[58]

Another question which has arisen is whether the destruction of the store premises, through the fault of neither party, terminates the agreement. In the only case where the problem has arisen, the court had no difficulty in rejecting the contention of the lessee of a right to operate the department at the store's new location on an alleged theory that the agreement was one to operate a department in the defendant's store wherever located.[59] Due to the fact that the terms of each leasing agreement must be largely dependent on the size, type, and location of the particular store, this result appears inevitable. The same result would be obtained under landlord and tenant law where the lease is for a portion of, or a room in, a building which is destroyed;[60] and it would also follow from the familiar contract principle applied upon destruction of an existing subject matter, the continued existence of which the parties relied upon in contracting.[61]

[55] Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801 (1894).

[56] 2 TIFFANY, LANDLORD AND TENANT, § 185 (i) (1912).

[57] Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (1902); Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801 (1894).

[58] Compare with the general measure of recovery for substantial breach of contract, where in computing the present worth of performance not due this may be estimated in the light of the past record of values of such service, or commodity, down to the time of trial. MCCORMICK, DAMAGES, § 144 (1935).

[59] Martin Emerick Outfitting Co. v. Siegel, Cooper & Co., 237 Ill. 610, 86 N. E. 1104 (1908).

[60] 1 TIFFANY, LANDLORD AND TENANT, §§ 24 (c), 182m (2) (1912); 35 C. J. 1059-1060 (1924).

[61] 3 WILLISTON, CONTRACTS, § 1948 (1920); 13 C. J. 643 (1917).

It might be expected that failure to include window space in a description of the area to be occupied by the department would raise a fair presumption that the right to its use was not intended under the agreement. Nevertheless one court has, on not very clearly reported facts, found an implied inclusion of certain window space immediately adjacent to the described floor area as incident and necessary to the enjoyment of the premises.[62] The result may be quite possible, given the requisite facts, under accepted principles for the construction of leases.[63] However, the problem ought not to arise; it should be fully and explicitly provided for in the leasing agreement.

6.

Problems of specific performance other than those in regard to assignment and the right to possession, discussed above, have arisen under department leasing agreements. The New York court has refused to enjoin defendants, who had agreed to operate a fur department exclusively in plaintiff's dressmaking establishment, from conducting their business elsewhere after they had breached the agreement by moving their business out of plaintiff's store and setting it up elsewhere; the court found that the defendants' services were not unique and hence could be substituted.[64] It would seem that the same result ought to be reached in case of abandonment by the department operator under a typical lease. To grant the injunction might compel performance, which, as has been seen, the court will not directly attempt; and if performance does not ensue the result may be to deprive the department lessee of a right to continue in business, a serious consequence which hardly appears to be warranted by the difficulty of measuring money damages to the store. It is submitted the problem is not the same as enforcing a vendor's covenant not to compete upon sale of a business.

On the other hand, the New York court has by injunction enforced a store's negative covenant not to sell any other make than plaintiff department's patterns, after the store had refused to carry out the agreement for alloting space.[65] Here, however, the effect of the decree would not be subject to the criticism that it necessarily tended to force a carrying out of the personal relationship involved in operation of a department by an outsider in another's store, for the store was not forbidden from continuing the department under its

[62] Herpolsheimer v. Funke, 1 Neb. (Unof. Rep.) 471, 95 N. W. 687 (1901).

[63] 1 TIFFANY, LANDLORD AND TENANT, § 26c (2) (1912); 36 C.J. 26 ff. (1924).

[64] Merl, Inc. v. Richfield-Jenks, 125 Misc. 318, 209 N. Y. S. 530 (1925).

[65] Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408 (1898).

own or another's management.[66] Likewise, the Nebraska court has, while the lessee was still in operation of its department, enjoined the lessor store from breaching its covenant not to interfere with the department's exclusive line, which it had been doing by giving away premiums and by authorizing another department operator in the store to sell competing goods.[67] Specific enforcement of negative covenants of this nature may represent the limit to which the courts could go. Up to this point they do not encounter the objections to general attempts at specific performance of these leasing agreements; the grant of relief is analogous to the justifiable practice of enjoining breach of various negative covenants of partnership agreements.[68]

In conclusion, it is submitted that the leasing agreement should not be construed to establish any of the standard well-recognized legal relations such as the landlord-tenant relation, the licensor-licensee relation, or the partnership relation. To classify it under any of these heads is to hold that certain rules of law are applicable which defeat the function of such agreements. Rather, it seems that the relation should be regarded as sui generis. So far as general principles are applicable at all, they should be the ordinary principles of the law of contract.

W. A. O.

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[66] An added inducement to performance was a condition in the decree that if the store chose within five days after entry of the decree to perform the agreement, the injunction should abate.

[67] Herpolsheimer v. Funke, 1 Neb. (Unof. Rep.) 471, 95 N. W. 687 (1901).

[68] MECHEM, PARTNERSHIP, § 226 (1920).