applied, it was bound by the *Cream of Wheat Case*,[16] the New Jersey court applied the ancient maxim *mobilia sequuntur personae*.

If the United States Supreme court should reaffirm this view when the situation is again properly presented to it, it would create an unjustified legal difference between two classes of personal property. It is submitted that jurisdiction to tax both tangibles and intangibles should be subject to the same rules. Neither should be subject to double taxation and, as in the case of tangibles, intangibles should be taxed where they are actually present. By their very nature intangibles are generally incapable of having a physical location since certificates and other *indicia* of ownership are merely evidence of wealth and not the wealth itself. However, in two instances, goodwill[17] and business situs, the intangible is deemed to have become so localized that it can be said to be physically present. In these cases that *locus* alone should be allowed to tax. If the intangible has not been "localized" it should be held to be present at the owner's domicile, and only the domiciliary state should tax.

LANDLORD AND TENANT — DUTY OF LANDLORD TO MITIGATE DAMAGES ON VACATION OF PREMISES BY TENANT BEFORE EXPIRATION DATE.—An interesting point in Landlord and Tenant law is raised by the recent case of *Carey v. Hejke*.[1] In holding that, when

16. 253 U.S. 325, 64 L. Ed. 931 (1920).

17. Adams Express Co. v. Ohio, 165 U.S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683 (1915).

1. 119 N.J.L. 594 (Sup. Ct. 1938). Plaintiff leased an apartment to defendant for a period of two months, by a written lease at a stipulated amount per month. The lease contained a clause that it should be considered as renewed from year to year at the end of the second month, unless either party gave a written notice of one month of intention to terminate on any yearly expiration date. No such written notice was ever given and defendant continued to occupy the apartment and pay the stipulated rent, until four months before the yearly expiration date, when he vacated and turned the keys over to the superintendent. The landlord entered into the apartment and redecorated it for the purpose of renting it and several months before the expiration date permitted another tenant to move in. In suit to recover rent for period when the apartment was unoccupied *held* when a tenant under lease vacates the premises prior to the proper termination thereof, the landlord has the *right* to re-enter and

a tenant vacates the demised premises prior to the expiration date of the lease, the landlord has a *right* to re-enter and relet the premises in mitigation of damages to the vacating tenant, the Court said,[2] *"In fact it was the landlord's duty to relet the premises, and his conduct was in furtherance of this purpose."*

The statement is purely *dictum*, the only adjudication of the case being that a *right* existed, and an examination of the cases raises a doubt whether a *duty* also so exists.

A tenant who abandons the occupancy of the demised premises before the expiration of his lease without the consent of his landlord or other legal justification does not thereby exonerate himself from the payment of rent for the residue of the term.[3] And the rule of the majority of the courts of the country is that a landlord is not, on the abandonment of the demised premises by the tenant in violation of his lease, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant and recover his rent for the remainder of the term.[4] There are cases to the contrary, holding the landlord to a use of reasonable diligence to find a new tenant.[5]

The question was first considered by the New Jersey courts in *Zabriskie v. Sullivan*[6] where, in ruling that a tenant from year to year was required to give six months' notice in order to terminate his obligation under the lease, the Supreme Court said,[7] "The premises having

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relet the premises and thus diminish damages resulting from the default. (Italics ours.)

2. At page 596

3. Banks v. Berliner, 95 N.J.L. 267, 113 Atl. 321 (Sup. Ct. 1920); Payne v. Hall, 82 N.J.L. 362, 82 Atl. 518 (Sup. Ct. 1912); Dolton v. Sickel, 66 N.J.L. 492, 49 Atl. 679 (Sup. Ct. 1901), *aff'd* in 68 N.J.L. 731, 54 Atl. 1124 (E. A. 1902). See also Whitcomb v. Brant, 90 N.J.L. 245, 100 Atl. 175, LRA—1917D—609 (E. & A. 1916).

4. See cases collected in 36 CORPUS JURIS 342 and ATL. DIG., LANDLORD AND TENANT, key No. 195.

5. Campbell v. McLauren, 74 Fla. 501, 77 So. 277; Roberts v. Watson, 196 Iowa 816, 198 N.W. 211

6. 80 N.J.L. 673, 77 Atl. 1075 (Sup. Ct. 1910), *aff'd* in 82 N.J.L. 545.

7. At page 675.

been vacated by the tenant, it became the duty of the landlord to rent them in diminution of the damages of the tenant."

This pronouncement, contrary to the generally accepted view, was vigorously denounced in *Muller v. Beck*[8] when the Court laid down the rule that where a lease contains a covenant that the lessee will not relet or underlet the whole or any part of the premises, nor assign the lease without the written consent of the lessor, and the usual option to the lessor to re-enter and relet the premises if they became vacant or deserted during the term, the landlord is not bound to seek a tenant in order to minimize the damages of the lessee. Mr. Justice Swayze in rendering the opinion of the Court recognized the fact that there is a great conflict in authorities, and energetically criticized the *Zabriskie Case,* saying that the present court was greatly embarrassed by the remark that a landlord was under a duty to mitigate his tenant's damages. The remark to that effect, he pointed out, was purely *dictum,* and in no way bound the Court in future considerations. But, he further stated, "We refrain from dealing with the general question of the landlord's supposed liability to find a new tenant or to accept one when offered. This case, like all others, must be decided on its own facts."

A careful reading of the two cases shows that they are to be distinguished. In the *Muller Case* the Court was dealing with a lease which expressly prohibited re-letting or assigning, a fact missing in the *Zabriskie Case.* Such a stipulation shows an obvious desire on the part of the landlord to restrict the premises to a particular type tenant. Having found such a tenant in the original lessee, the landlord prohibits subletting to protect himself from the lessee putting into possession a subtenant who might be viewed as undesireable. Assum-

8. 94 N.J.L. 311, 110 Atl. 831 (Sup. Ct. 1920). Plaintiff sought to recover rent under the terms of a written lease running from March 1, 1917 to March 1, 1920. The lease contained the usual covenant that the lessee would not relet or underlet the whole or any part of the premises if they became vacant during the term. The defendant vacated the premises before August 1, 1919, and left the key with the plaintiff. The defendant procured one Bernstein as a prospective tenant but plaintiff refused to accept him. The defendant claimed that plaintiff was bound to accept a proper tenant and thus minimize his damages. *Held,* plaintiff was under no duty to thus mitigate defendant's damages.

ing that a general rule requiring the landlord to mitigate damages existed, such a stipulation in the lease would be more than ample to spell an exception to that rule. In other words, the Court in the *Muller Case* had under consideration a set of facts different from that in the *Zabriskie Case,* a set of facts from which they could have reached the conclusion they did without vigorously denouncing the latter case. If such a thing exists, the consideration in the *Muller Case* presents *obiter* upon *dictum.* That this is true, seems further proven by the fact that, given the opportunity, the Court admittedly refrains from dealing with the general question.

The *Muller Case* has been consistently followed by the Courts in dealing with the problem, but in all cases examined the facts show that the problem involved a lease containing a stipulation against reletting, subletting, and assigning.[9] Hence, the only positive conclusion that can be reached is that, when such a stipulation is present, the landlord is under no duty to mitigate the vacating tenants damages either by seeking a new tenant or by accepting one if one is presented to him. Whether or not a duty is imposed when such a stipulation is missing is a question that remains open in New Jersey.

Logic seems to be with the view that no duty attaches, when the question is considered in connection with fundamental principles of the landlord and tenant relationship.

If a lease occupied the status of contract alone such a duty might exist on the general theory of mitigation of damages. But a lease involves more than a mere contract right in that it creates the existence of an estate in the tenant for a term, by virtue of which he is the owner of the land during the term. A lease is first of all a conveyance or transfer of an estate in the land from the landlord to the tenant.[10]

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9. Heckel v. Griese, 12 N.J.Misc. 211, 171 Atl. 148 (Sup. Ct. 1934); Joyce v. Bauman, 113 N.J.L. 438 (E. & A. 1934); Feist v. Guarantee B. & L. Assn., 118 N.J.L. 144 (E. & A. 1937).

10. WALSH, THE LAW OF PROPERTY, 2nd ed., p. 235; Shimer v. Phillipsburg, 58 N.J.L. 506 (Sup. Ct. 1896); Spielman v. Kliest, 36 N.J.Eq. 199: "A lease has always been regarded as a grant of an estate. . . Blackstone defines a lease to be a conveyance of lands or tenements made for life, for years, or at will. 2 BL. COM. 317. Cruise says a lease is a contract for the possession and profits of lands and tenements, or else it is a conveyance of lands and

Whatever might have been the ancient view, the New Jersey Courts are committed to the principle that a lease for a term of years is a conveyance of lands.[11] A lease, then, has a twofold effect: As a contract, it passes a right *in personam;* as a conveyance of an estate it passes a right *in rem.*

The principles involving the liability for rent after the destruction of the demised premises may be profitably considered as illustrating the nature of the landlord and tenant relationship. At the common law, if the building—which generally forms the greater part of the value of the leasehold—on the demised premises was destroyed by fire or other means before the expiration of the term, the tenant was compelled nevertheless to pay rent to the landlord as it accrued.[12] This is now changed by statute.[13] The theory of the common law rule is that the tenant's relation with the landlord is not a mere contract for possession and use in which the landlord retains ownership and dominion, that the tenant is owner of the premises for the term from the moment the lease is executed. Rent is considered as the purchase price which the tenant pays for his estate in the land. This being so, it follows that the obligation to pay rent is in no way affected by the destruction of the premises. The tenant, theoretically, is not paying for his use from day to day but is satisfying the purchase price for his estate in the land. The tenant by paying rent is paying the consideration for his acquired right *in rem.* Placing liability on the tenant is logically analogous to the obligation of the purchaser of a chattel which has

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tenements for life, for years, or at will. CRUISE, 372 Ch. V. A lease doth properly signify a demise or letting of lands common, or any hereditaments, to another for a lesser time than he that doth let hath in it. SHEP. TOUCH. 266. And a demise, in its more technical meaning, is said to be a conveyance of lands for a term of years. COMYN. ON L. & T., *fit Demise.* A lease is a contract in writing under seal, whereby a person having a legal estate in hereditaments, corporeal or incorporeal, conveys a portion of his interest to another. ARCHER, L. & T. 2.'

11. *Ibidem* at pages 203, 204.

12. WALSH, *supra,* note 14, p. 237; Booream v. Morris, 74 N.J.L. 95 (Sup. Ct. 1906)

13. 3 C. S. 1910, p. 3078; REV. ST. 1937, 46:8-6, 46:8-7. Booraem v. Morris, *supra* note 12, holds that the statute being in derogation of the common law rule, its scope should not be extended beyond the plain intent of its words.

been sold and delivered to him, to pay therefor would be in no way affected by the subsequent destruction of the chattel, the risk of loss following the title.[14]

From this illustration, it follows that, if at the common law he was under a liability to pay rent as it accrued even though the premises had been destroyed, the tenant is liable for rent after his abandonment of the premises and the landlord is under no duty to seek a new tenant to mitigate the damages, nor is he bound to accept another tenant. By the lease the tenant becomes the owner of the premises for the term as soon as the lease is made and delivered; he may occupy the premises or not as he pleases, but in any event he must pay the rent, which is the purchase price for the estate in land which he has acquired.[15]

The fundamental requisite, upon which the argument is founded, viz., that the tenant is owner of the premises during the term[16] is furthered strengthened by the facts that (a) he may maintain ejectment or trespass against the landlord or anyone else wrongfully entering on the land,[17] (b) the landlord is under no duty to make repairs which become necessary during the term,[18] and (c) that the tenant is under a liability to third persons rightfully on the premises for damages resulting from a dangerous condition existing on the demised land during the term.[19]

From the above consideration, it is submitted that the logical view places the landlord under no duty to mitigate damages upon the tenants abandonment before the expiration of his term and that the *dictum* in *Carey v. Hejke, supra,* is unfortunate and inconsistent with previous adjudications by the New Jersey Courts.

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14. Lummis v. Millville Mfg. Co., 72 N.J.L. 25 (Sup. Ct. 1905).
15. WALSH, *supra,* page 238.
16. See note 10 *supra.*
17. Rivoli Holding Co. v. Ulicny, 109 N.J.Eq. 55 (Ch. 1931); Totten v. Dreier, 79 N.J.L. 450 (Sup. Ct. 1910)
18. Barthelmess v. Bergamo, 103 N.J.L. 398 (E. & A. 1926).
19. McKeown v. King, 99 N.J.L. 251, 122 Atl. 753 (E. & A. 1923); Zak v. Craig, 5 N.J.Misc. 275, 136 Atl. 410 (Sup. Ct. 1927).