COMMENT: AN IMPLIED "CONTRACT" OF QUIET ENJOYMENT AND CONTINUING LESSOR LIABILITY

INTRODUCTION

As a part of the implied covenant of quiet enjoyment, the law has imposed upon lessors an obligation not to hinder or interfere with the lessee's use of the leased premises.1 It has generally been held that when a lessor conveys his reversionary interest in the premises, the subsequent acts of the purchaser which may constitute a breach of the lessor's obligation not to hinder or interfere with the lessee's use of the premises do not give rise to any liability on the part of the original lessor.2 In Sempek v. Minarik,3 the Nebraska Supreme Court established the rule that a lessor is liable for the purchaser's interference with the lessee's use of the leased premises after the reversion has been conveyed to the purchaser.4 The lessor's liability under the implied covenant of quiet enjoyment was held to be contractual in nature,5 and the court ruled that the lessor could not evade his contractual obligations by selling and conveying the property to a third person.6

This article will discuss the concepts involved in the various theories of enforcement of lease covenants and propose an analytical framework based upon a more sensitive use of terminology. Emphasis will be placed upon an examination of the covenant of quiet enjoyment and a final section will focus upon an analysis of the Sempek decision in light of available case law.

FRAMEWORK FOR ANALYSIS

Since the elimination of the requirement of a seal, the term covenant has merely referred to an agreement or promise.7 An express covenant is created by an express promise while an implied covenant is a promise inferred by law from the words within

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1. See note 32 and accompanying text infra.
4. See text following note 93 infra.
5. 200 Neb. at 534, 264 N.W.2d at 430.
6. Id.
the conveyance. Used in a narrow sense the term covenant should be synonymous with the word promise, but the descriptive label of implied covenant has also been used to describe an obligation imposed by law upon the parties to a lease regardless of any promise express or implied. Because the term implied covenant may often be used to describe either an implied promise or an obligation imposed by law, the mere use of the term compounds the difficulty involved in the analysis of the duties existing between a lessor and lessee.

Because of the difficulties posed by the use of the term covenant, this article proposes that the commonly used label “covenant” be divided into two classifications: promises, both express and implied, and obligations. The basis for distinguishing between these two classifications is that the underlying source of duty and consequent theory for enforcing the duty appears to be different within each class. An analysis of landlord-tenant cases indicates that, as between the parties to the covenant, certain duties are enforceable contractually or by virtue of privity of contract. The source of these duties, therefore, may be identified as a contract, either express or implied, arising from the lease itself or from the circumstances surrounding the contract to lease. Furthermore, these duties are found to remain contractually enforceable between the covenanating parties despite a conveyance of the reversion. Such contractually enforceable duties are referred to in

9. This article is based upon the contention that the Nebraska Supreme Court in Sempek analyzed the liabilities under the implied covenant of quiet enjoyment without distinguishing between the portion of that covenant which is truly an implied covenant or promise and the portion which is an obligation. For this distinction, see the discussion in the text following note 22 infra.
10. A similar classification is made in RESTATEMENT (SECOND) OF PROPERTY § 16.3 (1977):

Obligations That Do Not Rest on an Express Promise—Burden and Benefit of Performance After Transfer
(1) An obligation that is imposed on one of the parties to a lease without the aid of an express promise may rest on an implied promise found to exist from the facts and circumstances of the lease transaction. That implied promise is treated the same as an express promise in applying the rules of §§ 16.1 and 16.2 [concerning the liabilities for the respective burdens and benefits resulting after a transfer of the interest in leased property].
(2) An obligation that is imposed on one of the parties to a lease without the aid of an express or implied promise may be imposed by operation of law. The location of the burden and benefit of that obligation after a transfer of an interest in the leased premises depends on what is appropriate to further the purposes of imposing the obligation.

Id.

11. See, e.g. notes 47, 56, and 76 and accompanying text infra.
12. Id.
this article as promises which may be either express or implied.

In contrast with duties arising from express or implied promises, certain duties may be imposed upon the parties to a lease by operation of law because of the existence of the landlord-tenant relationship.\(^{13}\) A lessor would be subject to liability under a duty imposed by operation of law only so long as the underlying landlord-tenant relationship remained in existence. Since the liability rests solely upon an existing landlord-tenant relationship, it appears that privity of estate would be a viable theory of enforcement.\(^{14}\) Thus, upon a conveyance of the original lessor's reversion, the duty imposed upon the original lessor would cease with the termination of his privity of estate with the lessee and the assignee of the reversion would become subject to the imposed duty. These types of duties, imposed by law because of the landlord-tenant relationship, will be hereinafter referred to as obligations.

An additional factor which must be considered with regard to the enforcement of covenants is whether or not the underlying duty runs with the land. Since an obligation arises from the existence of a landlord-tenant relationship and is enforceable because of privity of estate, it appears that an assignee of the reversion would come into privity of estate with the tenant and become the landlord in a succeeding landlord-tenant relationship. Obligations, by their source, would therefore be considered as running with the land. However, the enforcement of promises as defined herein is complicated when the promise is described as running with the land.

A covenant [promise, express or implied] running with the land is primarily a contractual obligation, but a contract that has certain real characteristics; namely, the ability to run with the land of the covenantor and covenantee so that their respective assignees are subject to the duties and entitled to the rights of the contract.\(^{15}\)

\(^{13}\) See Restatement (Second) of Property § 16.3, comment b (1977) which states: "Various obligations of the parties to a lease are inherent in the landlord-tenant relationship, that is, they are imposed by operation of law because it is in the public interest generally that these obligations grow out of that relationship." Id. § 16.3 at 146-47.

\(^{14}\) The Reporter’s Note following Restatement (Second) of Property § 16.3 (1977) states:

Justification for the general rule—Obligations that do not rest on an express promise, but are inherent in the landlord-tenant relationship, are intimately tied to the continuance of that relationship. Hence the restriction of their assumption and duration in most instances to the period when the landlord and tenant are in privity of estate seems clearly justifiable.

Id. § 16.3 at 149.

\(^{15}\) 2 American Law of Property § 9.1 at 335 (A. J. Casner ed. 1952) [hereinafter cited as Casner].
The manner in which covenants running with the land developed is a result of the interplay between contract law and property law and appears to have been the judiciary's response to the problem of protecting grantees of leasehold interest.\(^{16}\)

If one concludes that an express or implied covenant (promise) runs with the land, two theories of enforcement of the promise become available. These two theories are: 1) privity of contract, resulting from the source of the promise being within the contract to lease, and 2) privity of estate (concurrent ownership of separate estates within the same property) resulting from the landlord-tenant relationship.

Where a covenant [promise, express or implied] in a lease satisfies the requirements of a covenant running with the

\(^{16}\) The following historical development is found in Casner, \textit{supra} note 15, at 336-42.

After the enactment of the Statute of \textit{Quia Emptores} in 1290 had abolished the alienation of land by subinfeudation, the relationship of lord and vassal which had existed between grantor and grantee was eliminated. Since this destroyed the grantee's protection which arose from a lord's feudal duty to protect his tenant vassal, it became necessary to develop a method of protecting the grantee's interest after a conveyance of land. An immediate grantee eventually received protection through a warranty of title. This protection was, at first, based upon the contractual relationship between the grantor and grantee and was not available to subsequent grantees as early common law did not recognize the assignability of contract rights. In order to extend this protection to subsequent grantees, the courts began to view grantee-grantor promises as somehow attaching to the land and thereby accruing to subsequent grantees, not as assigned contract rights, but as a result of the transfer of the estate. At first, only covenants of title were said to attach to the land but this concept was eventually broadened to include other covenants and by the time of the reign of Henry VIII, the running of both the benefit and burden of covenants in leases with the leasehold estate was well established. At this stage of the development of the law, however, neither benefits nor burdens of covenants were said to run with the reversion as there was no physical estate to which such covenants could attach.

With the dissolution of monasteries during the reign of Henry VIII, the lands held by the monasteries came into the hands of the king. However, as many of these lands were subject to long term leasehold estates, the lords to whom the king distributed such lands were unable to enforce the lease covenants since they had acquired only the reversion. Consequently, with the enactment of the Statute of 32 Henry VII in 1540, it was declared that the lessor's benefits and burdens would pass with the reversion to subsequent grantees. This statute gave the lords the ability to enforce the covenants within the leases of the monastery land.

At this point it would appear that the problems with covenants had been resolved since both benefits and burdens were to run with the reversion as well as the leasehold. However, this interlude of certainty was terminated by the ruling in \textit{Spencer's Case}, \textit{77 Eng. Rep. 72} (K.B. 1583), in which the court held that a covenant could not run with the estate "if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort." \textit{Id.} at 74. This touch and concern requirement "has been found to be incapable of being reduced to any system of absolute tests, but courts have variously attempted to state the requirement in reference to the facts involved in the particular case." Casner, \textit{supra} note 15, at 342.
land as to both sides, there exists between the covenantor and covenantee two different theories of enforcement at law—the covenant is first and foremost a simple contract that imposes a contract duty upon the covenantor, and a contract right is vested in the covenantee. The covenantor and covenantee are said to be in privity of contract with each other. But such a covenant is also a real covenant and as such there rests upon this covenantor a burden which attaches to his estate in the demised premises and runs with such estate to subsequent owners. Likewise, there exists a benefit which in turn attaches to the estate of the covenantee and runs with such estate to subsequent assignees. This second theory of enforcement is said to rest upon the privity of estate relationship that exists between the lessor and lessee. The term "privity of estate" is used to describe the existence of mutual or successive relationship in the same land between two different persons.\textsuperscript{17}

Given the existence of two theories of enforcement, a question arises as to what liabilities exist after the covenantor conveys the burdened estate. With regard to this question it is generally found that:

By an assignment of his entire estate, the covenantor extinguishes his liability as owner of the burdened estate, since he is no longer in privity of estate with the owner of the benefit; but he remains liable on his contract duty under privity of contract, since contract duties are not assignable. This puts the original covenantor in the unfortunate position of being an insurer as to performance of the covenant, even though by the transfer of the burdened estate it may be physically impossible for him to perform the covenant himself. Although the owner of the benefit has an election as to whether to sue the covenantor upon privity of contract or the present assignee of the burdened estate upon privity of estate, yet as between the covenantor and assignee or assignee's assignee the liability under privity of estate is treated as the primary obligation, while the liability under the contract duty is treated as that of a surety only. Therefore, even without any express assumption agreement in the assignment, the covenantor may recover reimbursement from his immediate assignee or a remote assignee, whichever held the privity of estate at the time of the breach, for any sums that he is required to pay because of his liability under privity of contract.\textsuperscript{18}

\textsuperscript{17} Casner, \textit{supra} note 15, at 353-54.
\textsuperscript{18} \textit{Id.} at 355 (emphasis added).
Promises may be divided into two categories depending upon whether or not the promise runs with the land. However, once promises are so classified there is no difference between the enforcement theories applied to express promises and those enforcement theories applied to implied promises.\textsuperscript{19} Given this basic premise, an analysis of the relationships described above indicates that the effect of the conveyance of an estate burdened with an express or implied promise running with the land may be diagrammed as in Figure I.

\textbf{Figure I}

Conveyance of an estate burdened with an express or implied promise described as running with the land.\textsuperscript{20}

\begin{quote}
\begin{center}
\begin{tikzpicture}
\node (a) at (0,0) {Covenanter} ;
\node (b) at (0,-1.5) {Assignee} ;
\node (c) at (2,0) {Covenantee} ;
\node (d) at (2,-1.5) {Surety} ;
\node (e) at (0,-3) {Conveyance} ;
\node (f) at (2,-3) {Note: dotted lines indicate enforcement theories after conveyance.} ;
\node (g) at (0,-2.5) {Surety (Right of Reimbursement)} ;
\draw[-latex] (a) -- node[right] {privity of estate} (c) ;
\draw[-latex] (a) -- node[right] {privity of contract} (b) ;
\draw[-latex] (b) -- node[right] {privity of contract} (d) ;
\draw[-latex] (d) -- node[right] {ability to enforce} (c) ;
\draw[-latex] (e) -- (a) ;
\draw[-latex] (e) -- (b) ;
\draw[-latex,dashed] (c) -- node[right] {privity of estate (primary liability)} (f) ;
\end{tikzpicture}
\end{center}
\end{quote}

\textsuperscript{19.} Accord, Restatement (Second) of Property § 16.3(1) (1977) set out in note 10 \textit{supra}.

\textsuperscript{20.} The relationship illustrated in this figure is consistent with the quoted material and text accompanying notes 17 and 18 \textit{supra}. 
When the express or implied promise does not run with the land, privity of estate would not be a source of liability and the sole method of enforcement would be privity of contract. As the privity of contract is not destroyed by a conveyance of the estate, it would appear that a covenantor would remain contractually liable for such promises after the transfer of the estate. As a result of these relationships, Figure II would represent the effects of a conveyance of the estate when the transferor has made an express or implied promise described as not running with the land.

Figure II

Conveyance of an estate when the transferor has made an express or implied promise described as not running with the land.

Covenantor (burden) (liability) privity of contract Covenantee (benefit) (ability to enforce)

conveyance

Assignee (No burden) (No liability)

Note: dotted lines indicate enforcement theories after conveyance.

Figures I and II have illustrated the relationships resulting from both express and implied promises. A final diagram will illustrate the liabilities in regard to an obligation. Given the source of an obligation as the landlord-tenant relationship it would follow that an obligation would run with the land by virtue of the super-
ceeding landlord-tenant relationship. Since privity of contract does not attach to an obligation, privity of estate would appear to be the sole enforcement theory applicable to an obligation and Figure III would illustrate the relationship existing after a conveyance of the reversion by the lessor.

**Figure III**

Effect of the conveyance of the estate of the party subject to an obligation.

\[
\text{obligor (covenantor)} \quad \text{privity of estate} \quad \text{obligee (covenantee)}
\]

\[
\text{burden} \quad \text{benefit} \quad \text{ability to enforce}
\]

\[
\text{conveyance}
\]

\[
\text{privity of estate}
\]

\[
\text{Assignee (burden)} \quad \text{ability to enforce}
\]

\[
\text{liability}
\]

\[
\text{Note: dotted lines indicate enforcement theories after conveyance.}
\]

THE "IMPLIED COVENANT" OF QUIET ENJOYMENT

The implied covenant of quiet enjoyment is ideally suited to illustrate the differences between implied promises and obligations because it may be considered to consist of both an implied promise and an obligation. Perhaps for this reason it is more likely that a court may confuse situations in which liability under the

21. *See* note 14 and accompanying text *supra*. 
“covenant” attaches. The covenant of quiet enjoyment was considered to be implied within a lease at common law and this view has been adopted in nearly all jurisdictions. This covenant is often described as running with the land, but when one examines the individual components of this “implied covenant” one finds that only a part of this covenant, the obligation, truly runs with the land.

A covenant of quiet enjoyment, often regarded as substantially equivalent to a covenant of warranty, usually consists of two phases. Under the first phase, the lessor “covenants” that upon the effective date of the lease the lessor will have a legal right to possess the premises and that this right will be transferred to the lessee. Under the second phase, the lessor “covenants” that the lessee’s right to possession will continue throughout the term of the lease. While the first phase fulfills the basic purpose of the covenant of quiet enjoyment to protect the lessee from persons claiming under paramount title, the second phase may be relied upon for the protection of the lessee against unlawful disturbance by the lessor.

Thus, under the first phase of the implied covenant of quiet enjoyment:

22. 3 G. THOMPSON, REAL PROPERTY 468 (1959).
24. A covenant of warranty is an “assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title.” BLACK'S LAW DICTIONARY 438 (Rev. 4th ed. 1968). For a discussion of the concept of paramount title, see note 28 infra.
25. 3 G. THOMPSON, supra note 22, at 472.
26. Id.
27. Id.
28. A paramount title is,
   [1]In the law of real property, properly one which is superior to the title with which it is compared, in the sense that the former is the source or origin of the latter. It is, however, frequently used to denote a title which is simply better or stronger than another, or will prevail over it. . . . But this use is scarcely correct, unless the superiority consists in the seniority of the title spoken of as “paramount.” BLACK'S LAW DICTIONARY 1267 (Rev. 4th ed. 1968) (citations omitted).
An interference under paramount title may occur where (1) the lessor has no power to lease all or a part of the premises, (2) a life tenant makes a lease without court order for a term of years and dies before the term expires, or (3) the lessor's estate is subject to a condition and is later extinguished upon breach of the condition. The last category includes cases in which the lessor's estate is subject to a prior mortgage or other lien and those in which the lessor is himself holding as a lessee under a lease from another.
1 AMERICAN LAW OF PROPERTY § 3.48 at 273 (A. J. Casner ed. 1952).
29. 3 G. THOMPSON, supra note 22, at 474.
enjoyment, the lessor has, by implication, promised that he has sufficient title to support the leasehold interest against claims of paramount title. This portion of the implied covenant does not concern the landlord-tenant relationship, which arguably does not exist until the leasehold is conveyed. Rather, this portion of the implied covenant concerns whether or not one owns what he claims to be able to convey. These circumstances suggest that the resulting duty arises from an implied promise rather than from an obligation dependant upon the existence of a landlord-tenant relationship. This implied promise is described as personal to the lessor in that it does not run with the land. Because this aspect of the covenant of quiet enjoyment may be characterized as an implied promise not running with the land, Figure II should illustrate the applicable relationships between the parties.

As to that portion of the implied covenant of quiet enjoyment imposing a duty upon the lessor not to hinder or interfere with the lessee’s possession of the premises, an examination of authorities and case law indicates that this duty runs with the land and that the lessor is not liable for the acts of others unless he instigates, authorizes or performs the breaching act.

A hinderance or disturbance of the tenant’s quiet enjoyment of the premises by a mere intruder is no ground for an action for breach of covenant for quiet enjoyment; as the hinderance or disturbance must be by the lessor, or some person deriving their [sic] right or title through the lessor. A landlord does not impliedly warrant his tenant's peaceable possession against unlawful seizures, levies, or trespasses, in which the landlord is not a participant.

The preceding authority appears, at first glance, to indicate that a lessor may be liable for the acts of those deriving title through him. However, the reference to persons deriving title through the lessor indicates the fact that this obligation runs with the land. A close examination of authorities reveals that the lessor is liable for the

30. "The normal facts and circumstances of entering into the lease transaction justify the implication of a promise by the landlord that the tenant will not be disturbed in his enjoyment of the leased property by a paramount title . . . ." RESTATEMENT (SECOND) OF PROPERTY § 16.3, comment a, at 146 (1977) (emphasis added).

31. "With respect to a disturbance by paramount title, the implied promise of the lessor is construed as personal to him so that the burden of his promise will not be carried to the assignee of his reversionary interest . . . ." RESTATEMENT (SECOND) OF PROPERTY § 16.3, comment a at 146 (1977).

32. 3 G. THOMPSON, supra note 22, at 478. See also RESTATEMENT (SECOND) OF PROPERTY § 16.3, comment a (1977), which refers to the duty not to interfere with the lessee’s possession as an implied promise rather than an obligation, but still restricts the landlord’s liability to “disturbances of the tenant by himself, or someone whose conduct is attributable to him.” Id. § 16.3 at 146.
acts of the purchaser only when the acts constituting the breach were instigated by the lessor.

Hence it may be stated that a general covenant for quiet enjoyment in a lease, whether express or implied, does not render the lessor liable for the tortious acts of strangers to the title. The lessee's action is against the tort-feasor. Generally the landlord is not responsible to any particular tenant for the misconduct of other tenants, unless such conduct is with the landlord's consent. *Even though the third party be a grantee of the landlord of a part or of the whole of the property, his interference with the tenant is not a violation of the covenant of quiet enjoyment.* Implied covenants [obligations] protect a tenant only against acts done by, or with the consent, or under the authority of the landlord.33

This comment suggests that the lessor's *obligation* not to interfere with the lessee's peaceable possession of the premises terminates with the sale of the reversion, as the privity of estate upon which this obligation rests has been destroyed.34 If, after the sale of the reversion, the original lessor does interfere with the lessee's possession by virtue of his own acts or the acts of others as a result of his instigation, his liability to the lessee should be founded in tort rather than based upon the obligation found within the implied covenant of quiet enjoyment.35 If the acts of the original lessor after the conveyance of the reversion were treated as tort liability, the lessee would have the same remedy against his former lessor as he would have against any stranger to the title who interferes with his possession.

In addition to the protection granted the lessee against interference by paramount title and the acts of the lessor, the "covenant" of quiet enjoyment is sometimes said to include a duty to place the lessee in possession of the premises at the commencement of the lease term.36 In jurisdictions adopting the English

33. 3 G. THOMPSON, *supra* note 22, at 502-03 (emphasis added); "[T]he lessor is liable if he authorizes acts of interference by third persons, and this rule extends to the acts of one to whom the lessor sells the reversion knowing that the grantee intends to violate the tenant's rights." 1 *AMERICAN LAW OF PROPERTY* § 3.53 at 296 (A.J. Casner ed. 1952).

34. The Reporter's Note following *RESTATEMENT (SECOND) OF PROPERTY* § 16.3 (1977) states: "No authority has been found on the precise issue of whether the original landlord's liability or the implied promise of quiet enjoyment [obligation not to interfere with the lessee's use of the premises] continues after transfer of the reversion." *Id.* § 16.3 at 150. For the general rule that a lessor's obligation terminates with the sale of the reversion, see note 14 *supra*.


36. 3 G. THOMPSON, *supra* note 22, at 480-81; *See* Obermeier v. Mattison, 98 Or. 195, 206, 192 P. 283, 286 (1920). While the duty to deliver possession is sometimes
view of this duty to deliver possession, the lessor is liable for a failure to place the tenant in possession regardless of the reason possession is denied to the tenant.\textsuperscript{37} This indicates that the lessor would be liable for a failure to deliver possession due to the refusal of the purchaser of the reversion to permit the lessee to take possession. Such a result is not surprising because the English view is regarded as an implied promise.\textsuperscript{38} The English view, therefore, appears to involve the determination that the lessor has made an implied promise to deliver possession to the lessee and that the applicable enforcement theory is privity of contract.\textsuperscript{39}

From the foregoing it should be observed that the "implied covenant" of quiet enjoyment may be deemed to consist of the following components:

1) The implied promise against interference by paramount title. This promise is similar to a covenant of warranty\textsuperscript{40} and evolves from the contract to lease.\textsuperscript{41} Since this promise does not run with the land,\textsuperscript{42} the enforcement of this promise would be illustrated by

considered to be part of the covenant of quiet enjoyment, this assumption may not be entirely correct since the implied covenant of quiet enjoyment does not impose liability upon the lessor for the independent acts of third persons while the duty to deliver possession does, under the English view, impose such liability. For this reason the duty to deliver possession may be more accurately described as an independent covenant. See Casner, supra note 15, § 3.37 at 251. It has also been noted that to base liability for failure to deliver possession upon a breach of the covenant of quiet enjoyment "disregards the impossibility of an 'eviction' prior to the beginning of possession." 2 R. Powell, The Law of Real Property \textsuperscript{[125]}(11, at 248 n.2 (1977).

37. See 3 G. Thompson, supra note 22, at 479-81; Casner, supra note 15, at § 3.37. Nebraska has adopted the English view. Herpolsheimer v. Christopher, 76 Neb. 355, 111 N.W. 359 (1907), on rehearing from 76 Neb. 352, 107 N.W. 382 (1906).

38. See 2 R. Powell, supra note 36, \textsuperscript{[1225]}(11, at 248 n.2. That the English view results in characterizing the duty to deliver possession as an implied promise is demonstrated in Obermeier v. Mattison, 98 Or. 195, 192 P. 283 (1920), discussed in the text following note 56 infra.

Some jurisdictions which follow the American view of the duty to deliver possession hold that the lessor is liable if the lessee is denied possession by either the lessor or a stranger holding paramount title. If the lessee is denied possession by anyone else, the lessor is not liable and the lessee is left to his remedy at law based upon his rights under the lease. See 3 G. Thompson, supra note 22, at 479-81; 1 American Law of Property § 3.37 (A.J. Casner ed. 1952). This view of the lessor's duty might be considered to be an obligation because the lessor would not be liable if the purchaser of the reversion denied possession unless some act of the lessor caused the denial. Just as obligations are personal to the lessor, so also would liability under the American view appear to be for the lessor's personal actions. Nevertheless, one might argue that the duty is still based upon an implied promise. In this event the difference between the English and American view would be the scope of the implied promise.

39. See 2 R. Powell, supra note 36, \textsuperscript{[1225]}(11, at 248 n.2.

40. See notes 16, 24, and 28 and accompanying text supra.

41. See text preceding note 31 supra.

42. See note 31 supra.
2) The obligation imposed by law that the lessor will not hinder or interfere with the lessee's peaceable possession of the premises. As expected by virtue of the definition of the term obligation proposed previously, this portion of the "implied covenant" of quiet enjoyment runs with the land\footnote{See note 23 and accompanying text supra.} and the enforcement of this obligation would be illustrated by Figure III.

3) It has been held that the duty to deliver possession of the premises is considered to be a portion of the covenant of quiet enjoyment.\footnote{See note 36 supra.} Under the English view this duty would be an implied promise as defined previously\footnote{See note 38 and accompanying text supra.} and, since this promise evolves from the contract and does not run with the land,\footnote{See case analysis following note 56 infra.} the enforcement of this implied promise would be illustrated by Figure II.

**CASE LAW ILLUSTRATIONS**

In order to more fully illustrate the terminology and enforcement theories proposed herein, and to provide a comparative basis for analyzing the rationale and impact of the *Sempek* decision, cases having factual patterns similar to *Sempek* will be examined. In these cases, the lessor was subject to a promise, either express or implied, or an obligation, and the reversion was conveyed to a purchaser. Subsequent to the conveyance, the purchaser breached the promise or obligation and a suit was brought by the lessee against the original lessor.

**LIABILITY UNDER PROMISES**

An example of liabilities resulting under an express promise is found in *Glidden v. Second Avenue Investment Co.*,\footnote{125 Minn. 471, 147 N.W. 658 (1914).} which dealt with an express promise to heat the leased premises. In 1909, the lessor executed a five year lease to the plaintiff's employer and expressly promised to properly heat the premises.\footnote{Id. at 471, 147 N.W. at 658.} The lessor then conveyed the reversion and the purchaser subsequently failed to properly heat the premises.\footnote{Id. at 472, 147 N.W. at 658-59.} As a result of this failure, the plaintiff, an employee of the lessee, became ill and instituted this suit against the lessor.\footnote{Id.} The court stated:

We would not say that the original lessor is, by a convey-
ance of the reversion, released from his personal obligations and covenants [promises] contained in the lease . . . , but the relation of landlord and tenant between them no longer exists. The obligations of the original lessor that remain after the conveyance of the reversion are personal contractual obligations only . . . . The liability of the lessor has become the liability of a surety only.\textsuperscript{51}

The court held that the plaintiff, an employee of the lessee, was \textit{not} in privity of contract with the lessor; therefore, the lessor could not be held liable as a surety under the contractual liability established by the express promise.\textsuperscript{52} This implies that the privity of contract would have supported the lessor's liability as a surety to the plaintiff's employer, the lessee, under the express promise.

It should be further noted that the liability of the purchaser, who was not a party in \textit{Glidden}, was addressed in an earlier action between the plaintiff employee and the purchaser of the reversion.\textsuperscript{53} In that action the court held that the purchaser owed the tenant a duty to heat the premises and that the plaintiff, as the tenant's employee, could recover from the purchaser of the breach of its duty to heat the premises was negligent.\textsuperscript{54} Since the duty to heat the premises is described as running with the land,\textsuperscript{55} the results of the plaintiff's actions against the lessor and the purchaser are consistent with the relationship illustrated in Figure I.

A more complicated factual situation was found in \textit{Obermeier v. Mattison},\textsuperscript{56} which involved a duty to place the lessee in possession of the leased premises. This duty was held to evolve from the implied covenant of quiet enjoyment.\textsuperscript{57} As the court adopted the English view of the duty to deliver possession,\textsuperscript{58} the duty would be classified as an implied promise under the criteria established earlier herein.\textsuperscript{59} This is consistent with the court's apparent conclusion that this implied promise evolved only from the contract relationship.\textsuperscript{60} The court's conclusion that the purchaser would not be liable for the breach of the implied promise to deliver posses-

\begin{footnotesize}
\begin{itemize}
\item[51.] \textit{Id.} at 474, 147 N.W. at 659 (citations omitted).
\item[52.] \textit{Id.}
\item[53.] Glidden v. Goodfellow, 124 Minn. 101, 144 N.W. 428 (1913).
\item[54.] \textit{Id.} at 105, 144 N.W. at 430.
\item[55.] \textit{See} Casner, \textit{supra} note 16, at 345-46. Although the fact that this promise runs with the land was not specifically mentioned in \textit{Glidden}, it does appear from the discussion to be an underlying concept.
\item[56.] 98 Or. 195, 192 P. 283 (1920).
\item[57.] \textit{Id.} at 206, 192 P. at 286.
\item[58.] \textit{Id.}
\item[59.] \textit{See} note 38 and accompanying text \textit{supra}.
\item[60.] \textit{See} note 72 and accompanying text \textit{infra}.
\end{itemize}
\end{footnotesize}
sion unless she had actually contracted with the lessee forces one to conclude that this particular promise does not run with the land and that the case should be resolved in accordance with the relationships illustrated in Figure II.

In Obermeir, the lessor and lessee executed a contract for lease on November 13, 1917, and the lease term was to begin on November 30, 1917. After November 13 and before November 31, 1917 the lessee subject to the lease, was conveyed to the purchaser. Because of the holdover of the previous tenant after expiration of his term, the lessee was denied possession of the premises until late February 1918. On January 11, 1918, the lessee, purchaser, and lessee executed a written agreement modifying the lease and stating liquidated damages as to all claims between the lessor and lessee. The lessee later brought this action against both the lessor and purchaser for damages sustained as a result of the failure to deliver possession and the court construed his petition as alleging that the agreement executed by all parties on January 11, 1918, was void as it was obtained by fraud and misrepresentation. Since the trial court had rendered a verdict against the lessor and a nonsuit as to the purchaser without considering the effects of this agreement the case was reversed and remanded.

However, during this appeal the court also adopted the English view of the duty to deliver possession of the premises and stated that such a duty was a part of the implied covenant of quiet enjoyment: "We therefore adopt the doctrine that a lease of real property, and the covenant of quiet enjoyment, involves the obligation [implied promise] upon the part of the lessor to place the lessee in possession of the premises at the time fixed for the commencement of the term." The court then concluded that the lessor would be liable for the failure to deliver possession of the premises despite the conveyance of the reversion since the duty is a personal contractual liability of the lessor.

61. See note 72 and accompanying text infra.
62. 98 Or. at 197, 192 P. at 283-84.
63. Id. at 197-98, 192 P. at 284. That the actual date of the conveyance was November 28, 1917, is found in Obermeier v. Mortgage Co. Holland-America, 111 Or. 14, 16, 224 P. 1089, 1090 (1924).
64. 98 Or. at 197, 192 P. at 284.
65. Id. at 198, 192 P. at 284.
66. Id. at 200, 192 P. at 285.
67. Id. at 207, 192 P. at 287.
68. Id.
69. Id. at 208, 192 P. at 286.
70. Id. at 207-08, 192 P. at 287.
Since all of the parties had contracted on January 11, 1918, the validity of that contract was crucial to the determination of liability. If this agreement was valid, the liability of the lessor had been liquidated and the duty to deliver possession of the premises to the lessee would have become, by virtue of this contract, an implied promise of the purchaser. Conversely, if this agreement was void the liquidated damages clause would be ineffective and the lessor could be held liable for the damages found by the trial court. In addition, if the agreement was void the purchaser would have no liability as she could not be said to have contracted with the lessee. As the trial court had not considered the impact of the agreement executed by all the parties (the allegations of fraud and misrepresentation were found to be present although not well pleaded), the case was reversed and remanded for a new trial.

This case returned to the Supreme Court of Washington six times before its final resolution, but the final conclusion as to liability was that the lessor was liable to the lessee whereas the purchaser was not liable since the agreement of January 11, 1918, was found to be void. The resolution of the case is clearly consistent with the relationships illustrated in Figure II.

It should be noted that in the above cases dealing with express or implied promises, either the lessor was held liable because of the privity of contract or the lessor was found to be not liable because of a lack of actionable privity of contract. The liabilities and theories of enforcement found in these cases and cases considering similar factual patterns follow the relationships illustrated

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71. Id. at 207, 192 P. at 287.
72. Id. This conclusion was further clarified in Obermeier v. Mattison, 98 Or. 195, 213, 193 P. 915, 916 (1920).
73. 98 Or. at 207-10, 192 P. at 287-8.
77. Revel dealt with an express promise to heat the premises. The subsequent holder of the reversion breached the promise and, as a result, the lessee became ill and died. The administrator of the lessee's estate brought a wrongful death action against the lessor and the transferee of the reversion alleging that the defendants had breached the duty to heat the lessee's apartment. The trial court judgment against the lessor was reversed in the appellate court; the appellate court decision was affirmed since the conveyance of the reversion had destroyed the privity of
within either Figure I or II. However, when considering cases dealing with the obligation of the lessor not to hinder or interfere with the lessee's possession of the premises during the term of the lease, one finds results consistent with the relationships illustrated in Figure III. With the exception of Sempek, these cases do not find that a contractual relationship exists and the decisions are based upon the presence or absence of privity of estate. This is demonstrated in the following discussion.

LIABILITY UNDER OBLIGATIONS

In *Ubbink v. Herbert A. Nieman & Co.* the court considered the liabilities resulting from the eviction of the lessee by the pur-

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estate and a wrongful death action could not be based upon the privity of contract which was acknowledged to exist between the lessor and lessee. *Revel v. Butler*, 322 Ill. 337, 153 N.E. 682 (1926), *aff'g sub nom.* *Revell v. Illinois Merchants Trust Co.*, 238 Ill. App. 4 (1925).

*Neal* involved an express promise to renew the lease. This particular express promise is described as running with the land. *Casner*, *supra* note 16, at 353. The purchaser offered lessee an opportunity to renew the lease but demanded a higher rent than that stipulated in the lease. The lessee refused this offer and brought an action against the lessor seeking damages for the breach of the express promise to renew the lease. The court stated that it was not necessary to determine whether or not the lessee could enforce the express promise against the purchaser since the lessor remained *personally liable* upon the express promise and the conveyance of the reversion had no effect on that liability. 212 Mass. at 521-22, 99 N.E. at 335.

*Carpenter* involved an express promise by the lessor to either sell the reversion to the lessee or to purchase the lessee's real improvements at the end of the lease term if the lease was not renewed. By a conveyance of the reversion during the lease term the lessor eliminated the possibility of selling it to the lessee. The lessee sued the lessor on the express promise of the lessor to purchase the real improvements from the lessee. The court concluded that the lessee was liable to the lessee since the sale of the reversion "does not put an end to the 'privity of contract, which is created by the contract itself, and subsists forever between the lessor and lessee.'" 180 Mass. at 133-34, 61 N.E. at 818.

In *Jones*, the lessor and lessee executed a lease containing an express promise by the lessor to deliver possession of the leased premises and to heat and light the premises. The lessor then conveyed the reversion and the lessee was effectively denied possession as the necessary heating and lighting apparatus was not installed. The court held the lessor liable to the lessee and concluded that:

[T]his covenant is pretty near the line, as it has been drawn between covenants that will and those that will not pass under the statute, in respect of their nature . . . . However this may be, the plaintiff [lessee] is entitled to his lease, and to his heat and light, notwithstanding the assignment; and whether the covenant [express promise] passes, or not, *he can hold the defendant, Parker [lessor], on his express contract.*

163 Mass. at 568, 40 N.E. at 1045 (emphasis added).

77. 265 Wis. 442, 62 N.W.2d 8 (1953). It should be noted that this case contains many facts similar to those found in *Sempek*. Since the written lease was unrecorded and expired, the lessees were found to be in possession under an oral lease. The lessor conveyed the reversion to the purchaser without exception or mention of the lessee's interests. The purchaser evicted the lessees and refused to allow them to remove their property from the premises since he claimed that he had purchased the property belonging, in fact, to the lessees. Under these facts the lessor was
chaser of the reversion. At the time of the conveyance of the reversion, the lessee was in visible possession of the premises under an oral lease.\(^7\) The lessor conveyed the reversion to the purchaser with no exceptions or reservations and failed to mention the lessee’s interests.\(^7\) However, the court found that the purchaser had notice of the lessee’s interests and, therefore, took the reversion subject to such interest.\(^8\) Subsequent to the conveyance of the reversion and before the expiration of the lease term, the purchaser refused to allow the lessee to remove his property from the premises.\(^9\) The lessee then brought this action to recover damages and obtained a trial court judgment against the lessor.\(^10\)

The Wisconsin Supreme Court found that the conveyance of the reversion by the lessor destroyed the landlord-tenant relationship between the lessor and lessee and created a superceding landlord-tenant relationship between the purchaser and lessee.\(^11\) The court stated that the “obligations arising from the terms of the lease passed with the sale to [the purchaser].”\(^12\) The decision of the trial court was then reversed and remanded with direction to dismiss the complaint.\(^13\)

The question of whether plaintiffs [lessees] have been unlawfully interfered with in respect to their rights or whether they have abandoned their rights is a matter for adjustment between the plaintiffs and their last succeeding landlord, the Kiekhaefer Corporation [purchaser]. These matters in difference could not be determined within the limits of an action by plaintiffs against Herbert A. Nieman Co. [lessor], the defendant as here, and cannot be the basis of the cause of action alleged in the complaint. It follows, therefore, that the real issue has not been tried, and that the judgment must be reversed, there being no cause of action shown to exist against the defendant [lesser].\(^14\)

\(^7\) 265 Wis. at — , 62 N.W.2d at 9-10.
\(^8\) Id. at — , 62 N.W.2d at 9.
\(^9\) Id. at — , 62 N.W.2d at 10.
\(^10\) Id. at — , 62 N.W.2d at 10.
\(^11\) Id. at — , 62 N.W.2d at 10. The trial court concluded that the lessor had conveyed the lessee’s property since the lease was unrecorded. Id. at — , 62 N.W.2d at 10. This theory of recovery will be labeled as a wrongful conveyance and will be discussed subsequently in this comment. See note 116 and accompanying text infra.
\(^12\) 265 Wis. at — , 62 N.W.2d at 10.
\(^13\) Id. at — , 62 N.W.2d at 10.
\(^14\) Id. at — , 62 N.W.2d at 10 (emphasis added).
The eviction of the lessee by the purchaser of the reversion was also considered in *Hankins v. Smith*. The lessee brought an action against the lessor seeking damages sustained as a result of a fifteen-month eviction by the purchaser who was not a party to the litigation. The court stated that the lessor could not be liable unless he had, in some manner, caused the eviction: “It must be conceded that, unless the defendant, Dean T. Smith [lessor] sanctioned or in some manner caused the grantee, Roth, to effect a ‘constructive eviction’ of the plaintiff [lessee], Smith could not be held responsible for an act with which he had no connection.”

The plaintiff's action was based upon an implied covenant of quiet enjoyment but as the plaintiff's declaration contained no allegation that the lessor instigated the purchaser's breach of this “covenant”, the lessor's demurrer was properly sustained by the trial court.

However, there is no direct allegation in the declaration, nor can it be gathered from the declaration as a whole, except possibly by inference, that the acts complained of were instigated and sanctioned by the lessor, and, unless it does so appear, the lessor cannot be held liable for the acts of his grantee after the lessor has parted with his title and ownership . . . .

It should be observed that the two preceding cases concerned an eviction of the lessee by the purchaser of the reversion. In each case, the lessee sought to hold the lessor liable for the purchaser's breach but this attempt to impose liability upon the lessor under the circumstances was rejected. This result is consistent with results found in other cases having similar factual patterns.

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87. 103 Fla. 892, 138 So. 494 (1931).
88. *Id.* at —, 138 So. at 495.
89. *Id.* at —, 138 So. at 495.
90. *Id.* at —, 138 So. at 496.
91. *Id.* at —, 138 So. at 496.
92. See *Baker v. Simonds*, 79 Nev. 434, 386 P.2d 86 (1963); *Linton v. Hart*, 25 Pa. 193 (1855). *Linton* dealt with a constructive eviction of the lessee by the purchaser of a portion of the reversion. The lessor brought an action in order to recover rents due and the lessee claimed that since he had been evicted from the premises the rent was estopped. The court concluded that the lessor was entitled to the rents due and was not liable to the lessee for the breach of the purchaser since:

In such a case there is no reason for visiting the reversioner [lessor] with the consequences of a trespass committed by the corporation [purchaser]. It had no right to take the estate of the tenant without compensation given or secured. The sale of the reversioner's interest in the part so taken conferred no such right, and the tenant has an ample remedy for the injury without depriving his landlord of the just portion of rent due for the premises enjoyed under the lease.

*Id.* at 196.

In *Baker* the lessee alleged that the purchaser committed acts constituting
and with the relationships illustrated in Figure III with respect to obligations.

**THE NEBRASKA RULE: SEMPEK V. MINARIK**

The final section of this comment will now focus upon how the Nebraska Supreme Court has approached the enforcement of the implied covenant of quiet enjoyment with regard to the lessor's liability for interference with the lessee's use of the premises. The rule established in *Sempek v. Minarik* is not consistent with the scheme of enforcement outlined in the foregoing material. This raises serious questions which may indicate some weaknesses in the court's approach.

In *Sempek* the lessors, Sempek and Walsh, had entered into oral year-to-year leases with the lessor, Minarik, for the recreational use of a tract of land along the Platte River. The annual rent due from each lessee was two hundred dollars and both lessees had constructed cabins upon the premises. Sempek's lease term ended on May 29 of each year while Walsh's lease term ended on March 22 of each year. The lessor, on October 5, 1972, accepted a purchase agreement on the property and agreed to construct a 1978]
vey the premises subject to the outstanding leasehold interests. 98 Both lessees were aware of a possible sale of the property but were assured by the lessor that their interests would be protected. 99 Because of the confusion as to whether or not a sale was pending and who the new owner was if a sale had been completed, the lessees did not pay the rents due in 1973. 100

On December 29, 1972, the lessor, by warranty deed, conveyed the property "free of encumbrances except easements and restrictions of record," 101 but, unlike the purchase agreement, no mention was made of the lessees' interests. The lessor failed to serve formal notice on the lessees as to termination of their leaseholds, and, in the spring of 1973, he gave the lessees additional assurances that their interests would somehow be protected. 102 On May 29, 1973, the lessor executed a quitclaim deed on the same property to the purchaser, and on May 31, 1973, both the warranty deed and quitclaim deed were recorded. 103

During May of 1973 the lessees were refused entry upon the premises and further use of the property was denied to the lessees by employees or representatives of the purchaser. 104 The lessees

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98. Id. at 535, 264 N.W.2d at 429.
99. Id. at 534, 264 N.W.2d at 428.
100. Id. at 535, 264 N.W.2d at 429.
101. Id. at 536-37, 264 N.W.2d at 429.
102. Id. at 534, 264 N.W.2d at 429. The court implied that the lessees had some knowledge of a sale of the reversion. See note 100 and accompanying text infra.
103. 200 Neb. at 535, 264 N.W.2d at 428-29. Although the court did not explain why the quit claim deed was executed on May 29, 1973, the following quote from the appellant's brief provides some explanation.

On December 29, 1972, a warranty deed (concerning the land involved herein) conveying the land from defendant [lessor] to purchaser Truman Clare as trustee for Matthew L. Flinn was signed, witnessed and delivered to the purchaser. Purchaser took possession of his land immediately following the closing. Defendant [lessor] was later requested to obtain quit claim deeds from parties the purchaser felt could possibly have an interest in the land conveyed. Defendant [lessor] obtained these deeds and then executed a quit claim deed (with the same legal description as contained on the Warranty Deed of December 29, 1972) to the purchaser on May 29, 1973.

Brief for Appellant at 5, Sempek v. Minarik, 200 Neb. 532, 264 N.W.2d 426 (1978) (citations omitted). It should be noted that the lessor, at the request of the purchaser, obtained several quit claim deeds. The identity of the parties executing these quit claim deeds was not disclosed.

104. 200 Neb. at 535, 264 N.W.2d at 428. "Plaintiffs [lessors] were barred, by the purchaser Flinn, from entering the land upon which their cabins were located on May 30, 1973. At no time prior to May 30, 1973 were plaintiffs deprived of the use of
then initiated this action in the Municipal Court of the City of Omaha seeking to recover damages suffered as a result of a breach of the implied covenant of quiet enjoyment. The municipal court found for the lessor and dismissed the lessees' petition. This decision was reversed by the Douglas County District Court after a trial de novo on the record and a judgment for $4,999 was entered in favor of the lessees. The Supreme Court of Nebraska affirmed the decision of the district court in accordance with the following specific holdings:

1) A covenant of quiet enjoyment is implied in every lease and parol leases are no exception to this rule.

2) A year-to-year lease requires six months notice in order to terminate the tenancy and the lessor failed to give any such notice to the lessees. Therefore, the lessees possessed oral leases which were in effect until their respective termination dates in 1974.

3) The "implied covenant of quiet enjoyment" was breached by the lessees' "actual eviction from the premises through the actions of purchasers claiming through the defendants Minarik [lessor]."

4) The lessors "could not evade their contractual obligations as lessors by selling and conveying the property to a third person" and were, therefore, liable to the lessees for the breach of the implied covenant of quiet enjoyment.

This decision clearly holds that a lessor is contractually liable for the breach of the obligation imposed upon him not to hinder or interfere with the lessee's use of the leased premises. This lia-

their leased premises by the defendant [lessor]." Brief for Appellant at 6, Sempek v. Minarik, 200 Neb. 532, 264 N.W.2d 426 (1978) (citations omitted).

105. 200 Neb. at 533, 264 N.W.2d at 428.
106. Id.
107. Id.
108. Id. at 537, 264 N.W.2d at 429.
109. Id. at 534, 264 N.W.2d at 428.
110. Id. It is interesting to note that the lessor could not have given the required six months notice to lessee Walsh even if he had notified Walsh on the day the purchase offer was accepted because Walsh's lease term ended on March 22, 1973. See note 97 supra. The required notice to Walsh would have had to be given by September 22, 1972. As the purchase contract was accepted on October 5, 1972, it would not be possible to terminate the Walsh leasehold on March 22, 1973. At the time of conveyance, December 29, 1972, it was no longer possible to terminate either Sempek's or Walsh's leasehold during 1973.
111. 200 Neb. at 534, 264 N.W.2d at 428.
112. Id. at 537, 264 N.W.2d at 430.
113. Id. (emphasis added).
114. Of the three possible phases of the covenant of quiet enjoyment, discussed in text following note 39 supra, the eviction in Sempek could not have breached the promise against interference by paramount title because of the nature of that prom-
bility was imposed upon the lessor for acts of the purchaser after a conveyance of the reversion despite the fact that the privity of estate no longer existed. Because the liability was imposed upon the lessor by virtue of contract and was extended to encompass the independent acts of third parties, it appears that the Nebraska court has converted this obligation into an implied promise as earlier defined within this comment.

Although the court stated that the warranty deed, executed by the lessor in December, conveyed the premises free of encumbrances except those of record and concluded that the lessor thereby “represented to the new owners that they could rightfully bar Walsh and Sempek [lessees] from the premises after May 29, 1973”, it does not appear that the court found that the lessor instigated or participated in the eviction of the lessees. In order to attempt to reconcile this decision with the caselaw and authorities cited within this comment, it is necessary to examine the possible effects of the warranty deed upon the liability of the lessor.

There is authority for the proposition that a conveyance of a reversion in such a manner that the leasehold is purposely destroyed may be grounds for lessor liability to the lessee.

When defendants [lessors] wrongfully conveyed the land in question to an innocent purchaser for value without notice of complainant’s [lessee’s] leasehold estate, the leasehold estate in the land was necessarily destroyed. The absolute and unrestricted title of such purchaser rendered the further existence of a leasehold estate impossible. The conveyance to the innocent purchaser was, in effect, a conveyance of the term and the reversion. Complainant thereby became entitled to recover from defendant in an action at law, based upon the implied contract of defendant to pay the complainant the money had and received for his use, such amount as was received by defendant for the term. Or complainant could have maintained against defendant an action for breach of the engagements in the lease, or for damages based upon the tort consisting of the wrongful destruction of complainant’s term, and thus recovered the value of the term.

See note 28 supra. Since the lessees had been in possession of the leaseholds and the eviction occurred during the term of the lease, neither was the implied promise to deliver possession to the lessee under the English view involved in Sempek. As the action was based on a breach of the “covenant” of quiet enjoyment and the court found that the lessees were unlawfully evicted, one must conclude that the breach involved the lessor’s obligation not to hinder or interfere with the lessee’s possession during the term of the lease.

115. 200 Neb. at 537, 264 N.W.2d at 429.
116. Williams v. Young, 78 N.J. Eq. 582, 81 A, 1118, 1119 (1920) (emphasis added).
It should be noted that an essential element of this action is that the purchaser be without notice of the lessee's interests.

The Nebraska court in *Sempek* did not specifically address the issue as to whether or not the lessees' interests were enforceable as against the purchaser and, therefore, the status of the purchaser as a bona fide purchaser for value in good faith and without notice was not clearly stated. However, this issue appears to have been resolved by implication when one examines the findings of the court. First, the lessees' interests were held to be effective beyond the date of the conveyance.\(^{117}\) Second, the eviction of the lessees was described as wrongful\(^ {118}\) and such eviction was by the purchaser after the conveyance of the reversion.\(^ {119}\) These findings clearly indicate that the purchaser took subject to the lease despite the implications of the warranty deed. Facts stated within the opinion and found within the record support the conclusion that the purchaser took with notice of the lessees' interests\(^ {120}\) and that the lessees' interest, by virtue of Nebraska case law, would have been enforceable as against the purchaser.\(^ {121}\) This conclusion would eliminate the possibility that the lessor in the *Sempek* case may have been liable to the lessees for the wrongful conveyance of both the reversion and leasehold interests.

If the lessor had personally interfered with the lessees' possession of the premises after the conveyance of the reversion, it would seem that the lessor could have been found liable under existing tort theory.\(^ {122}\) However, the Nebraska court did not even imply that the lessor participated in the eviction of the lessees. The court did, however, state that the lessor, by virtue of the warranty deed, represented to the purchaser that he could bar the lessees from the premises after May 29, 1973.\(^ {123}\) The fact that the lessor conveyed the premises by warranty deed and failed to exempt the

\(^{117}\) 200 Neb. at 534, 264 N.W.2d at 428.

\(^{118}\) The cause of action was based upon wrongful eviction. *Id.* at 533, 264 N.W.2d at 428. Damages were awarded in a manner stated by the court to apply to wrongful eviction. *Id.* at 538, 264 N.W.2d at 430.

\(^{119}\) *Id.* at 537, 264 N.W.2d at 430.

\(^{120}\) The purchase contract was made subject to the leases. *Id.* at 535, 264 N.W.2d at 429. The lessee's use of the cabins and premises was open and apparent. *Id.* at 534, 264 N.W.2d at 428. See note 102 *supra*.


\(^{122}\) See text following note 34 *supra*.

\(^{123}\) 200 Neb. at 537, 264 N.W.2d at 429.
interests of the lessees might constitute grounds for an action between the purchaser and lessor. However, to conclude that a conveyance of a reversion without mentioning the lessee’s interest is, by itself, a source of lessor liability to the lessee is a conclusion contrary to existing precedent. The general conclusion under these circumstances is that such a conveyance is not a wrong to the lessee if the purchaser had notice of the lessee’s interest. An examination of this conclusion seems to indicate that lessor liability is unnecessary since the law will protect the interests of the lessee as against the purchaser with notice and that the real cause of action lies between the lessor and the purchaser.

In any event, the speculation as to whether or not the lessor, in some fashion, instigated the eviction of the lessees is superfluous as the court did not base its decision upon these grounds. Instead, the court stated that the implied covenant of quiet enjoyment was breached by the purchaser and that the lessor was contractually liable despite the conveyance of the reversion. As the eviction was not a result of paramount title, one must assume that the court extended the concept of contractual liability to that portion of the implied covenant of quiet enjoyment which imposes an obligation on the lessor not to interfere with a lessee’s peaceful enjoyment of the premises during the term of the lease. As authority for the imposition of contractual liability upon the lessor the court relied upon an earlier Nebraska decision, Canaday v. Krueger. An examination of Canaday and the cases cited therein indicates that they may be inapplicable to the fact situation present in the Sempek case.

In Canaday the lessor was the owner of property upon which a commercial building was being constructed. On September 7, 1950, the lessor and lessee entered into a written lease whereby the lessee was to lease the building under construction and enter into possession on October 1, 1950. On October 1, 1950 the building was not yet complete and on October 3, 1950 the lessor conveyed

125. This result follows from the resolution of cases previously discussed wherein the lessor was not held liable under similar situations. See Hankin v. Smith, 103 Fla. 892, 138 So. 494 (1931), discussed in text following note 87 supra. Linton v. Hart, 25 Pa. 193 (1855) discussed in note 92 supra. See also Searle v. Roman Catholic Bishop of Springfield, 204 Mass. 493, 89 N.E. 809, 810 (1909).
126. 200 Neb. at 537, 264 N.W.2d at 430.
127. See note 114 supra.
129. 156 Neb. at 289-90, 56 N.W.2d at 125.
130. Id.
the property to the purchaser subject to the lease. The lessee was denied possession of the premises both on and after the date upon which the lease term was to begin. The lessee subsequently instituted actions against both the lessor and purchaser for damages sustained as a result of their failure to deliver possession.

In reversing and remanding the trial court's directed verdict in favor of the lessor and purchaser, the supreme court held that a lessor impliedly covenants with the lessee that the premises leased shall be open to entry by the lessee at the beginning of the term. The court further found that there was "evidence from which a jury might find that the defendant Thomas Lumber Company [lessor] and defendant Krueger [purchaser] both repudiated the lease prior to October 1, 1950, the date which the lease was to be effective." As this was the ground upon which the trial court verdict was reversed and remanded, one must speculate why the court made the following statement which was relied upon in Sempek: "The fact that a lessor has sold the land subject to the lease does not relieve him of liability for damages for failure to deliver possession."

The facts of the Canaday case support two possible reasons why the court stated that lessor liability did not cease upon conveyance of the reversion. First, the implied promise to put the lessee into possession on October 1, 1950 was breached before the conveyance of the reversion on October 3, 1950. In this event the denial of possession would constitute a chose in action which would not be affected by a conveyance of the reversion. The second possible interpretation is that the duty to place the lessee in possession of the premises was regarded as an implied promise as defined herein.

Since the Canaday court cited Obermeier as authority for this

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131. *Id.* at 292, 56 N.W.2d at 126.
132. *Id.* at 290, 56 N.W.2d at 125.
133. *Id.* at 295, 56 N.W.2d at 127.
134. *Id.* at 296, 56 N.W.2d at 128.
137. A chose in action includes "[a] right to receive or recover a debt, demand, or damages on a cause of action *ex contractu* or for a tort or omission of a duty." *Black's Law Dictionary* 305 (Rev. 4th ed. 1968).
138. See, *e.g.*, Muscatel v. Storey, 56 Wash. 2d 635, 354 P.2d 931 (1960). *Muscatel* held that a lessor's right to rents due before the conveyance of the reversion was a chose in action and was not affected by a conveyance of the reversion. The court held that the chose in action was personality and accrued to the injured party at the time of the breach. *Id.* at —, 354 P.2d at 933.
statement,\textsuperscript{139} and since the Nebraska court had previously adopted the English view as to the duty to deliver possession,\textsuperscript{140} it appears that the statement quoted from \textit{Canaday} in \textit{Sempek} evolves from the conclusion that the duty to deliver possession is an implied promise. However, the applicability of the \textit{Obermeier} holding and the need to state this conclusion in \textit{Canaday} are doubtful because the possible breach of the implied promise to deliver possession was described as occurring prior to the conveyance of the reversion in \textit{Canaday}, while it occurred subsequent to the conveyance in \textit{Obermeier}.\textsuperscript{141}

In the \textit{Sempek} decision the court cited \textit{Canaday} as authority for the conclusion that a lessor has a personal or contractual obligation to place the lessee in possession of the premises. The court then applied this conclusion to a breach of the obligation not to hinder or interfere with the lessee's possession precipitated by the acts of the purchaser after the conveyance of the reversion and during the term of the lease. The possibility that the duties breached within the \textit{Canaday} and \textit{Sempek} cases may be of a different nature or that the standards applicable to such breaches may be different was not discussed by the court. Because of this lack of clarification or discussion, one must assume that the Nebraska court has attached a contractual liability to what, in other jurisdictions, would be classified as an obligation.

The conversion of this obligation into an implied promise suggests that the \textit{Sempek} decision may have far reaching implications. For example, the obligation not to hinder or interfere with the lessee's use of the premises is described as running with the land\textsuperscript{142} and, if such a duty is deemed to be an implied promise, Figure I should illustrate the relationships existing between the parties. This raises the question whether or not the Nebraska court would recognize a suit by the lessor against the purchaser seeking to recover the damages sustained by the lessor as surety

\textsuperscript{139} \textit{Id.} It will be recalled that \textit{Obermeier} concerned an implied promise to deliver possession under the English view. \textit{See} text following note 56 \textit{supra}.

\textsuperscript{140} 156 Neb. at 296, 56 N.W.2d at 128. \textit{Obermeier} is discussed in the text following note 56 \textit{supra}. For the conclusion that Nebraska has adopted the English view, see note 37 \textit{supra}.

\textsuperscript{141} \textit{See} note 134 and accompanying text \textit{supra}. It is interesting to note that the court in \textit{Canaday} did not address the specific basis for the possible liability of the purchaser except to state that evidence existed to show that the purchaser repudiated the lease prior to October 1, 1950. \textit{As} the conveyance of the reversion occurred on October 3, 1950, one must speculate why the purchaser would be liable for repudiating the lease \textit{prior} to October 1, 1950, before the purchase of the reversion.

\textsuperscript{142} \textit{See} note 23 and accompanying text \textit{supra}.
Another issue which arises if Figure I illustrates the applicable scheme of liabilities is whether the lessees, having obtained a judgment against the lessor, would still have a cause of action against the purchaser. If the lessor's liability under Figure I is that of a surety, it would follow that after a judgment against the lessor, the cause of action against the purchaser should belong to the lessor rather than to the lessees. In the *Sempek* case the lessor offered in evidence a petition by the lessees against the purchaser. This petition had been filed in Douglas County District Court and was acknowledged by the court to be pending at the time of the *Sempek* decision. Except for acknowledgment of the pending action, the court did not address, in any manner, the implications of that action upon the liabilities of the lessor.

The legal relationships among the lessor, purchaser, and lessees was further complicated by the court when it stated: "It is evident that the plaintiffs [lessees] may choose to pursue their legal remedies against the parties with whom they dealt, leaving the matter of filing a third party action against the Minariks [lessor] if they so desire." This statement followed the court's holding that the lessors could not evade their contractual obligations as lessees by selling and conveying the property to a third party. Thus, the court apparently was indicating that the lessees could have sued the purchasers who in turn could have filed a third-party action against the lessor. One must speculate as to the possible grounds for an action by the purchaser against the lessor. If the purchaser was able to implead the lessor for indemnification arising from the lessees' suit for wrongful eviction, the relationship between the lessor and purchaser would be such that the lessor is the purchaser's insurer rather than surety. If the purchaser sustained damages as a result of taking the reversion subject to the lessee's interest, he would have a possible action against the lessor.

143. *See* Figure I *supra*. *See also* text accompanying note 18 *supra*.

144. "Although payment by the surety discharges the debt as to the creditor, such is not its effect between the surety and the principal. Whatever rights and priorities possessed by the creditor pass to the surety." L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 210 (1950). *See, e.g.*, Beck v. McLane, 129 App. Div. 745, 114 N.Y.S. 44 (1909) (because tenant obtained judgment against original lessor upon a contractual agreement which was breached by actions of the purchaser of the reversion, the lessor was subrogated to the tenant's right of action against the purchaser).

145. 200 Neb. at 536, 264 N.W.2d at 429.

146. *Id.* As of August 15, 1978, the litigation between the lessees and the purchasers was still on the active case docket. It will be interesting to see of the purchaser is found to be liable and the grounds upon which such liability may rest.

147. *Id.* at 537-38, 264 N.W.2d at 430.
by virtue of the warranty deed. However, to allow the lessee to bring this action against the purchaser and then to allow the purchaser to implead the lessor because of the provisions within the warranty deed would constitute an unusual extension of the warranty deed concept.

After examining these relationships and ramifications resulting from the determination that the lessor is contractually liable for the obligation not to hinder or interfere with the lessee's use of the premises, it may be questioned whether or not the proper parties or issues were, in fact, before the court. The purchaser, for example, was not before the court but his acts of eviction were found to be wrongful. The finding that the eviction was wrongful strongly implies that the purchaser's property rights were adjudicated. This follows because the eviction would be wrongful only if the lessee's interests were enforceable against the purchaser. The possible liability between the purchaser and lessee as well as that between the purchaser and lessor were not resolved in any way. Perhaps the Wisconsin court in *Ubbink v. Herbert A. Nieman Co.* chose the wiser course when it concluded that differences such as those present within the *Sempek* case could not be determined within the limits of an action by the lessees against the lessors.

**CONCLUSION**

The Nebraska court determined in *Sempek* that a lessor is contractually liable for that portion of the "implied covenant of quiet enjoyment" which insures that the lessor will not hinder or interfere with the lessee's use of the premises. Because this duty was held to be contractual, the lessor's liability was found to continue after the privity of estate had been destroyed by the conveyance of the reversion. In addition, the liability of the lessor was deemed to include, within its scope, responsibility for the independent acts of the purchaser of the reversion. The conversion of this obligation to an implied promise, as defined within this comment, has changed this aspect of the "implied covenant of quiet enjoyment" into a virtual lessor insurance program that heretofore could have

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149. Subsequent takers after the warranty deed have been allowed to rely upon the warranty. See note 124 supra. However, research did not reveal a case permitting a lessee to rely upon a warranty in a conveyance of the reversion after the granting of the leasehold.
150. See note 118 supra.
151. 265 Wis. 442, —, 62 N.W.2d 8, 10 (1953). For a discussion of this case, see text following note 77 supra.
been established only by a broadly written express promise. Since the authorities cited by the Nebraska court in the *Sempek* decision do not deal with breaches of a similar nature but rather with express or implied promises, the applicability of contractual liability to this obligation is a view apparently held only by the Nebraska court.

If one accepts *Sempek* as accurately stating the law as it exists in Nebraska, a lessor conveying a reversion becomes, in essence, an insurer protecting the lessee from the acts of the purchaser. Since the law protects a lessee against a purchaser taking with notice and against strangers to the title, the fact that the lessor now stands as an insurer places a Nebraska tenant in an enviable state of protection. This extension of lessor liability as a result of an "implied covenant" should be of concern to any lessor contemplating the conveyance of the reversionary interest. Future Nebraska decisions should indicate whether the lessor is truly contractually liable for the lessee's peaceable possession of the premises both before and after a conveyance of the reversion or if the *Sempek* decision was either too simply or too broadly stated.

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