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COMMENTS

SOME PROBLEMS INVOLVING THE CALIFORNIA STATUTES ON LANDLORD AND TENANT

By DAVID M. GLICKMAN

Several areas of uncertainty become apparent upon even a casual reading of the California statutes dealing with the landlord and tenant relationship. The scope of this comment is limited to a discussion of some of these problems which arise in connection with the statutory provisions for the creation and termination of tenancies of uncertain duration. A study of the related provisions for unlawful detainer proceedings would be very useful but is not included at this time.

A difficulty encountered at the outset is the fact that the various pertinent sections have not been gathered together in one continuously numbered sequence. The arrangement of the sections adopted herein is one possibility for the organization of the present statutes: other workable plans of organization are no doubt possible, but any comprehensive outline which would bring all the related provisions together would be preferable to the present scattering and utter lack of system.

A. Term of Lease When No Limit Is Specified

The tenancy from year to year and later the other forms of the periodic tenancy were a development of the common-law tenancy at will,¹ and became clearly distinguishable from it. The tenancy at will was terminable by either party at any time without formal notice; it terminated upon the death of either party, or by a conveyance by the lessor or attempted assignment by the lessee. A tenant at will was entitled to emblements and was not liable for permissive waste, because of the uncertain duration of his term.² In contrast, the periodic tenancy could only be terminated upon suitable notice. It did not automatically terminate upon the death of either party nor by a conveyance by the lessor. Further, the periodic tenancy was like a term of years in that the tenant was liable for permissive waste, his right to emblements was limited, and his interest was transferable and insurable.³ The distinction between these two types of tenancies as it existed at common law is here emphasized because it has not always been observed under California law.

² WALSH, LAW OF REAL PROPERTY 145 (1st ed., 1947).

¹ AMERICAN LAW OF PROPERTY, § 3.28 (1st ed., 1952); 2 POWELL, REAL PROPERTY, § 257 (1st ed., 1950); 1 TIFFANY, LANDLORD AND TENANT, § 13b (1st ed., 1912); 2 WALSH, LAW OF REAL PROPERTY, §§ 152, 154 (1st ed., 1947).

³ AMERICAN LAW OF PROPERTY, § 3.23 (1st ed., 1952); 2 POWELL, REAL PROPERTY, § 255 (1st ed., 1950); 1 TIFFANY, LANDLORD AND TENANT, §§ 14a, 14d (1st ed., 1912); 2 WALSH, LAW OF REAL PROPERTY, § 148 (1st ed., 1947).

In *Tracy v. Donovan*⁴ the court said (with a reference to Civil Code, section 761)⁵, “. . . the defendant became a tenant from year to year. . . . We are satisfied that it is a form of tenancy at will.” Two later cases support that proposition by inference.⁶ The court mentioned this problem in *Palmer v. Zeiss*,⁷ but failed to clear it up, saying only that a tenancy at will “perhaps” includes a month-to-month tenancy. Although Civil Code, section 761, does not provide specifically for periodic tenancies in its classification of estates according to their duration, such forms of holding are recognized elsewhere in the California statutes; for example, Civil Code, section 1944, refers to a monthly hiring, Civil Code, section 1946, provides for tenancies from month to month, and Civil Code, section 827, begins with these words: “In all leases of lands or tenements, or of any interest therein, from week to week, month to month, or other period less than a month, . . .” Therefore, even if periodic tenancies are included in the classification “estates at will” for the purposes of Civil Code, section 761, it seems fair to conclude that the two types of tenancies are recognized as distinct in California for most purposes, since they are treated separately under other California statutes discussed herein.

At common law a tenancy at will arose by inference of law in many situations where no valid limitation of the duration of the letting was stated; for example, under a general letting, oral or written, in which the term was not fixed;⁸ or where a tenant went into possession under a lease which was invalid for any reason;⁹ or where an entry was made during negotiations for a lease which proved unsuccessful;¹⁰ or where a prospective purchaser of property went into possession before title was conveyed;¹¹ or where a purchaser of property went into possession under a void contract of sale.¹² However, a holding which began as a tenancy at will could become a periodic tenancy if the parties reserved periodic rents. The ultimate determining factor was the intention of the parties and although reservation of periodic

⁴37 Cal.App. 350, 351, 174 Pac. 113 (1918); see, also, *Camp v. Match*, 87 Cal.App.2d 660, 197 P.2d 345 (1948).

⁵§ 761. Kinds of Estates.—Estates in real property, in respect to the duration of their enjoyment, are either:

1. Estates of inheritance or perpetual estates;
2. Estates for life;
3. Estates for years; or,
4. Estates at Will.”

⁶*Orly v. Russell*, 53 Cal.App. 660, 200 Pac. 732 (1921); *Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 Pac. 455 (1920).

⁷65 Cal.App.2d Supp. 859, 151 P.2d 323 (1944), citing *Orly v. Russell*, *supra*, n. 6.

⁸2 WALSH, LAW OF REAL PROPERTY 172 (1st ed., 1947).

⁹1 AMERICAN LAW OF PROPERTY, § 3.27 (1st ed., 1952); 2 WALSH, LAW OF REAL PROPERTY 173 (1st ed., 1947).

¹⁰1 AMERICAN LAW OF PROPERTY, § 3.29, n. 6 (1st ed., 1952); 2 POWELL, REAL PROPERTY, § 256, n. 69 (1st ed., 1947).

¹¹2 POWELL, REAL PROPERTY, § 256, n. 70 (1st ed., 1947).

¹²2 WALSH, LAW OF REAL PROPERTY 172 (1st ed., 1947).

rent was persuasive evidence of an intention to create a periodic tenancy, other circumstances could overcome that evidence.¹³ It should be noted that the period adopted for the estimation of the rent was more significant than the intervals at which the rent was actually to be paid.¹⁴ If a yearly rent was to be paid in quarterly or monthly installments, a tenancy from year to year was presumptively created; or if a monthly rent was originally agreed upon but was paid irregularly, the creation of a month to month tenancy was presumed to have been intended. Of course, it was competent for the parties to provide expressly for either a periodic tenancy or a tenancy at will and in that way avoid judicial conjecture about their intentions.

In California the problem of the duration of a term when no limit is fixed by the parties is dealt with in two code sections. Civil Code, section 1944, applies only to the hiring of lodgings and dwelling houses for an unspecified term:

"Section 1944. Lodging and Dwelling Leases Presumed for Rental Period.—A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly."

There are almost no reported cases construing this section. One reason for this may be the small monetary value of the rights involved in this type of hiring. That suggestion was made by Professor Powell in his work on real property:

"This type of estate is tremendously important sociologically in that occupancy thereunder conditions the home life of a very substantial fraction of the population. On the other hand, the financial smallness of the involved rights results in a great dearth of reported decisions from the courts concerning them."¹⁵

The first sentence of Civil Code, section 1944, appears to create a presumption of a fixed term, that is, a term of years equal in length to the period adopted by the parties for the estimation of rent. The last sentence of the section creates a presumption of a "monthly" hiring in the absence of any agreement respecting the length of time or the rent. The word "monthly" probably means a tenancy from month to month, although that is not certain, and the use of that terminology has been criticized as ambiguous.¹⁶

Civil Code, section 1943, applies to the hiring for an unspecified term of realty other than lodgings and dwelling houses:

"Section 1943. Land Leases Presumed Annual.—A hiring of real prop-

¹³1 AMERICAN LAW OF PROPERTY, § 3.25, n. 5 (1st ed., 1952); 1 TIFFANY, LANDLORD AND TENANT, § 14b(2) (1st ed., 1912).

¹⁴1 TIFFANY, LANDLORD AND TENANT 129, n. 482 (1st ed., 1912).

¹⁵2 POWELL, REAL PROPERTY 374 (1st ed., 1950).

¹⁶1 TIFFANY, LANDLORD AND TENANT 119 (1st ed., 1912).

erty, other than lodgings and dwelling-houses in places where there is no usage on the subject, is presumed to be for one year from its commencement unless otherwise expressed in the hiring."

This section creates a presumption of a fixed term of one year, and has been applied where the subject of the hiring was a restaurant,¹⁷ farm land,¹⁸ a packing house,¹⁹ a stall in a market,²⁰ and a hotel.²¹ The presumptions raised by Civil Code, sections 1943 and 1944, are rebuttable.²²

Various California decisions have dealt with terms of indefinite duration without any reference whatsoever to these apparently applicable statutes. For example, *Carteri v. Roberts*,²³ is a leading case which holds that one who takes possession of premises with permission of the owner during unsuccessful negotiations for a lease is a tenant at will. There are dicta in the opinion to the effect that a tenant in possession under an invalid lease is a tenant at will,²⁴ and that a vendee in possession under a void deed is also.²⁵ An early case, *Hall v. Wallace*,²⁶ held that a prospective purchaser in possession under an oral contract of sale is a tenant at will. On the authority of the *Hall* case, it was held as a general proposition in *Turney v. Collins*²⁷ that a vendee in possession before title is conveyed is a tenant at will; this is probably in conflict with the common law,²⁸ however (since a vendee claims as owner, not as tenant) and is nowhere sanctioned by the California statutes.²⁹ Where a writing fixes a monthly rental but no certain term of hiring, a tenancy from month to month has been held to have arisen.³⁰ None of these opinions discuss statutory presumptions but seem rather to be in accord with common law principles (with the exception of the *Turney* case).

There is no code provision for the creation of a periodic tenancy but in general the situations which gave rise to a periodic tenancy at common law

¹⁷*Aaker v. Smith*, 87 Cal.App.2d 36, 196 P.2d 150 (1948).

¹⁸*Pierce v. Walter*, 129 Cal.App. 228, 18 P.2d 345 (1933); *Gabel v. Page*, 6 Cal.App. 618, 92 Pac. 749 (1907).

¹⁹*Randolph Marketing Co. v. Stevenson*, 65 Cal.App. 1, 222 Pac. 849 (1923).

²⁰*Herman v. Rohan*, 37 Cal.App. 378, 174 Pac. 379 (1918).

²¹*Brill v. Carsley*, 2 Cal.App. 331, 84 Pac. 57 (1905).

²²Neither presumption is included in Cal. Code Civ. Proc., § 1962, which is a list of the only presumptions deemed conclusive or indisputable under the California codes.

²³140 Cal. 164, 73 Pac. 818 (1903); followed in *Linnard v. Sonnenschein*, 94 Cal.App. 729, 272 Pac. 315 (1928).

²⁴See, also, dictum in *Pacific Coast Joint Stock Land Bank of San Francisco v. Jones*, 14 Cal.2d 8, 92 P.2d 390 (1939). Cf. *Phelan v. Anderson*, 118 Cal. 504, 50 Pac. 685 (1897).

²⁵See, also, *Hayden v. Collins*, 1 Cal.App. 259, 81 Pac. 1120 (1905).

²⁶88 Cal. 434, 26 Pac. 360 (1891).

²⁷48 Cal.App.2d 381, 119 P.2d 954 (1941).

²⁸1 AMERICAN LAW OF PROPERTY, § 3.9, n. 3 (1st ed., 1952).

²⁹This holding may be the result of confusing the situation of a vendee in possession under a valid contract of sale with that of a vendee in possession after rescission of the contract to sell. See *Simpson v. Applegate*, 75 Cal. 342, 17 Pac. 237 (1888); *Frisbie v. Price*, 27 Cal. 253 (1865).

³⁰*Watkins v. McCartney*, 57 Cal.App. 643, 207 Pac. 909 (1922); *Flournoy v. Everett*, 51 Cal.App. 406, 196 Pac. 916 (1921).

do so under the California decisions. In *Linnard v. Sonnenschein*,⁸¹ the Court said:

“. . . the holding is at will, which by the acceptance of rent may become a tenancy from month to month or from year to year. If the rent is paid monthly, the tenancy becomes one of month to month, or if it be agricultural land and the rent is paid annually, the tenancy is from year to year.”

B. The Effect of Holding Over

It was well-settled at common law that a landlord had the option of treating a tenant holding over after the expiration of his lease either as a trespasser, or as a tenant for a new period. The tenancy which arose upon the landlord electing to treat the party holding over as a tenant was generally considered to be a one year term; and this resulted though the holding over was slight, and in spite of any contrary desire on the part of the tenant.⁸² Obviously this rule worked a hardship on tenants in many instances and there has been a tendency by the courts to find ways of mitigating its harshness.⁸³

Only one California code section, Code of Civil Procedure, section 1161(2), applies to the case of a tenant holding over without an expression of acceptance or non-acceptance by the landlord, and this section applies only to a hiring of agricultural lands:

“Section 1161(2). . . In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord or successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.”

This section works a rather radical change in the common law since it places a burden on the landlord to speak within 60 days or be bound for another year, whereas at common law the tenant was bound for another year by holding over a day or two. It was held in *Pierce v. Walter*⁸⁴ that the landlord's demand for possession must be in writing; but the opinion does not mention *Swithenbank v. Wood*⁸⁵ in which the Court upheld the validity of acts and words which constituted notice without a writing. It is settled by the decisions that the presumption raised by this section is rebuttable.⁸⁶ There

⁸²94 Cal.App. 729, 735, 272 Pac. 315, 318 (1928).

⁸¹1 AMERICAN LAW OF PROPERTY, § 3.33 (1st ed., 1952); 2 WALSH, LAW OF REAL PROPERTY, § 149 (1st ed., 1947).

⁸³1 AMERICAN LAW OF PROPERTY, § 3.34 (1st ed., 1952).

⁸⁴129 Cal.App. 228, 18 P.2d 345 (1933).

⁸⁵99 Cal.App. 341, 278 Pac. 496 (1929).

⁸⁶Cowell v. Snyder, 171 Cal. 291, 152 Pac. 920 (1915), citing *Ambrose v. Hyde*, 145 Cal. 555, 79 Pac. 64 (1904); followed in *Swithenbank v. Wood*, *supra*, n. 35.

would seem to be nothing in the section to prevent the landlord before expiration of the 60 days from exercising either alternative of the option he had at common law; that is, of treating the tenant holding over as a trespasser or as his tenant for another period. Though the rule of this section was unknown to the common law, it is by no means unique. Substantially similar provisions regarding agricultural lands are in effect in several states³⁷ and Kentucky has even extended its application to leases in general.³⁸

Often a tenant will hold over after expiration of his lease and tender rent payments for the additional periods which are accepted by the landlord. This situation is covered by Civil Code section 1945:

"Section 1945. Implied Renewal of Lease.—If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly nor in any case one year."

The phraseology of this section might lead one to believe that the term resulting from the holding over would be a fixed term, that is, a term of years for one month, when the rent is payable monthly.³⁹ The opinion of the court in *Kaye v. M²Divani*⁴⁰ suggests that view. Speaking of a holding over with the landlord's consent the Court said:

"In any event, in the absence of evidence of a distinct agreement, it would by law be a renewal of the tenancy for a period of one month, since the rental under the written lease was paid in monthly payments. Civ. Code, § 1945."

The following language from *Hull v. Laugharn*⁴¹ seems to support the same view: "The tenancy for years resulting from a holding over by consent of the landlord rests upon implication only." But there is ample California authority to support the interpretation that a tenancy from month to month is presumptively created by this section.⁴²

There is some doubt as to whether the tenancy thus created is a new one or a continuation of the old. Before enactment of Civil Code section 1945 in 1872, it was held in *Blumenberg v. Myers*⁴³ that the circumstance of a landlord accepting rent from a holdover tenant created a new tenancy subject to the terms and conditions of the old lease. The first case affecting this problem which was decided under Civil Code, section 1945, was *Woods v.*

³⁷Mont. Rev. Codes, § 9289 (1939); Nev. Comp. Laws, § 9136 (1929); Utah Code Ann., § 104-60-4 (1949); Wash. Rev. Stat., § 813 (1940).

³⁸Ky. Rev. Stat., § 383.160(1), (2) (1949). See, also, La. Civ. Code, § 2689 (Dart, 1932).

³⁹2 POWELL, REAL PROPERTY 380, n. 37 (1st ed., 1950).

⁴⁰6 Cal.App.2d 132, 134, 44 P.2d 371, 372 (1935).

⁴¹3 Cal.App.2d 310, 314, 39 P.2d 478, 480 (1934).

⁴²*Renner v. Huntington-Hawthorn Oil and Gas Co.*, — Cal. —, 244 P.2d 895 (1952); *Earle v. Kelly*, 21 Cal.App. 480, 132 Pac. 262 (1913); *Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422 (1899).

⁴³32 Cal. 93 (1867).

*Bank of Haywards*⁴⁴ in which the Court clearly states that the tenancy arising under Civil Code, section 1945, was not a new tenancy. The Court makes no reference to *Blumenberg v. Myers*. *Earle v. Kelly*⁴⁵ was a case involving a fact situation similar to that of *Woods v. Bank of Haywards* and without mentioning the *Woods* case the Court reached the opposite result, holding that a new tenancy was created under Civil Code, section 1945. Two later cases have some bearing on the question, *Kaye v. M'Divani*⁴⁶ treating the tenancy arising under Civil Code, section 1945, as a new tenancy, and *Knox v. Wolfe*⁴⁷ treating it as a continuation of the old tenancy; but the Court in the *Knox* case probably based their determination of this point on the fact that the lease gave the lessee an option to renew without executing a new lease. The majority view elsewhere seems to be that a holdover tenancy is a new tenancy. ". . . although the holdover tenancy generally is subject to the same terms and conditions as the prior lease, it is clear that it is a new tenancy and not simply an extension or renewal of the first lease."⁴⁸

The presumption raised by Civil Code, section 1945, that the parties renewed the hiring on the same terms is rebuttable. In fact, according to *Brill v. Carsley*⁴⁹ conflicting presumptions under Civil Code, section 1943, and Civil Code, section 1945, arise upon a holding over with the landlord's consent where the subject of the hiring is real property other than lodgings or dwelling houses. The subject of the lease in the *Brill* case was a private hotel and the Court held that the facts reinforced the presumption arising under Civil Code, section 1943, thereby overcoming the presumption created by Civil Code, section 1945. A similar holding may be found in *Aaker v. Smith*;⁵⁰ but the Court seems to be on firmer ground in *Herman v. Rohan*,⁵¹ wherein it held that an original letting of a stall in a market for an unspecified term at a monthly rental presumptively created a one year term under Civil Code, section 1943, and that a holding over beyond the year with the landlord's approval presumptively created a month to month tenancy under Civil Code, section 1945.

C. Notice to Terminate or Change

At common law the continuance of a tenancy at will depended on the concurrence of the will of the landlord with that of the tenant. Consequently either party could terminate the tenancy without advance notice—the tenant by moving off, and the landlord by demanding possession or even by the

⁴⁴10 Cal.App. 93, 106 Pac. 730 (1909).

⁴⁵21 Cal.App. 480, 132 Pac. 262 (1913).

⁴⁶*Supra*, n. 40.

⁴⁷73 Cal.App.2d 494, 167 P.2d 3 (1946).

⁴⁸1 AMERICAN LAW OF PROPERTY 242 (1st ed., 1952).

⁴⁹*Supra*, n. 21.

⁵⁰*Supra*, n. 17.

⁵¹*Supra*, n. 20.

doing of acts inconsistent with an intent to continue the relationship (such as an entry by the landlord to cut timber).⁵² This element of terminability without advance notice did not protect the interests of either party satisfactorily and was responsible, according to one theory, for the evolution of the periodic tenancy.⁵³ It was also responsible for the enactment of statutes in many states requiring notice as a prerequisite to termination of tenancies at will, and in California this was done by Civil Code, section 789:

"Section 789. Estates at Will.—A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than thirty days, to be specified in the notice."

The wording of this section clearly requires notice to be given by the landlord, but it does not clearly require notice by the tenant. Tiffany interprets this section as impliedly authorizing a tenant at will to terminate without advance notice.⁵⁴ There are no California cases which touch upon this problem, and therefore there is no solution to it at present.

It should be remarked that notice given under this section may expire at any time, and its expiration need not coincide with the expiration of an interval between rent payments—a requirement which existed at common law.

Since the enactment of Civil Code, section 789, in 1872, it has been held that a tenancy at will is terminated by the death of the lessor,⁵⁵ by the death of the lessee,⁵⁶ and by an attempt by the lessee to assign his interest.⁵⁷ Whether or not the parties may expressly provide for a tenancy at will terminable without advance notice as at common law, does not seem to have been passed on by the California courts. There is a dictum in *Nye v. Dotta*⁵⁸ to the effect that if a lessor has the right to terminate without notice under a lease, that a tenancy at will is created which necessitates 30 days' notice under Civil Code, section 789, for its termination. Also there are cases (*Turney v. Collins*,⁵⁹ for example) which emphasize that by the terms of Civil Code, section 789, a tenancy at will, however created, may be terminated by 30 days' notice; but there is no conclusive holding in California on this point.

As originally enacted Civil Code, section 789, provided for a notice

⁵²*Blum v. Robertson*, 24 Cal. 127 (1864), has a statement of the common law to the effect that acts of ownership by the lessor inconsistent with a tenancy at will terminate such tenancy.

⁵³1 AMERICAN LAW OF PROPERTY 222 (1st ed., 1952).

⁵⁴1 TIFFANY, LANDLORD AND TENANT 1423. "Some of the statutes are so phrased as to require a notice to be given only by the landlord, thus by implication authorizing the tenant to terminate the tenancy immediately, without formal notice, as at common law, . . ." (citing Cal. Civ. Code, § 789).

⁵⁵*Joy v. McKay*, 70 Cal. 445, 11 Pac. 763 (1886).

⁵⁶*Dugand v. Magnus*, 107 Cal.App. 243, 290 Pac. 309 (1930).

⁵⁷*McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879 (1887).

⁵⁸— Cal. —, 245 P.2d 529 (1952).

⁵⁹19 Cal.2d 162, 119 P.2d 954 (1942).

of not less than one month. Several opinions carelessly substituted 30 days' notice in satisfaction of the statutory requirement,⁶⁰ and in 1911 Civil Code, section 789, was amended to provide for a notice of not less than 30 days instead of one month.

When periodic tenancies first were recognized by the common law, a reasonable length of time was required for notice of termination. This elastic requirement was crystallized by custom and the rule came to be that notice to terminate a year-to-year tenancy had to be given at least six months before expiration of a year period, and notice to terminate other periodic tenancies had to be given at least as long before the tenancy was to be terminated as a period of the tenancy itself. In any case the expiration of the notice to terminate had to coincide with the end of a period of the tenancy.⁶¹

Civil Code, section 1946, deals with the notice required to terminate periodic tenancies:

"Section 1946. Notice Required to Terminate Lease.—A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in section 1162 of the Code of Civil Procedure."

It may be significant that this section expressly provides for notice by either of the parties,⁶² in contrast with the wording of Civil Code, section 789, which apparently requires notice by the landlord only.

From the time of its enactment in 1872 until the year 1947 Civil Code, section 1946, provided for one month's notice.⁶³ During that time the courts often referred to 30 days' notice as the requirement for terminating a month-to-month tenancy.⁶⁴ The section was finally amended in 1947 to require 30 days' notice, thereby conforming to the requirement in effect since 1911 in Civil Code, section 789, of 30 days' notice to terminate a tenancy at will.

Before the amendment of Civil Code, section 1946, in the year 1947

⁶⁰*Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818 (1903); *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657 (1902).

⁶¹2 WALSH, LAW OF REAL PROPERTY 146 (1st ed., 1947).

⁶²*Dorn v. Oppenheim*, 45 Cal.App. 312, 187 Pac. 462 (1920).

⁶³An example of the correct application of this provision may be found in *Psihozios v. Humberg*, 80 Cal.App.2d 215, 181 P.2d 699 (1947).

⁶⁴*Greenberg v. Koppelow*, 76 Cal.App.2d 631, 173 P.2d 821 (1946); *Wagner v. Havard*, 87 Cal. App. 310, 262 Pac. 47 (1927); *Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 Pac. 455 (1920).

it was apparently necessary under this section for notice to expire at the end of a period of the tenancy, as at common law. "The effect of a notice under section 1946, Civil Code, is, as stated therein, to *prevent a renewal* of the existing lease at the end of its term (implied by law), and this means that at the end of that term the lease expires by lapse of the time provided (by implication) for its duration."⁶⁵ Italics by the Court.

Since the amendment of this section, however, 30 days' notice that expired during a period of the hiring has been sanctioned.⁶⁶

Civil Code, section 1946, seems to prohibit the parties from expressly providing for notice to terminate to be given less than seven days before the expiration of a term of the tenancy.⁶⁷ Several cases have given approval to an express provision superseding the notice required by statute,⁶⁸ but no cases have been found dealing with an attempt to provide for less than seven days' notice. It is conceivable that this portion of Civil Code, section 1946, is an unwarranted interference with the freedom of the parties to contract. Perhaps the Legislature enacted this provision in view of the shortage of accommodations which impairs the bargaining power of tenants as a class and in an effort to create an equality in bargaining power without which practical freedom of contract is impossible.

Civil Code, section 827, provides for changing of terms of a tenancy from month to month, week to week, or other period less than a month:

"Section 827. Change of Terms of Month to Month or Week to Week Lease.—In all leases of lands or tenements, or of any interest therein, from week to week, month to month, or other period less than a month, the landlord may, upon giving notice in writing to the tenant, in the manner prescribed by Section 1162 of the Code of Civil Procedure, change the terms of the lease to take effect, as to tenancies for less than one month, upon the expiration of a period at least as long as the term of the hiring itself, and, as to tenancies from month to month, to take effect at the expiration of not less than 30 days, but if such change takes effect within a rental term, the rent accruing from the first day of such term to the date of such change shall be computed at the rental rate which obtained immediately prior to such change; provided, however, that it shall be competent for the parties to provide by an agreement in writing that a notice changing the terms thereof may be given at any time not less than seven days before the expiration of a term, to be effective upon the expiration of such term. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rents, and conditions specified in the notice, if the tenant shall continue to hold the premises after said notice takes effect."

⁶⁵Palmer v. Zeiss, 65 Cal.App.2d Supp. 859, 863, 151 P.2d 323, 325 (1944). Also, see, Downing v. Cutting Packing Co., *supra*, n. 64.

⁶⁶Wheeler v. Bainbridge, 84 Cal.App.2d Supp. 849, 191 P.2d 134 (1948).

⁶⁷The following discussion of this limitation on the power of the parties to provide for notice different from the statutory notice, applies also to a similar prohibition appearing in Cal. Civ. Code, § 827 (discussed below), with regard to the power of the parties to expressly provide for notice to change the terms of a periodic tenancy different from the statutory notice.

⁶⁸Devonshire v. Langstaff, 10 Cal.App.2d 369, 51 P.2d 902 (1935); Watkins v. McCartney, 57 Cal.App. 643, 207 Pac. 909 (1922).

This section, logically enough, is worded so as to apply only to landlords. This may be some indication that the use of similar language in Civil Code, section 789, was meant to exclude 30 days' notice as a requirement of termination of tenancies at will by a tenant.

There is some authority to the effect that a periodic tenancy may be terminated by notice under Civil Code, section 827. In *Alden v. Mayfield*,⁶⁹ for example, the Court said: "Mrs. Alden then immediately consulted her attorney, and upon May 2, 1910, served upon defendant a formal notice to quit and surrender possession upon the last day of May, 1910. Civ. Code, § 827." The Court seems to clearly reject this view in the leading case of *Colyear v. Tobriner*:⁷⁰

"We are of the view that section 827 does not apply to the case herein. Defendants did not, in the language of section 827, 'purport to change the terms of the lease,' and thereafter continue an existing tenancy on changed terms. Instead in clear and unequivocal language they 'terminated' the tenancy as of midnight December 9, 1934."

But the Court apparently misconstrued the holding in the *Colyear* case in *Hudson v. Zumwalt*:⁷¹

"The tenancy from month to month could not lawfully be terminated for nonpayment of rent for the month of July, except upon notice as provided by either section 1161, subdivision 2, of the Code of Civil Procedure, or section 827 of the Civil Code."

There is no dearth of statutory provisions in California for the termination of the landlord-tenant relationship, and it is difficult to see any good reason for broadening the effect of Civil Code, section 827, to include that function.

From 1907 onward this section provided for a month's notice to change the terms of a month-to-month tenancy; in 1947 the month's notice provision was struck out and a provision for 30 days' notice was substituted.

The only significant related code section which today still sets forth a requirement of one month's notice instead of 30 days' notice is Civil Code, section 3345,⁷² relating to penal damages. Rather than change Civil Code, section 3345, to conform in this respect with other sections dealing with notice, it would be better to repeal it, because it has been held to have been impliedly repealed by Code of Civil Procedure, section 1174 (as amended in 1907), in the case of *Field v. Walton*.⁷³ It is the opinion of the Court

⁶⁹164 Cal. 6, 8, 127 Pac. 45, 46 (1912).

⁷⁰7 Cal.2d 735, 742, 62 P.2d 741, 745 (1936).

⁷¹64 Cal.App.2d 866, 874, 149 P.2d 457, 461 (1944).

⁷²§ 3345. After Demand and Notice to Quit.—If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice."

⁷³94 Cal.App. 596, 271 Pac. 500 (1928).

that the companion provision, Civil Code, section 3344,⁷⁴ was also impliedly repealed by Code of Civil Procedure, section 1174, but that would seem to be dictum since Civil Code, section 3344, was not before the Court at that time.

The Court in the *Field* case displays an unusually fine analysis of the problem before it, and a sure hand in paring away superfluous code provisions. It would be a great service if the Legislature would do likewise, and revise the California statutes on landlord and tenant into a clear and meaningful whole.

⁷⁴“§ 3344. Holding Over After Termination of Tenancy.—If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during that time he continues in possession after such notice.”