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OPERATIVE FACTS IN SURRENDERS*

A discussion of surrenders is likely to begin with the oft repeated definition of Lord Coke: "SURRENDER' *sursum redditio*, properly is a yeelding up of an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them."¹ In the passages which follow Coke classifies surrenders in two different ways: first, into surrenders "in deed, or by express words", and surrenders "in law"; secondly, into surrenders "by deed" and surrenders "without deed". There is an obvious shift in the meaning of the word "deed" as used in these two classifications. In the former, the words "in deed" are equivalent to the words "in fact"; in the latter, the word "deed" signifies a writing under seal. The definition above quoted was clearly intended to cover all surrenders, of both classifications. Since this definition has been so generally approved,² it may be assumed that it is fairly expressive of the meaning in law of the word "surrender".

The substance of this definition lies in the phrase "a yeelding up of an estate for life or yeares". This is figurative language, since the word "estate"³ does not refer to the physical land, but rather to the legal relations⁴ which inhere in the tenant. These intangible legal relations are not capable of manual tradition. The phrase must be taken to refer,

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1. Co. Litt. *337. b.

2. See, e. g., 2 Taylor, Landlord & Tenant (9th ed. 1904) 101; Tiffany, Landlord & Tenant (1912) 1307; 1 Washburn, Real Property (6th ed. 1902) 451.

3. It is doubtful if any useful distinction in meaning can be made between the words "estate" and "interest". "An *estate* in lands signifies such *interest* as the tenant has therein" 2 Bl. Comm. *103. The writer of this article has discussed possible distinctions between these two words in "*Legal*" and "*Equitable*" *Interests in Land under the English Legislation of 1925* (1926) 40 Harv. L. Rev. 248, 255 *et seq.* A legal interest in land may be defined as "the aggregate of the legal relations" of the person having such interest. Corbin, *Legal Analysis and Terminology* (1919) 29 Yale L. J. 163, 173.

A legal relation has been defined as follows: "A statement that a legal relation exists between A and B is a *prediction* as to what society, acting through its courts or executive agents, will do or not do for one and against the other." Corbin, *supra*, at 164. And see Holmes, *The Path of the Law* (1897) 10 Harv. L. Rev. 457, 458: "But as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court,—and so of a legal right."

4. *Supra* note 3.

therefore, to the legal consequences of certain acts on the part of the tenant or the person in reversion or remainder, or of both; these legal consequences may be shortly described as the extinguishment of the estate of the tenant and the corresponding enlargement of the estate of the reversioner or remainderman.⁵ It is possible, then, to view the definition as an attempt to describe certain operative facts in terms of their legal consequences. An operative fact is one the occurrence of which will give rise to new legal relations between persons.⁶ The definition might be paraphrased by saying that a surrender is any aggregate of facts manifesting the intention of both parties to extinguish the set of legal relations known as the "estate" of the surrenderor and to create an identical set in the surrenderee, and having in law that effect. The same idea is expressed by saying that it is any aggregate of facts which will effect a "transfer" of the particular estate to the reversioner or remainderman,⁷ but it must be remembered that this again is figurative language.⁸ Coke's definition does not specify in detail what particular facts will suffice to effect the legal consequences indicated, altho it does suggest that they must be such as manifest mutual intention to that end. It is not to be assumed lightly that there is one constant group of facts described by the term "surrender". A study of the cases dealing with the relationship of landlord and tenant will make it clear that there are many different groups of facts which have the legal consequence of

5. It is not possible in this paper to discuss in detail the legal consequences of surrender. See Tiffany, *op. cit. supra* note 2, 1348 *et seq.* Since a surrender not only terminates the leasehold estate, but also extinguishes, as a rule, duties of subsequent performance growing out of the contractual stipulations of the lease instrument, a tenant is not liable for rent falling due after surrender. But he continues liable for rent falling due after surrender. But he continues liable for rent accrued prior thereto: *Lott v. Chaffee*, 126 Atl. 559 (1924, R. I.) *Willis v. Kronendonk*, 58 Utah 592, 200 Pac. 1025 (1921). He is liable for rent due in advance on the first of the month in which surrender occurs. *Stern v. Murphy*, 102 N. Y. Supp. 797 (1907, Sup. Ct.). A surrender does not affect the interest of a sublessee. He becomes the tenant of the lessor-in-chief, who is liable to him upon the covenants of the sublease. *Rhineland Real Estate Co. v. Cammeyer*, 117 Misc. 67, 190 N. Y. Supp. 516 (1921, Sup. Ct.). The immunity of the sublessee from a destruction of his interest thru a surrender by the principal lessee is clearly recognized in *Morrison v. Sohn*, 90 Mo. App. 76 (1901), where the sublessee was held privileged to remove trade fixtures after a surrender of the principal term.

6. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 Yale L. J. 16, 25; Corbin, *supra* note 3, at 164.

7. "A surrender, then, is a particular mode or form of transfer which derives its distinguishing characteristics from the fact that it is made by the tenant of a particular estate to the reversioner or remainderman." Tiffany, *op. cit. supra* note 2, 1307.

8. Hohfeld, *supra* note 6, at 24.

extinguishing the leasehold estate. To some of these groups the term "surrender" is applied, while to others different names are given. Nor ought it to be assumed *a priori* that all of the groups described by the name "surrender" have common elements; not even the common element of mutual intention can be assumed. If that was a common element in Coke's day, it does not follow that it still is. Here, as elsewhere in the study of law, the only method of achieving scientifically accurate results is to examine the phenomena of the decisions, and to ascertain from these to what groups of facts the courts have applied the term "surrender", and why it has not been given either a narrower or a more extensive application.

Whether the term "surrender" be viewed in the light above suggested, as an attempt to describe operative facts in terms of legal consequences, or as a description of the legal consequences in exclusion of the facts, is not a matter of vital importance. Operative facts are necessary concomitants of legal consequences; both will be suggested to the mind when a word descriptive of either is used. Occasionally "surrender" may denote the operative facts to the entire exclusion of their legal consequences, or *vice versa*. Perhaps more frequently both ideas are involved at the same time, and their separation is practically impossible; one can perceive only a difference in emphasis.⁹ Careful scrutiny of the contest will usually enable one to determine in what sense the word is used. Our legal terminology is not the result of deliberate scientific thought, nor is it rich in the number of its descriptive terms; quite commonly the same word must serve to describe both the operative facts and the legal consequences.

Allusion has previously been made to Coke's classification into surrenders "by deed" and those "without deed". A deed, meaning a writing under seal, was required only in the case of a future interest or an "incorporeal" interest.¹⁰ In the discussion which follows, we shall not concern ourselves with this kind of transfer, except incidentally;

9. "Every right is a consequence attached by the law to one or more facts which the law defines, and whenever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denotes such a group of facts connotes the rights attached to it by way of legal consequences, and any word which denotes the rights attached to a group of facts connotes the group of facts in like manner." Holmes, *The Common Law* (1881) 214.

10. Co. Litt. 172. a; Tiffany, *op. cit. supra* note 2, 1312-13.

our principal investigation will be with reference to the surrenders of estates in possession.

There is little in Coke's definition to indicate the distinction between his surrenders "in deed, or by express words", and his surrenders "in law".¹¹ Probably the distinction would not have been of more than academic interest but for the passage of the Statute of Frauds.¹² The third section of that momentous piece of legislation required that no estates should be surrendered "unless it be by deed or note in writing . . . or by act and operation of law". It will be noted that this section does not mention surrenders "by express words"; altho it clearly creates two classes of surrenders, it gives no clue to the distinction between them, unless the phrase "by act and operation of law" had a definite significance in the minds of legal scholars of that day. It may be that the phrase had the same meaning for them as Coke's term "surrender in law". It is impossible to be certain as to the exact meaning of either phrase in 1676; nor does that appear to the writer to be of great importance. Certainly the phrase in the Statute has grown in significance since that date,¹³ as the courts have gone about their labor of moulding law to meet new social and economic needs. English decisions rendered prior to the passage of a statute of frauds in an American state are not of binding effect in that state in the absence of an express legislative or judicial adoption.¹⁴ The rules of law of prime importance to us are those which are being applied in our courts today, and it is to the modern cases that we shall look, therefore, to determine what groups of operative facts are sufficient in law to cause the change in legal relations suggested in the term "surrender" and to what groups that term has been applied.

11. One might infer from the terms used that the former class comprises surrenders in which the intention of the parties to effect the legal consequences of surrender is made to appear by words; and that the latter class comprises surrenders in which the intention is not so expressed. It is not a necessary inference, however, that intent plays no part in surrenders of the latter class; nor, on the other hand, that intent expressed in acts as distinguished from words is the sole differentiating characteristic of this latter class.

12. 29 Car. II, c. 3.

13. "I think there can be no doubt that the expression 'surrender by act and operation of law' means much more than it did when the Act of 29 Car. II, c. 3 was passed; and that this extension is due to the desire on the part of the courts to do justice in particular cases without doing violence to the wording of the act." Riddell, J., in *Mickleborough v. Strathy*, 23 Ont. L. R. 33 (1911, Div. Ct.). See also the remarks of Coltman, J., in *Dodd v. Acklom*, 6 Man. & Gr. 672 (1843, C. P.); and of Gilbert, C. B., in *Magennis v. McCollough*, quoted *infra* note 52. Hereafter in this discussion the phrases "surrender by act and operation of law" and "surrender in law" will be used interchangeably.

14. Reinsch, *English Common Law in the Early American Colonies*, 1 Select Essay in Anglo-American Legal History (1909) 367 *et seq.*

Express Words Indicative of Intent

Will mere words indicative of the intention of both¹⁵ the lessor and the lessee to extinguish the estate of the latter, and to enlarge correspondingly the estate of the former, be effective to produce these legal consequences? The validity of a surrender is not usually called into question until after the lessee has vacated the premises, but occasionally it may be necessary to determine whether this transfer of possession from the lessee to the lessor is a fact which must concur with the words indicating intention in order that the intended consequences may be effected. It is hard to understand why a change of possession should be thought necessary. A surrender is a species of conveyance, the effect of which is to transfer the ownership of an estate. Most forms of conveyance operate today without any change of possession, and have so operated since the feoffment was displaced by the forms growing out of the Statute of Uses. A demise of land for a term creates at least an *interesse termini* without entry of the lessee, and for many purposes this is an interest in the land.¹⁶ An assignment of a term to a stranger does not require delivery of possession to make it effective.¹⁷ It is doubtful if there are any decisions holding squarely that a change of possession is essential to a surrender, altho there are more or less positive statements to this effect in some of the cases.¹⁸ Probably these are the result of some confusion be-

15. In *Thompson v. Leach*, 2 Vent. 198 (1691, C. P., K. B., & H. L.), it was held that a surrender did not require an acceptance on the part of the surrenderee. But that was a case of surrender by deed. It does not follow that acceptance is unnecessary where the words of the surrenderor are not in writing. Because of the necessity for imposing some limitations upon a discussion, the writer feels unable to consider this problem in this paper. So far as he knows, it has never been held that the mere spoken words of the lessee can vest his estate in the lessor without the latter's assent, even though it be admitted that the latter would have a power to divest himself in that event. A survey of the cases on surrender "by act and operation of law" leaves one in little doubt that some act on the part of the lessor is necessary to the transfer of the leasehold estate to him.

16. *Kokomo Rubber Co. v. Anderson*, 161 Ga. 842, 132 S. E. 76 (1925); *Tiffany*, *op. cit. supra* note 2, 290 *et seq.*

17. *Tiffany*, *op. cit. supra* note 2, 957, 974-75.

18. *Kower v. Gluck*, 33 Cal. 401 (1867) has been cited as an authority for the proposition that a surrender by words is not effective where the tenant retains possession. (*Tiffany*, *op. cit. supra* note 2, 1318). In that case P made a lease to D for a year, and D put F into possession as "undertenant". Subsequently D executed an instrument purporting to surrender all his interest to P, but F refused to vacate. P brought an action of forcible detainer against F and D. The former defaulted, and judgment was given against the latter for possession with damages for detention. The court said: "The technical relation of landlord and tenant was created by the lease executed between the plaintiffs and Gluck and Hansen and the entry of the latter upon the term granted. That relation was not dissolved by the execution of the

tween a surrender as the transfer of an estate and the "surrender of the premises" which the lessee frequently covenants to make at the expiration of the term. There are several authorities holding that there may be a surrender altho the lessee remains in possession.¹⁹ In this connection there must be noted the cases in which the words of surrender are spoken before the lessee has ever entered into possession. In such situation he obviously cannot give up possession. It may be contended that he does not have an "estate", and that there cannot, therefore, be a "technical surrender".²⁰ This argument involves the double assumption that the lessee before entry does not have an "estate", and that only an "estate" can be surrendered. It may be said in answer to this contention, that for many purposes it appears that the lessee does have an "estate" before entry:²¹ also, that whether or not it be termed an "estate" the *interesse termini* is certainly an aggregate of legal relations which the parties chiefly concerned may desire to extinguish, and which can be terminated by mere words indicating such intention. It is only a mat-

papers intended as an assignment and release and cancellation of the lease. The execution of such papers was a step toward working the termination of the relation of landlord and tenant; but a surrender in fact of the demised premises was essential to a completion of a dissolution of that relation The term of the leasehold expired by contract of the parties on the sixteenth of April, when the lessees were in law bound to surrender possession to the lessors. Their possession after that date was a holding over contrary to their agreement, and therefore they were liable to be proceeded against under the act concerning forcible entries and detainers." Looking at what the court did rather than at what it said, it seems clear that the case is an authority *contra* on the point for which it has been cited. Judgment was given for the plaintiff on the ground that the lessee had extinguished his right to possession by execution of the written instrument. If his right to possession had been extinguished, the surrender had already become effective. The statement of the court that the relation of landlord and tenant still existed was by way of attempt to justify the use of the action for forcible detainer, which decisions had held would lie only where the "conventional" relationship of landlord and tenant existed. There was no more occasion for this statement than there would have been in the case of a tenant holding over after the natural expiration of a fixed term. It was sufficient for the purposes of the case that the defendant had gone into possession *as a tenant*. See also dicta in *Forgotson v. Becker*, 81 N. Y. Supp. 319 (1903, Sup. Ct.); *Duncan v. Moloney*, 115 Ill. App. 522 (1904). No doubt the fact of a change in possession is strongly evidential of the required intent. See *Brewer v. National Union Building Association*, 166 Ill. 221, 46 N. E. 752 (1897). But this is quite different from regarding it as an indispensable operative fact.

19. *Langendorf v. Ritter*, 225 Ill. App. 466 (1922); *Ross v. Schneider*, 30 Ind. 423 (1868) *Schwin v. Perkins*, 77 N. J. L. 402, 72 Atl. 454 (1909, Sup. Ct.); *Harris v. Hiscock*, 91 N. Y. 340 (1883); *Hall v. Brown*, 102 Or. 389, 202 Pac. 719 (1921).

20. See *Thompson v. Western Casket Co.*, 219 Ill. App. 184 (1920).

21. Whether or not we call the interest of the lessee before entry an "estate" is merely a question of the choice of words. See notes 3 & 16 *supra*.

ter of choosing terms whether or not we describe the operative facts in such a case as a "surrender".²²

That spoken words were as effective as written words before the Statute of Frauds cannot be doubted.²³ Such a result was the one normally to be expected in a time when even a conveyance in fee simple could be made without a writing. It has already been remarked that the English Statute of Frauds in its third section requires surrenders to be in writing, except those by "act and operation of law". Section one provides that all estates "*made and created*" without writing shall have the effect of estates at will only; section two excepts leases for not to exceed three years from the operation of this first section, but has no application to the third section dealing with surrenders. It would seem from the language of the statute, therefore, that while a term for three years may be created by parol, it can be extinguished only by a writing. And to this effect are the English decisions.²⁴ The provisions of the statutes of frauds in the various states differ in their phraseology. In several there is specific mention of surrenders, as in the English original.²⁵ In some instances there is express allowance or oral surrender in the case of leases for less than a specified duration. Where surrenders are expressly required to be in writing, with no exception in favor of the surrender of short-term leases, but parol creation of short leases is expressly provided for, there is a division in the American authority. Some courts hold that no term can be surrendered by parol, even tho a term of the

22. In the following cases the interests of the lessees were terminated by oral agreement before entry, and apparently the cases were not regarded as materially different from ordinary "surrenders": *Beidler v. Fish*, 14 Ill. App. 29 (1883); *Haff v. Forty-Eighth Street Co.*, 199 N. Y. Supp. 788 (1923, Sup. Ct.); *Flannigan v. Dickerson*, 103 Okla. 206, 229 Pac. 552 (1924); *Ford v. Miller*, 149 Ark. 443, 232 S. W. 604 (1921). *Cf. Stein v. Hyman-Lewis Co.*, 95 Miss. 293, 48 So. 225 (1909); *McInerney v. Brown*, 125 N. Y. Supp. 639, 141 App. Div. 36 (1910).

23. *Challis*, Real Property (3d ed. 1911) 397; *Tiffany*, *loc. cit. supra* note 10.

24. *Mollett v. Brayne*, 2 Campb. 103 (1809, N. P.); *Thomson v. Wilson*, 2 Stark. 379 (1818, N. P.) *A fortiori* where the term was for more than three years originally, though the unexpired portion is of less duration. *Lord Ward v. Lumley*, 5 Hurl. & N. 87 (1860, Exch.).

25. The third section of the English Statute has been re-enacted in Missouri, almost *verbatim*. The full text as it appears in sec. 2168 of the Missouri Revised Statutes of 1919 is as follows: "No leases, estates, interests, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents lawfully authorized by writing, or by operation of law."

same length could be created in that manner;²⁶ others hold that any term capable of parol creation is also capable of parol extinguishment.²⁷ This latter view seems more reasonable. Both the demise of a term and its surrender involve the extinguishment of one set of legal relations in him who demises or surrenders, and the concurrent creation of another corresponding set in him to whom the demise or surrender is made. If there is no objection to this process of extinguishment and creation of legal relations by parol in the case of a demise, neither should there be in the case of a surrender. In some states there is one general provision of the statute which is designed to cover the first three sections of the English act, but in which the word surrender does not appear. So it may be provided that "conveyances of lands or of any interest therein, shall be, . . . in writing . . . except *bona fide* leases for a term not exceeding three years."²⁸ There ought not to be any doubt that under such a statute the surrender of a term of more than the prescribed length must be in writing, as it is undoubtedly a "conveyance" of "an interest in land". Nor should there be any doubt that a term of three years or less may be surrendered by spoken words.²⁹ In one or two states the statutes have been

26. *Logan v. Barr*, 4 Harr. 546 (1847, Del. Super. Ct.). And see *Friedberg v. Parsons*, 128 Atl. 788 (1925, N. J. Sup. Ct.).

27. *Whelen v. Laird*, 56 Pa. Super. Ct. 489 (1914). And see *McKinney v. Reader*, 7 Watts 123 (1838, Pa.). In *Johnson v. Reading*, 36 Mo. App. 306 (1889), there was a parol assignment which the court held invalid under sec. 2168 of the Missouri Statutes, quoted *supra* note 25. Referring to this section, the court said: "We are of opinion that the contract sued upon was one within the statute of frauds, both as one touching the assignment or sale of a lease for a term exceeding one year, and as . . ." Is there an intimation here that a term of one year or less may be surrendered by oral agreement? It seems somewhat doubtful whether a fixed term of one year can be *created* in Missouri by parol. According to the literal language of sec. 2167 of the Statutes it cannot be. But *Hosli v. Yokel*, 57 Mo. App. 622 (1894) declares the contrary, although the statement may be regarded as not essential to support the decision. A tenancy from year to year may be *created* by parol. *Kerr v. Clark*, 19 Mo. 132 (1853). But an oral demise of stores, houses, etc., in cities creates only a month-to-month tenancy under sec. 6880, of the Statutes. Except in a case within the operation of sec. 6880, therefore, it would seem that it should be possible to make an oral surrender in this state of any term not exceeding one year.

28. *Burns*, Ann. Ind. Stats. (1914) sec. 3947. For a similar statutory provision see *Carroll*, Ky. Stats. (1915) sec. 490.

29. *Ross v. Schneider*, *supra* note 19; *Hall v. Brown*, *supra* note 19. In the form of statute quoted in the text, it seems clear that the exception of "leases" for three years covers surrenders as well as demises of such terms. The word as used here seems descriptive of the estate of the lessee, and does not refer to the instrument whereby it is created, nor to the operative facts of creation.

construed to permit the surrender by spoken words of a term of any length.³⁰

If the local statute is construed to permit the parol surrender of a short lease, the question will arise whether it is the length of the term as created which controls the operation of the statute, or the duration of the unexpired portion. It is usually held that the period of time the term has yet to run is the decisive point.³¹ This seems sound. If a term of one year may be surrendered by parol agreement, it is not apparent why a ten-year term with an unexpired residue of one year may not be extinguished in the same way; there can be no greater practical objection in the latter case.

The parol "extension" of a lease for the additional period of one year would seem to be the creation of a new term of one year to begin *in futuro*. The surrender of an *interesse termini* has already been discussed. There ought not to be any objection to an oral surrender in this case on the ground that the term is for more than a year. Yet a recent New York case seems to say by way of dictum that surrender in such a case must be in writing.³²

It has already been stated that before the Statute of Frauds only the surrender of a future interest, or an "incorporeal" interest, was required to be in writing under seal. Apart from these cases a seal should never be a necessary element in a surrender, even tho the leasehold interest has been created by a sealed instrument. The seal is usually not necessary to the creation of a tenancy.³³ Moreover, the method for surrendering a term should not depend upon the formality which was employed in creating it; the law ought not to look beyond the fact of present existence. The usual rule is, therefore, that a surrender need not be under seal merely because the demise was so made.³⁴ Occasionally one finds decisions influenced by the rule that an instrument under seal can-

30. In Illinois and Kentucky. See *Harms v. McCormick*, 30 Ill. App. 129 (1888); *Alschuler v. Schiff*, 164 Ill. 298, 45 N. E. 424 (1896); *McKenzie v. City of Lexington*, 4 Dana 128 (1836, Ky.). Note the language of the present Kentucky statute, *supra* note 28.

31. *Smith v. Devlin*, 23 N. Y. 363 (1861); *Gorlin v. Hrvatsky Publishing Co.* 214 N. Y. Supp. 45 (1926, Sup. Ct.); *Garrick Theatre Co. v. Gimbel Bros.*, 158 Wis. 649, 149 N. W. 385 (1914).

32. *Volkening v. Raymond*, 154 N. Y. Supp. 145, 91 Misc. 53 (1915, Sup. Ct.)

33. See Mo. Rev. Stats. (1919) sec. 2159; *Tiffany, op. cit. supra* note 2, 1316.

34. *Alschuler v. Schiff, supra* note 30; *Peters v. Barnes*, 16 Ind. 219 (1861); *Smith v. Devlin, supra* note 31. And see *Prior v. Kiso*, 81 Mo. 241 (1883). There are numerous cases holding a surrender "by act and operation of law" to have extinguished a term created under seal. *E. g., Prior v. Kiso, supra.*

not be modified or discharged except by an instrument of like dignity.³⁵ But this rule is usually thought to apply only to executory contracts. A lease creates an estate in land, and does not necessarily create any executory rights and duties at all.³⁶ And it may be added that, regardless of the historical origin of such a rule, there can be no reason for its continued existence after the seal has lost so much of its former importance.

Must the words of surrender purport to terminate the leasehold interest immediately, or may they become operative *in futuro*, upon the arrival of a definite future day, or the happening of some uncertain future event? A lease may be created to begin *in futuro*.³⁷ It is hard to understand why a surrender may not likewise become operative *in futuro*. In *Mundy v. Warner*,³⁸ the lessee executed a written surrender to take effect April 1, but refused to yield possession at that date. In an action to recover possession of the land, the lessor was successful, the court recognizing the validity of the surrender *in futuro*. And there are other cases to the same effect.³⁹

35. See *Lewis v. Fish*, 40 Ill. App. 372 (1890); *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869 (1896).

36. See *Tiffany, op. cit. supra* note 2, sec. 16, for an excellent discussion of the distinction between the "demise" of an estate and the contractual obligations which may be created concurrently therewith.

37. *McCroy v. Toney*, 66 Miss. 235, 5 So. 392 (1889); *Baumgarten v. Cohn*, 141 Wis. 315, 124 N. W. 288 (1910). But in Missouri such a lease falls within the not-to-be-performed-within-a-year clause of the Statute of Frauds. *Briar v. Robertson*, 19 Mo. App. 66 (1885). *Contra: McCroy v. Toney, supra; Baumgarten v. Cohn, supra.*

38. 61 N. J. L. 395, 39 Atl. 697 (1898, Sup. Ct.).

39. *Allen v. Jaquish*, 21 Wend. 628 (1839, N. Y. Sup. Ct.); *Whelen v. Laird, supra* note 27; *Garrick Theatre Co. v. Gimbel Bros., supra* note 31 (*semble*). But see *Hurley v. Sehring*, 17 N. Y. Supp. 7 (1891, Sup. Ct.). *Cf. Mayberry v. Johnson*, 15 N. J. L. 116 (1835, Sup. Ct.). There the parties to a ten-year lease under seal made a subsequent agreement that if either should become dissatisfied with the other, the lease should come to an end. The lessor brought ejectment. The action failed, the court declaring that the tenancy could not be made into one at will by parol. The opinion was also expressed that the agreement violated the spirit, at least, of the Statute of Frauds. The decision was correct. Had the agreement been inserted in the instrument of lease itself, its effect would have been that of a special limitation, whereby either party might have terminated the lease. Such a special limitation may not be engrafted on a lease under seal by parol (See *Allen v. Jaquish, supra*). It would seem that the oral agreement was two-fold; its object was to place it within the power of either party to terminate the lease whenever he might become dissatisfied. This object could be accomplished by considering the agreement as creating a surrender *in futuro*, the future event being manifestation of dissatisfaction by either party; the same result could be attained approximately by treating the agreement as making a contract for a future surrender, with a remedy in damages or specific performance for breach. In either case, the Statute of Frauds stood in the way with the requirement of a writing.

A determination of the state of the decisions on surrenders *in futuro* is made exceedingly difficult by reason of the failure of the courts to distinguish clearly three distinct conceptions. A present surrender effects an immediate termination of the leasehold interest; a surrender *in futuro*, if valid, effects such a termination on the happening of the specified future event, and it is not within the power of either of the parties to prevent it, except as the occurrence of the specified future event chances to be within the control of one party or the other;⁴⁰ a contract for a surrender in the future is merely a promise on the part of the lessee to tender a surrender at the date named, and a promise on the part of the lessor to accept a surrender at that time. If either party in the last-mentioned case refuses to perform his promise at the appointed time, no termination of the relationship occurs; the only consequence is a right of action in the other party for breach of contract.⁴¹ It is frequently impossible to determine from the reported facts which of the above sets of legal consequences the parties contemplated; and often it is not possible to ascertain from the court's opinion which set has resulted.⁴² A surrender *in futuro* may be by parol where the statute permits. It is a matter of the greatest difficulty to determine the intention of the parties as between such a parol surrender *in futuro* and a mere contract obligating the parties to a tender and acceptance of a surrender at a future time. It is doubtful if the parties themselves usually have any definite intention as between these alternatives.

The difficulty to be encountered is illustrated in a recent Ohio case⁴³. The lessor had asked the lessee to vacate in order that the premises might be let to another person. The lessee agreed that he would vacate as soon as he could find new quarters, and he was assisted in his search by the lessor. After the lessee had secured a new location and moved his goods, the lessor repudiated the agreement, and brought an action for rent subsequently accruing. It was held that he could recover. It would be possible to base such a decision upon the ground that there was a mere

The court was probably not correct in considering the agreement as an attempt to convert the tenancy into one at will; the incidents of a ten-year term with surrender *in futuro*, or a contract for future surrender, would not be the same as those of a tenancy at will.

40. There is in this respect an exact analogy to the situation which exists in the case of a springing use of a freehold interest. See *Abbot v. Holway*, 72 Me. 298 (1881); *Tiffany, Real Property* (2d ed. 1920) 557, 568.

41. *Fish v. Thompson*, 129 Mich. 313, 88 N. W. 896 (1902). *Cf.* the distinction between a lease and a contract for a lease. See *Tiffany, op. cit. supra* note 2, 371-2, 391.

42. *E. g.*, *Duncan v. Moloney*, *supra* note 18; *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346 (1908); *Cromwell v. Bissinger Candy Co.*, 13 Oh. App. 216 (1920).

43. *Cromwell v. Bissinger Candy Co.*, *supra* note 42.

contract whereby the lessor was bound to accept a surrender when tendered to him, and that while there may have been a breach of contract on his part which would have entitled the lessee to an action for damages, there was no termination of the lease as such. Therefore, the lessee would be liable for the rent. He could not maintain a cross-action for the breach of contract by the lessor in this particular case because the agreement was not in writing, as required by the Ohio statute. Most of the opinion is a discussion of the necessity for a writing; the reader is left in doubt whether the court viewed the case as one of oral surrender, void by the Statute of Frauds, or as one of *contract* for a surrender, also void by the Statute. It would seem most likely that the parties contemplated a termination of the tenancy upon the occurrence of a future event,—the removal of the lessee to his new quarters,—without further act on the part of anyone. This would make a case of surrender *in futuro*. The Statute of Frauds would have invalidated such a surrender just as tho it had been *in praesenti*. But suppose the lease had been a short one capable of parol surrender. Certainly it would have been advantageous to the lessee to have the agreement considered as creating a surrender *in futuro* rather than a mere contract, for in the former case his removal would have ended the term despite the lessor's repudiation, and his liability for rent would have ceased; while in the latter case he would have been forced to pay the rent and counterclaim for damages, a much more burdensome procedure.

It should be possible to terminate any tenancy by a surrender in express words, whether it be a fixed term, a periodic tenancy (from year to year, or from month to month), or at will. The fact that a periodic tenancy or one at will may be terminated by either party by the giving of a written notice according to statutory requirements⁴⁴ should not make an oral surrender impossible. Since a periodic tenancy may be created orally, no reason is perceived why it should not be capable of extinguishment in similar manner.⁴⁵ The statutory notice to quit is a method of termination to be employed where the parties cannot reach an amicable agreement. Nevertheless, it has been held in Missouri that the statutory notice to quit cannot be "waived" by either party, and that an oral agreement is not effective to terminate the tenancy.⁴⁶ But

44. A periodic tenancy may be terminated at the end of any period by a notice in writing given sixty days prior thereto in the case where the period is a year, and thirty days prior thereto in the case where the period is a month. A tenancy at will may be terminated at any time on thirty days' notice. See Mo. Rev. Stats. (1919) secs. 6879, 6880.

45. See note 27 *supra*.

46. *Smith v. Smith Bros.*, 62 Mo. App. 596 (1895); *Longacre v. Longacre*, 132 Mo. App. 192, 196 S. W. 855 (1908).

there are decisions in other states permitting the extinguishment by oral surrender of both periodic tenancies⁴⁷ and tenancies at will.⁴⁸ There are numerous cases in which both classes of tenancies have been extinguished through surrenders "by act and operation of law".⁴⁹

Destruction or Defacement of the Instrument of Lease

It is probably common practice for the parties to destroy or deface the instrument of lease when agreeing upon a surrender. Sometimes testimony as to the fact of such destruction may be the only evidence bearing on the question of surrender; or it may be that there is testimony as to words evidencing the intention of the parties in addition to the testimony of destruction. It seems to be well settled that the fact of destruction or defacement of the written instrument of lease adds nothing to the effect of the words,—it does not take the place of a writing where the Statute of Frauds requires it.⁵⁰ Where no writing is required, the mere fact of destruction or cancellation of the lease may go far toward proof of surrender.⁵¹ The denial that this destruction or cancellation is sufficient in itself to take the case out of the Statute of Frauds may seem reasonable at first thought, but comparison of this situation with others which will be discussed later, where non-verbal acts alone have sufficed to satisfy the Statute, raises a little curiosity as to the reason for the unhesitating opinions rendered in this class of cases. Further comment will be deferred.⁵²

Oral Agreement for Surrender Followed by Acts in Reliance Thereupon

Cases are frequent in which the parties to a lease orally agree upon either an immediate or a future surrender, and the lessee vacates the premises at the appointed time. If the lease is of such length that it

47. *Eimermann v. Nathan*, 116 Wis. 124, 92 N. W. 550 (1902). *Cf.* *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. 379 (1893).

48. *Davis v. Murphy*, 126 Mass. 143 (1879).

49. *Vegely v. Robinson*, 20 Mo. App. 199 (1886); *Talbot v. Whipple*, 14 All. 177 (1867, Mass.); *Dobbin v. McDonald*, 60 Minn. 380, 62 N. W. 437 (1895).

50. *Roe d. Berkeley v. Archbishop of York*, 6 East 86 (1805, K. B.); *Rowan v. Lytle*, 11 Wend. 616 (1834, N. Y. Sup. Ct.).

51. See *Brewer v. National Union Building Association*, *supra* note 18; *Langendorf v. Ritter*, *supra* note 19. Particularly would this be true where the lessee has never taken possession, and consequently cannot manifest his intention by yielding possession. *Beidler v. Fish*, *supra* note 22.

52. In *Magennis v. McCullogh*, Gilb. Eq. Cas. 235 (1714-27, Exch.), Chief Baron Gilbert declared it as his opinion that the purpose of the Statute of Frauds was to do away with the old practice of transferring land "by Signs, Symbols, and Words only", and to require a writing. Before the Statute, the cancelling of a lease "was a Sign of Surrender". He added that the words "*by Act and Operation of Law*" were to be construed as referring to the taking of a new lease, "which being in Writing, is of equal Notoriety with a Surrender in Writing."

cannot be terminated by spoken words under the Statute of Frauds, does the lessee continue subject to the rent and liable upon all the covenants of the lease, despite the fact that he has given up possession in reliance upon the oral agreement? In other words, does the additional fact of vacation by the lessee bring the case within that class of surrenders allowed by the Statute of Frauds under the name of surrenders "by act and operation of law", or is vacation such "part performance" as will, in equity at least, entitle the lessee to some relief? Affirmative and negative answers may be found to both questions. It must be noted at the outset that surrender "by act and operation of law" is not necessarily the same thing as the legal consequences of "part performance". It is entirely possible to attribute the legal consequences of surrender to a group of operative facts consisting of an oral agreement of the parties to terminate the tenancy and the subsequent vacation of the lessee in pursuance of that agreement; and to label such a surrender "by act and operation of law" to distinguish that group of operative facts from those involved in the surrender by express words only. The Statute of Frauds makes express mention of surrenders "by act and operation of law" without defining the precise facts necessary to constitute them; the court may determine what the sufficient facts are. If there are good reasons why an oral agreement and vacation by the lessee should be a sufficient fact-group, the court may so decide, and that is an end of the matter in that jurisdiction. The lessee will then be relieved of all the burdens growing out of the leasehold estate, and deprived of all its advantages. On the other hand, if an attempt is made to solve the difficult problem of the lessee after vacation by applying the doctrine of part performance, the results may not be so favorable to him. It is conceivable that such a doctrine will merely afford him affirmative relief in a court of equity, and subject him in the meantime to all the burdens of tenancy, including tort liability for the condition of the premises as well as liability for the rent.

It is desirable first to consider the applicability of the doctrine of part performance. In its origin this doctrine created in the plaintiff an equitable right to a performance *in specie* by the defendant whenever the plaintiff had done certain acts in reliance upon the defendant's promised performance, notwithstanding the fact that the contract was oral and within the Statute of Frauds.⁵³ In the case of an oral contract to lease land, the lessee is entitled to specific performance as a rule when he had taken possession in pursuance of the oral agreement.⁵⁴ By analogy one

53. Pomeroy, *Specific Performance of Contracts* (3d ed.1926) sec. 30.

54. Pomeroy, *op. cit. supra* note 53, secs. 115, 118; Tiffany, *op. cit. supra* note 2, 386-7.

might suppose that where the lessee has given up possession under an oral contract for a surrender, he would be entitled to relief in equity by way of specific performance of the lessor's promise to accept a surrender. It may be objected that equity cannot well enforce an acceptance by the lessor specifically. No real difficulty is perceived here; equity has power under modern statutes to act *in rem*, and can by its simple decree vest the leasehold interest in the lessor; the doctrine of merger will complete the extinguishment.

If the oral agreement properly construed creates only a contractual obligation for the tender and acceptance of a surrender at a future day, there can be little doubt as to the propriety of applying the doctrine of part performance. But if the parties intend a surrender *in praesenti* or *in futuro*,—an executed transfer,—some doubt may possibly be felt.⁵⁵ Mr. Tiffany in his excellent treatise on *Landlord and Tenant* has contended that the doctrine of part performance is applicable only to contracts creating executory rights and duties, and not to professedly executed transfers of property interests, such as are effected by the demise or surrender of a leasehold estate.⁵⁶ It may well be that the word "performance" naturally suggests executory obligations for future performance; but we ought not to be misled by the name attached to the doctrine, and we may find that it has a much broader application than the name would at first suggest. There is a familiar line of cases in which an owner of land attempts to make an oral gift thereof, and the donee going into possession makes improvements in reliance upon the donation. Equity gives relief by requiring the donor (or his heirs, etc.) to make a legal convey-

55. The difficulty of ascertaining from the words or acts of the parties to a surrender agreement whether they have intended an executed transfer (operative *in futuro*, perhaps) or an executory contract has already been discussed. It appears to the writer that the great majority of the cases ought to be regarded as surrenders *in futuro*,—executed transfers depending upon future events to bring them into full effect. Usually the parties do not contemplate any further act as necessary to the accomplishment of their purpose. The lessee contemplates a future removal from the land, of course, but it is doubtful if he thinks of this act as an offer of a surrender which the lessor may or may not accept, with the consequence of the leasehold being terminated or not, according to the latter's inclination. If asked, the lessee would almost certainly say that he supposed his removal would in itself be sufficient to bring about a termination of the lease, without regard to the state of mind of the lessor at the time of such removal; he would be greatly surprised if he were told that his only recourse in event of the lessor's repudiation of the surrender agreement would be an action for breach of contract. One might expect that the courts would not be keen to differentiate in such cases, and he will find his expectation amply justified in the broad and indefinite language of the decisions.

56. *Op. cit. supra* note 2, 257-8.

ance.⁵⁷ The parties do not think in terms of contract in these cases, and frequently do not know that something more than spoken words is necessary to the accomplishment of their objective. The courts may phrase their opinions in terms of specific performance, yet the fact remains that very often all the parties had in mind, all they attempted to make, was an executed oral transfer.⁵⁸

And there is another instance in which the doctrine of part performance has been applied to an executed oral transfer. It will be recalled that the first section of the English Statute of Frauds⁵⁹ provided that all demises not in writing should have the force and effect of estates at will only, with an exception in section two of leases for not to exceed three years. An oral lease invalid under this statute is an attempt at an executed transfer. It is well known that many American decisions, following the lead of the English courts, have held that a tenant who enters under such an invalid oral lease becomes a tenant from year to year, or month to month, according to the manner of reservation of the rent.⁶⁰ Thus, while the intent of the parties is not carried out exactly, neither are their acts wholly ineffectual to produce the desired legal consequences. A periodic tenancy accomplishes their intent to a degree, and avoids the hardship which would result if the literal language of the Statute were adhered to. One may perceive in this interpretation of the Statute a strong disinclination on the part of the courts wholly to deny to the parties the intended consequences of their acts where they have gone a considerable length in reliance upon such supposed consequences. This treatment of invalid oral demises might be characterized as a "legal" approach toward a doctrine of part performance. But many courts have been dissatisfied to leave the tenant where this interpretation of the Statute placed him, and have applied the doctrine of part performance in its fullest development to this situation.

A striking illustration of the application of this doctrine to an oral lease is found in the case of *Christopher v. National Brewery Co.*,⁶¹ where the tenant in possession under an oral lease for five years gave the proper statutory notice to terminate a month-to-month tenancy, it being conceded that the tenancy could not be one from year to year under the

57. *West v. Bundy*, 78 Mo. 407 (1883). The making of improvements is an essential element in the plaintiff's case. *Anderson v. Scott*, 94 Mo. 637 (1888).

58. It seems clear that there is nothing of contract in such cases. See Pound, *Consideration in Equity* (1919) 13 Ill. L. Rev. 667, 672. And see remarks of Torrance, J., in *Wainwright v. Talcott*, 60 Conn. 43, 22 Atl. 484 (1891).

59. This section has been re-enacted in Missouri. Mo. Rev. Stats. (1919) sec. 2167.

60. *Kerr v. Clark*, *supra* note 27; *Delaney v. Flanagan*, 41 Mo. App. 651 (1890).

61. 72 Mo. App. 121 (1897).

Missouri statute.⁶² The lessor was allowed to collect nine months' rent subsequently accruing,—a result explainable only upon the ground stated by the court, that part performance had made the oral lease valid according to its terms. And there are many other decisions in the same language, altho it is not always clear, to be sure, that the result would have been different had the theory of a periodic tenancy been adopted instead of that of part performance.⁶³ Assignments are required by the Statute of Frauds to be in writing as well as demises and surrenders. There are many cases holding that an oral assignment is fully effective after entry by the assignee.⁶⁴ With respect to both oral demises and oral assignments the rule of part performance is frequently applied in actions for rent, for possession of the land (ejectment, forcible detainer) and for breach of covenant. Where there has been no fusion of law and equity, these actions are strictly "legal" actions; and when a court applies the rules of part performance to such actions in the case of an oral demise or assignment, it takes the equitable doctrine of part performance into the legal system. It should also be noted, that with the transfer comes a material simplification in the procedure required. Originally the doctrine

62. The demise being of a building in a city, a month-to-month tenancy would arise under sec. 6880 of the Statutes, rather than a year-to-year tenancy.

63. *Halligan v. Frey*, 161 Ia. 185, 141 N. W. 944 (1913); *Stautz v. Protzman and Peer*, 84 Ill. App. 434 (1899); *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565 (1884); *Fronkling v. Berry*, 125 Miss. 763, 88 So. 331 (1921); *Grant v. Ramsay*, 8 Oh. St. 158 (1857). In *Bard v. Elston*, *supra*, the court declared that where there was an oral lease with possession taken by the lessee, he became a periodic tenant; but where there was the additional fact of the making of valuable improvements, he became a tenant for the full term agreed upon.

It is doubtful if the decision in the case of *Christopher v. National Brewery Co.*, *supra*, is in entire harmony with some other Missouri cases. The decision was based largely upon the Court's interpretation of two earlier cases: *Bless v. Jenkins*, 129 Mo. 647, 31 S. W. 938 (1895); and *Winters v. Cherry*, 78 Mo 344 (1883). In neither of these earlier cases had the tenant given a notice sufficient to terminate a periodic tenancy, so that they can scarcely be regarded as authorities supporting the result arrived at in *Christopher v. National Brewery Co.* And *cf. Nally v. Reading*, 107 Mo. 350, 17 S. W. 978 (1891), where the court said, "Whatever may be the rule in equity as to the doctrine of part performance, that rule has no place in an action at law, as in the present instance."

64. *C. C. C. & St. L. Ry. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619 (1901); *Wells v. Waddell*, 59 Mont. 436, 196 Pac. 1000 (1921); *Tyler Commercial College v. Stapleton*, 33 Okla. 305, 125 Pac. 443 (1912). *Cf. Rooth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. 967 (1902), where the oral assignee was allowed to enforce a covenant against the lessor on the ground that the latter could not set up the failure of the parties to the assignment to comply with the Statute of Frauds; and *Updike v. City of St. Louis*, 94 Mo. 234, 6 S. W. 689 (1887), where in ejectment the lessor claiming under a surrender from the oral assignee prevailed over a subsequent assignee by writing, on the theory of "estoppel". *Contra: Nally v. Reading*, *supra* note 63.

only enabled one⁶⁵ of the parties to obtain affirmative relief by way of performance *in specie* of the agreement. But when a lessor is permitted to recover against a lessee for rent under such circumstances as existed in *Christopher v. National Brewery Co., supra*, the procedure is abbreviated; there is no order requiring the lessor to execute the lease agreed upon. The same conclusion must be drawn where the lessee is allowed to set up the part performance by way of defense to an action by the lessor to recover possession.⁶⁶ Where law and equity have been fused, the procedure has not been changed materially in this class of cases, altho it may no longer be desirable to distinguish between what is "legal" and what is "equitable".⁶⁷

One is not surprised to find the doctrine of part performance applied in similar manner in the surrender cases. There are several decisions based in whole or in part upon the ground of part performance sufficient to take the case out of the Statute of Frauds.⁶⁸ And here, also, the doctrine is applied in "actions at law".⁶⁹ Many of the cases have involved not only a giving up of possession by the lessee in pursuance of the oral agreement for surrender, but also a resumption of possession by the lessor. They are similar to a class of cases subsequently to be discussed under the title, *Vacation by the Lessee and "Resumption of Possession" by the Lessor*. The yielding up of possession is an act similar in its import to the taking of possession, and might in itself be deemed a sufficient part performance of an oral agreement for surrender as reasonably as the taking of possession in the case of an oral demise. A few cases have applied the doctrine where there was nothing more than vacation by the lessee, and perhaps not always that.⁷⁰

65. The lessor is entitled to relief on the ground of the lessee's part performance. *Tiffany, op. cit. supra* note 2, 393.

66. See *Bard v. Elston, supra* note 63.

67. See *Cook, Equitable Defenses* (1923) 32 *Yale L. J.* 645, 650-1.

68. *Tobener v. Miller*, 68 *Mo. App.* 569 (1897); *Ford v. Miller, supra* note 22; *Commissioners of Lewes v. Breakwater Fisheries Co.*, 13 *Del. Ch.* 234, 117 *Atl.* 823 (1922); *Evans v. McKanna*, 89 *Ia.* 362, 56 *N. W.* 527 (1893); *People's Express v. Quinn*, 235 *Mass.* 156, 126 *N. E.* 423 (1920); *Stotesbury v. Vail*, 13 *N. J. Eq.* 390 (1861, *Ch.*); *McDaniels v. Harrington*, 80 *Or.* 628, 157 *Pac.* 1068 (1916); *Aaron v. Holmes*, 35 *Utah* 49, 99 *Pac.* 450 (1908).

69. *Tobener v. Miller, supra* note 68; *Evans v. McKanna, supra* note 68; *McDaniels v. Harrington, supra* note 68; *Aaron v. Holmes, supra* note 68.

70. In *Evans v. McKanna, supra* note 68, it appears that the court regarded the surrender as effective while the lessee yet remained in possession. In *People's Express v. Quinn, supra* note 68, there had been an oral agreement between the lessor and lessee to a five-year lease that the lessee would give up the demised premises to permit construction of a new building thereupon, and that the lessor would provide the lessee with temporary quarters in another building and with permanent quarters

In so far as the doctrine of part performance is applied in courts of law to oral agreements for surrender, its consequences are practically identical with those of a surrender "in law". Frequently the courts have mixed the two theories (if there really are two different theories) and placed the decision of a single case, first upon the ground of part performance, and then upon the ground of surrender "in law".⁷¹ To decide these cases upon the ground of surrender "in law" is to affirm that the act of vacation by the lessee in pursuance of an oral agreement for surrender completes the fact-group necessary to constitute such surrender "in law". Whether or not the facts of oral agreement and vacation by the lessee should have the effect of terminating the leasehold estate is a question of policy in dealing with the Statute of Frauds. The answer will depend largely upon one's idea of the value of the Statute in the social and economic life of the people. Once it is granted that the fact-group referred to should effect the extinguishment of the tenancy, the question how to describe the result,—whether to call it part performance in law, or surrender "by act and operation of law",—is only one of terminology. The real problem is the constitution of the fact-group.

There can be no doubt that in deciding certain states of fact to make surrenders "by act and operation of law", to which the Statute of Frauds does not apply, the courts have been moved chiefly by the idea that the intention of the parties to effect the consequences of surrender was evident.⁷² Intention may be indicated as clearly by acts

in the new building upon its completion. In reliance upon this agreement, the lessor had procured temporary quarters for the lessee, made contracts for excavation and masonry work, and had actually begun clearing the ground for the new building, when the lessee repudiated the agreement and sought to restrain destruction of the old building. An injunction was refused. The court hesitated to say that there was a surrender, since the lessee retained possession, but declared that he was "estopped" to set up the Statute of Frauds after the lessor had proceeded so far in reliance upon the oral agreement. See also *Commissioners of Lewes v. Breakwater Fisheries Co.*, *supra* note 68.

71. *Evans v. McKanna*, *supra* note 68; *Aaron v. Holmes*, *supra* note 68.

72. *Rogers v. Dockstader*, 90 Kan. 189, 133 Pac. 717, 135 Pac. 1185 (1913); *Ledsinger v. Burke*, 113 Ga. 74, 38 S. E. 313 (1901); *Talbot v. Whipple*, *supra* note 49. In *Sander v. Holstein Commission Co.*, 121 Mo. App. 293, 99 S. W. 12 (1906), Goode, J., said, in speaking of a surrender by operation of law, "The whole matter is one of intention."

An interesting comparison may be made between the surrenders "by act and operation of law" which are excepted in the third section of the Statute of Frauds, and the trusts "arising or resulting by implication or construction of law" which are excluded in the eighth section. It has been pointed out very clearly by Professor Costigan that certain of the trusts to which this exception has been construed to extend are trusts implied-in-fact, are based upon the intention of the parties as manifested by their acts. See *The Classification of Trusts* (1914) 27 Harv. L. Rev. 437, 458, 462.

done as by words spoken. The statute had as its purpose the elimination of oral testimony in a class of cases where there was particularly large opportunity for fraud and perjury.⁷³ The exact limits of the class which the framers of the legislation had in mind we cannot tell, and need not attempt to ascertain. If we are satisfied that under present-day conditions the apprehended danger does not exist with respect to a given class of cases, then we are justified in excepting that class from the operation of the Statute, under the term surrenders "by act and operation of law". Witnesses may easily disagree as to the words spoken by the parties to an oral agreement for surrender; there is far less possibility of disagreement where only non-verbal acts are involved,—acts of more or less notorious character, such as the going out of possession of the lessee, and the re-entry of the lessor. Such acts are more or less suggestive of some agreement, between the lessor and the lessee, tho the precise nature of it is not indicated. With such a foundation of evidence, parol testimony may safely be admitted to supply the necessary superstructure. The testimony as to the non-verbal acts corroborates the testimony as to the words used. It may be thought that a non-verbal act on the part of each party ought to be required to constitute a surrender "in law", or a part performance sufficient to raise the bar of the Statute. Those courts which have sought to solve the problems arising from these partly-performed oral agreements by resort to the doctrine of surrender "by act and operation of law" have often denied the surrender when the only act in reliance upon the oral agreement has been vacation by the lessee.⁷⁴ It would appear that the courts using the language of part performance have been somewhat more liberal. The hardship upon the lessee is as great whether the lessor re-enters or not. This hardship, under the more opprobrious name of "fraud" may have influenced considerably the courts using the part-performance formula.

73. See Costigan, *Has There Been Judicial Legislation in the Interpretation and Application of the "Upon Consideration of Marriage" and Other Contract Clauses of the Statute of Frauds* (1919) 14 Ill. L. Rev. 1.

74. The decisions are in conflict. Holding that there is no surrender: *Burgett v. Loeb*, *supra* note 42; *Friedberg v. Parsons*, *supra* note 26; *Cromwell v. Bissinger Candy Co.*, *supra* note 42; *Thomson v. Wilson*, *supra* note 24. *Contra*: *Millis v. Ellis*, 109 Minn. 81, 122 N. W. 1119 (1909); *Goldsmith v. Schroeder*, 87 N. Y. Supp. 558, 93 App. Div. 206 (1904) (*semble*).

Where the premises demised have been sublet, it has been held in a few cases that an oral agreement for surrender followed by the collection of rents by the lessor-in-chief constituted a surrender "in law": *Zipser v. Dunst*, 153 N. Y. Supp. 394 (1915, Sup. Ct.); *Ellman v. Bralow*, 84 Pa. Super. Ct. 413 (1925); *Truesdale v. Straight*, 198 N. W. 620 (1924, Wis.).

Cf. *Fish v. Thompson*, *supra* note 41.

Vacation by the Lessee After the Lessor's Assent, or After His Demand for Possession

It frequently happens that after a quarrel over the condition of the premises, the lessor tells the lessee that he ought to move if he is not satisfied. If the lessee acts upon this suggestion, will he be liable for rent subsequently accruing? Perhaps it is possible to infer from the discussion of the parties an oral agreement for a surrender. If so, then after vacation by the lessee, the case is like those dealt with in the preceding section. It may be contended, however, that in such a situation there is no agreement in words for a surrender; that the language of the lessor cannot be construed as expressing a willingness to relieve the lessee of the tenancy, and that the lessee himself does not assent to a surrender until he actually vacates. Taking this latter view of the matter, the vacation cannot be regarded as part performance of an oral agreement, the argument for a termination of the tenancy is not so strong as in the case of an express agreement by both parties. It is still possible to treat such a fact-group as constituting a surrender "in law", if it is felt that the tenancy ought to be terminated under these circumstances. The decisions are not in entire accord.⁷⁵

If the lessor should go beyond a mere expression of assent to the lessee's vacation, and make an unjustifiable demand for possession of the premises, what ought to be the consequences? The lessee may refuse to yield, and defend an action at law, or oppose with force an entry by the lessor. But the lessee may be a pacific individual who does not wish to engage in warfare of either sort; accordingly he yields possession. Thereafter he is sued for rent subsequently accruing. Doubtless sympathy will be with the lessee in this situation. As has been judicially declared, he is not bound to resist force or to litigate a suit; he may give up the premises and plead the facts in defense to an action for the rent.⁷⁶ Certainly it would be unfair to compel the tenant to bear the expenses of litigation, or to engage in forcible resistance to the unwarranted entry

75. In *Mollett v. Brayne*, *supra* note 24, it was held there was no surrender. Where the lessee vacates at the suggestion of the lessor, and the latter "resumes possession", there is a surrender. *Boyd v. George*, 2 Neb. Unoff. 420, 89 N. W. 271 (1902). Also, where the lessor conveys the premises after the lessee's vacation. *Robertson Bros. v. Winslow Bros.*, 99 Mo. App. 546, 74 S. W. 442 (1903). This type of case is dealt with *infra* under the title, *Vacation by the Lessee and "Resumption of Possession" by the Lessor*. In *Churchill v. Lammers*, 60 Mo. App. 244 (1895), it was held that a surrender had occurred, but it is not entirely clear whether there had been acts on the part of the lessor amounting to a "resumption of possession". *Cf. Kelly v. Noxon*, 64 Hun 281, 18 N. Y. Supp. 909 (1892, Sup. Ct.).

76. *Tarpy v. Blume*, 101 Ia. 469, 70 N.W. 620 (1897); *Greton v. Smith*, 33 N. Y. 245 (1865).

of the lessor. Conceding that the act of the tenant in yielding possession should effect a termination of the lease, should the fact-group be described as a "surrender"? It has been so described.⁷⁷ Other courts have applied the term "eviction".⁷⁸ In some decisions no clear designation is given.⁷⁹ It is evident that this kind of case is not like the typical eviction. An eviction originally signified the actual ouster of the tenant from possession of all or a part of the land.⁸⁰ There is also the so-called "constructive eviction", in which a landlord does or permits certain acts which have the effect of diminishing in substantial degree the beneficial enjoyment of the premises demised; the lessee may abandon the premises without liability for subsequent rent.⁸¹ An unjustifiable demand for possession diminishes the beneficial enjoyment of the demised premises only in so far as it creates mental distress in the lessee; the premises are just as attractive physically as they ever were, and worth as much in a pecuniary sense. On the other hand, while the kind of case discussed is not exactly like the ordinary surrender situation, it bears a close resemblance to it. The demand of the lessor is certainly an indication of his willingness to have the leasehold interest extinguished; the vacation of the lessee signifies his assent. The statute of frauds alone stands in the way with its requirement of a writing. We have seen that often the vacation of the lessee under an oral agreement for termination of the lease is not regarded as sufficient to effect a surrender "in law". Perhaps the result should be otherwise where the vacation follows an absolute demand, for the reasons suggested above. It must not be forgotten that the consequences of eviction are different from those of surrender. The latter signifies a termination of the leasehold estate, with a consequential extinguishment of the rent. Eviction suspends the rent,⁸² and also gives an action against the lessor for damages.⁸³ The court which feels that the lessee should be privileged to abandon the premises on demand, and should have at the same time a claim against the lessor for damages, will naturally prefer to treat these cases as evictions.

(To be concluded)

77. *Ex'r Patchin v. Dickerman*, 39 Vt. 666 (1859). But see *Prentiss v. Warner*, 10 Mo. 601 (1847).

78. *Starkweather v. Maginnis*, 98 Ill. App. 143, 196 Ill. 274, 63 N. E. 692 (1902); *Jennings v. Bond*, 14 Ind. App. 282 (1895); *Tarpy v. Blume*, *supra* note 76; *Greton v. Smith*, *supra* note 76.

79. *Cornwell v. Sanford*, 222 N. Y. 248, 118 N. E. 620 (1918); *Swerdlow v. Harros*, 210 N. Y. Supp. 265, 213 App. Div. 521 (1925); and see *Conkling v. Tuttle*, 52 Mich. 630, 8 N. W. 391 (1884); *Lawrence v. Rapaport*, 213 Mich. 358, 181 N. W. 1011 (1921).

80. TIFFANY, *op. cit. supra* note 2, 1258.

81. *ibid.*

82. *ibid.* 1290.

83. *ibid.* 1291.