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COMMENT

LANDLORD AND TENANT: THE CALIFORNIA LANDLORD'S REMEDIES UPON ABANDONMENT OF THE PREMISES BY THE TENANT

By ALEX. B. YAKUTIS

Scope of This Comment

The basic fact situation involved in the cases to be examined here is a simple one: For some reason, or for no reason, a tenant abandons leased premises before expiration of the term.

Upon such an occurrence, the landlord will naturally want to know, "What can I do about this?" As a practical matter, the specific question will most often be, "Can I make a new lease and hold the old tenant liable for any deficiency in the rent?" A long line of California cases have addressed themselves to answering this question. Some would respond "Yes" to the landlord's query, others would say "No," and still others would conclude "Maybe."

This article will furnish a chronological *resumé* of the cases reaching the Supreme Court of California, and discuss the competing theories involved.

Status of the Parties Upon Abandonment

That the tenant abandons the premises does not affect his liability for rent.¹ The tenant has an estate which "stays alive" whether he elects to remain in possession or not. Accordingly, the California cases are unanimous in holding that, should the tenant abandon the premises, the landlord is as entitled as before to the installments of rent, and can sue for them as they become due. The cases also agree that the landlord may enter upon abandoned premises to prevent waste, and that such reentry will not prejudice his position.

Subsequent Conduct of the Landlord

A. One View: Emphasis Upon "Conveyance"

One method of analysis is to consider the basic problem to be one of conveyancing. The tenant's continued liability for rent would depend upon a finding of whether or not a surrender has taken place.

Surrender is a form of conveyance operating by force of the common law. It is defined by Lord Coke to be "a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder,

¹For a general discussion and for collections of the many cases, see: 3 TIFFANY, REAL PROPERTY § 902 (3d ed. 1939); 32 AM. JUR., *Landlord and Tenant*, § 517 (1941); 52 C.J.S., *Landlord and Tenant* § 497 (1947).

wherein the estate for life or yeares may drowne by mutual agreement between them."² Since the Statute of Frauds,³ express surrenders are required to be in writing. The statute, however, does not affect those surrenders which take place by operation of law; where the law infers a surrender from certain acts by the parties which are inconsistent with the continued distinct existence of the two former estates.

It would, for example, be inconsistent for the landlord to take unqualified possession of the premises on his own account and still urge that the old tenancy is in effect. It would be even more inconsistent should the landlord create a new tenancy by making a lease to another party. In either case a surrender of operation of law is perfected, and the tenant is as free from liability for rent as he would be if an express surrender in writing had returned the right of possession to the landlord.⁴

B. Another View: Emphasis Upon "Contract"

Practical considerations have influenced many jurisdictions to give judicial approval to an importation of the contract principle of mitigation of damages into actions for the rent, giving the landlord the privilege of making a new lease and still holding the original tenant liable for any deficiency in the rent.⁵

The argument in favor of such a rule is often organized in terms of "the lease contract," "repudiation" and "damages." Some cases, on the other hand, consider a new lease to work a surrender only if the landlord *intended* to thus "accept" the surrender.

Perhaps the realistic approach of the Supreme Court of New Hampshire⁶ is the most useful one:

"It is frequently said that the rule that the tenant's liability is terminated by the reletting as a matter of law, irrespective of notice, is supported by the better logic, but that strong practical considerations justify the adoption of the rule generally followed. Of course, it cannot be denied that where the landlord relets he performs an act repugnant to the continuance of the former tenancy . . . but this does not necessarily mean that his right to sue on the original undertaking is either illogical or out of harmony with the prevailing trend of the law in analogous situations."⁷

The parties may, and often do, eliminate many bothersome questions in this area by covenanting that, upon the termination of the tenancy by reentry or equivalent action on the part of the landlord, he may relet to another at the risk of the tenant, the tenant remaining liable for any

² COKE LITT. p. 337b (Cit Perkins p. 581; 2 Rolle Abr. p. 494).

³ 29 CAR. 2, c. 3 (1677); CALIF. CODE CIV. PROC. § 1971.

⁴ 4 TIFFANY, REAL PROPERTY § 962 (3d ed. 1939); 32 AM. JUR., *Landlord and Tenant* § 916 (1941); 51 C.J.S., *Landlord and Tenant* §§ 124, 125 (1947).

⁵ *Supra*, note 4.

⁶ *Novak v. Fontaine Furniture Co.*, 84 N. H. 93, 146 A. 525 (1929).

⁷ *Id.* at 94, 146 A. at 526.

deficiency in the amount so obtained. Such covenants seem to be enforced everywhere.

Early California Cases

The first significant case on this question to come before the Supreme Court of California appeared in 1890, *In re Bell*.⁸ The tenant had abandoned the premises. The landlord had made no new lease, but brought his action to collect damages for "prospective rents." The court held that the action had been prematurely brought, but went on to say that "the lessor might have relet the premises for the benefit of the original tenant."

In June of the following year, the court had another opportunity to consider the point, in *Respini v. Porta*.⁹ The tenant had abandoned "certain real and personal property." The landlord resumed possession and made a new lease to a third party. The court was of the opinion that:

"In cases of this kind, the landlord is not entitled to recover for rent of the premises after abandonment of them by defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent reletting."¹⁰

Within two months of that opinion, another case reached the Supreme Court of California involving the same basic fact situation. In *Welcome v. Hess*¹¹ the tenant abandoned the premises and the landlord went into possession and relet for a term longer than the balance of time remaining under the original lease. The court declared that the landlord's conduct, whatever his intention, amounted to a surrender by operation of law.

"The assertion that the reletting is for the interest of the tenant is gratuitous and unwarrantable, though if it were true, how could that fact tend to show authority in the landlord to dispose of the tenant's property?"¹²

The court particularly noticed those authorities which would allow the landlord to make a new lease without losing the liability of the original tenant but concluded:

"While there are many cases which hold to this view, the weight of authority and the better reason is the other way."¹³

⁸ 85 Cal. 119, 24 Pac. 633 (1890). The only authority cited by the court was *GEAR, Landlord and Tenant*, §§ 128, 176 (1888). Accordingly, Mr. Gear may be said to be the "father" of the view advanced. At § 176, he writes: "If the premises are abandoned without cause, the landlord may elect to leave them vacant and recover rent, or to enter and determine the tenancy; but he cannot both enter and treat the contract as subsisting; yet he may relet the premises for the benefit of the tenant; though not bound to do so. . . ." The cases to support the privilege of reletting were referred to as "Meyer v. Smith, 33 Ark. 627; Langsdorf v. Legardeur, 27 La. An. 364; Ledoux v. Jones, 20 La. An. 540; Roumage v. Blatrier, 11 Rob. (La.) 101; Holden v. Tanner, 6 La. An. 74; Allen v. Saunders, 6 Neb. 436; Morgan v. Smith, 70 N.Y. 537, aff'g in part, 7 Hun. 244; Randall v. Thompson, 1 Tex. App. Civ. Cases § 1102." It is noteworthy that the list is dominated by cases from Louisiana, where the Civil Law prevailed.

⁹ 89 Cal. 464, 26 Pac. 967 (1891).

¹⁰ *Id.* at 466, 26 Pac. at 967.

¹¹ 90 Cal. 507, 27 Pac. 369 (1891).

¹² *Id.* at 513, 27 Pac. at 371.

¹³ *Ibid.*

But what of the 60-day-old rule of the *Respini* case? The court proceeded to harmonize that ruling by giving some facts that were not included in the report of the *Respini* case: The *Respini* lease included and was predominantly one of "a going dairy business." "It partook," to use the court's words, "more of the nature of an ordinary contract than a grant of a term." Thus, the *Respini* case could no longer be said to be authority for the proposition that a landlord may relet and still hold the old tenant liable for any deficiency; the recovery was one for breach of contract to operate a dairy business, with the former rent merely furnishing a convenient measure of damages.

In the course of the *Welcome* decision, the court suggested, however, that a different result might have been realized if the landlord had notified the tenant before going into possession that he would continue to hold the tenant for rent, and that any new lease would be for the tenant's account.

More Cases: "*Respini v. Welcome*"

*Bradbury v. Higginson*¹⁴ appeared in the Supreme Court reports for 1912. The tenant had abandoned the premises six months before the expiration of the term. The landlord did not relet the premises but, as *In re Bell*, brought an action for the balance of the six months rent on the theory that immediately upon the repudiation of the lease contract by the tenant, the landlord might sue for the full amount which would have become due had the contract run its full term.

Judge Sloss for the Supreme Court, adopted the opinion of the District Court of Appeals which had reversed a judgment for the landlord, the District Court holding that the suit was prematurely brought. The District Court had said, however:

"That a landlord may have an action for damages for breach of contract when a tenant abandons his lease is not questioned by any of the authorities. His damages, however, in that event are to be ascertained in a particular way. Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or, he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease."¹⁵

Which are the authorities in which the District Court found such unanimity? *In re Bell* and *Respini v. Porta* were cited, along with a case in the Texas Civil Appeals and a citation to JONES, LANDLORD AND TENANT. As to the latter, the section referred to related not to leases, but to the measure of damages for breach of *agreements* to lease.

¹⁴ 162 Cal. 602, 123 Pac. 797 (1912).

¹⁵ *Id.* at 604, 123 Pac. at 798.

*Oliver v. Loydon*¹⁶ was also reported in 1912. It was held in that case that the landlord failed to state a cause of action since the tenant was still in possession. However, the *Bradbury* case was cited and approved by dictum.

During 1916, the question of a tenant's continued liability was again before the Supreme Court. In *Triest & Co. v. Goldstone*,¹⁷ a lease of commercial property had been given to a corporation. The corporation forfeited its charter before the term expired but the premises continued to be occupied after being divided between two partnerships composed of individuals who had been directors of the corporation. This arrangement was made with the knowledge and acquiescence of the landlord. Subsequently, one of the partnerships quit the premises and the landlord brought an action on the original lease for accrued rents, against the corporation's erstwhile directors.

Judge Sloss adopted the opinion of the District Court of Appeals which held that the landlord could not succeed in his action, surrender by operation of law having released the corporation from any further obligation for rent under the lease. The District Court had supported the result on the authority of *Welcome v. Hess*.

In 1917, *Bernard v. Renard*¹⁸ appeared, as if to resolve the conflict between the *Bradbury* and *Triest & Co.* cases. The landlord had given a ten year lease, but a dispute having arisen, the tenant refused to go into possession. During the next four years, the landlord had rented the premises to a number of persons for short periods and small sums. The landlord then brought an action against the original tenant and won a judgment for \$7,500. This judgment was reversed by the Supreme Court.

According to the epitomized briefs appearing in the AMERICAN LAW REPORTS annotation of the case, counsel for tenant had urged that there was a surrender of the lease by the tenant and an acceptance by the landlord of such surrender. The list of authorities was headed by *Welcome v. Hess*.

Counsel for the landlord urged, on the authority of *Respini v. Porta*, that there was no surrender; and that the landlord had a duty to make a subsequent letting, and that such a letting does not constitute an acceptance of a surrender.

It was necessary, therefore, for the court to answer two questions: Did the conduct result in a surrender by operation of law; and if so, did the tenant's liability cease as of the date of the surrender? The court, approving the doctrine of the *Welcome* case, answered both questions in the affirmative.

The court went on to offer its view on the matter implicit in the *Welcome* case: Could the landlord have continued to hold the tenant liable for any

¹⁶ 163 Cal. 124, 124 Pac. 731 (1912).

¹⁷ 173 Cal. 240, 159 Pac. 715 (1916).

¹⁸ 175 Cal. 230, 165 Pac. 694, 3 A.L.R. 1076 (1917).

deficiency if he had given notice to the tenant that the reentry and reletting were for the tenant's account? The court indicated that they would answer "yes" to this question also.¹⁹

At Last "The Rule Is Well Settled"

By 1930 we are advised, in *Phillips-Hollman, Inc. v. Peerless Stages*,²⁰ that "The rule is well settled"—in favor of the *Respini* case and its learning! However, the lease under consideration contained a provision which allowed the landlord to reenter and relet upon abandonment by the tenant, and that the tenant should not be released from liability for the full rental.

In 1932, in *Treff v. Gulko*,²¹ the landlord was unsuccessful in his action, the tenant having been shown to be a mere "naked assignee" and liable for rent only while he was in possession. Nevertheless, the court went on to approve by dictum the "well settled rule" of the *Phillips-Hollman* case.²²

The Most Recent California Cases

The three most recent Supreme Court cases on the subject question have one factor in common; in each case the lease contained a covenant authorizing the landlord to reenter and make a new lease for the account of the tenant.

Despite the covenant, judgment was against the landlord in *Kulawitz v. Pacific Paper Co.* (1944),²³ where the court held that the tenant had been constructively evicted, and allowed rescission of the lease. Dictum in that case approved the view that the landlord may "retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what it was able in good faith to procure by reletting."²⁴

Almost identical language was used in *De Hart v. Allen* (1945).²⁵ The new lease in that instance was authorized by express provision and, moreover, the landlord had given notice to the tenant that the new lease would be

¹⁹ On this point, the court cited with approval *Rekopf v. Wirz*, 31 Cal.App. 695, 161 Pac. 285 (1917). Dictum there had approved the give-notice-and-relet view on the strength, in turn, of dictum in *Baker v. Eilers Music Co.*, 26 Cal.App. 371, 146 Pac. 1056 (1913), based on the *Bradbury*, *supra* note 10, and *Oliver*, *supra* note 11, cases.

²⁰ 210 Cal. 253, 291 Pac. 178 (1930).

²¹ 214 Cal. 591, 7 P.2d 697 (1932).

²² Curiously, *Siller v. Dunn*, 103 Cal.App. 154, 284 Pac. 232 (1930), was also cited. The court there, although of the opinion that the law "seems to be pretty well settled" on the continuing liability of the old tenant, held that the act of the lessor in unqualifiedly taking possession of the premises after the abandonment, and remodeling the building so as to fit it for an entirely different use and purpose, established a surrender by operation of law *despite* a provision in the lease allowing the landlord to reenter and make a new lease upon abandonment.

²³ 25 Cal.2d 664, 155 P.2d 24 (1944).

²⁴ The *Treff* case, *supra* note 16, and *Siller* case, *supra* note 17, were given as the supporting authorities.

²⁵ 26 Cal.2d 829, 161 P.2d 453 (1945).

made for the tenant's account. The case is noteworthy since the court went on to say that they would be disposed to grant relief to the landlord, the covenant and the notice aside.²⁶

The most recent pertinent case before the Supreme Court to the date of this comment was in 1950, *Yates v. Reid*.²⁷ A provision which allowed reletting was held valid and controlling and judgment was given for the landlord. One sentence in the opinion, however, furnishes an appropriate stopping off place for this chronology. ". . . The doctrine of the *Welcome* case," we are informed by the court, "has not always been applied."

The Cases Categorized

To return to our original question, the landlord wants to know, "Can I make a new lease and hold the old tenant liable for any deficiency in the rent?"

Five of the Supreme Court cases have replied with an unqualified "Yes." Such was the holding of *In re Bell* and the *Bradbury* cases, although in each case the landlord was turned away with the advice that his action was for damages and was prematurely brought. Dicta in the *Treff* and *Oliver* cases gives numerical support to the "Yes" response. Only in *Respini v. Porta* did the landlord get an affirmative reply *and* a judgment, and the case continues to be widely cited for the proposition that one may have a new lease and his old tenant too.

The "Maybe" decisions of the Supreme Court—where the new lease was made under a covenant of the original lease—are four in number. Such a covenant was upheld and enforced in the *Phillips-Hollman*, *De Hart* and *Yates* cases and, but for the constructive eviction of the tenant, would no doubt have been given the same effect in the *Kulawitz* case as well.

On three occasions, the Supreme Court has turned the landlord away with a "No" reply, holding that the new lease was inconsistent with the continuance of the old tenancy, and that accordingly a surrender by operation of law had been perfected and the old tenant freed from further liability for rent. Such was the result in the *Welcome*, *Triest & Co.* and *Bernard* cases. In each of the three cases, the court approved by dictum a rule which would allow the landlord further recourse against the tenant, should the landlord give notice that the reentry and reletting were for the tenant's account.

What Is the Rule in California?

On the over-all, it can be said that the balance is at least somewhat in favor of those cases that are oriented in terms of "lease contract" and the

²⁶ The decision was rested on the *Treff* case, *supra* note 16, the *Phillips-Hollman* case, *supra* note 16, and the *Oliver* case, *supra* note 11.

²⁷ 36 Cal.2d 383, 224 P.2d 8 (1950).

landlord's privilege to "mitigate the damages" should such lease be "repudiated" by the tenant. Unfortunately, not one of the five cases upholding this view have presented a critical analysis of the problem or set out any cogent reasons for the result. Nevertheless, these cases have been frequently cited and followed in the District Courts of Appeal and elsewhere,²⁸ and have acquired whatever verity repetition can give.

The recent cases—the "Maybe" cases involving covenants which permit reletting—decidedly add to the weight of those cases favoring the "contract" view. They have in general been decided on a very broad basis with the court virtually saying that, were such covenants not present, they would imply them and allow the landlord to recover any deficiency under a new lease.

Those cases which are reasoned in terms of conveyancing may by no means be said to be no longer of value as authorities. Their persuasive force has swayed many lower courts in the past, and continues to do so.²⁹ Everything taken into consideration, the belief that, given a proper case, the "conveyancing" view might still prevail before the Supreme Court is justified.

What Should the Rule Be?

It cannot be denied that any rule which strictly applies the doctrine of surrender by operation of law impales the landlord on the horns of a dilemma when the tenant abandons the premises. If the landlord reenters and exercises dominion over the place, he no longer has a tenant to look to; if the landlord stays out of possession, the premises remain idle and unproductive of income, and the landlord must undertake the risk and inconvenience of bringing an action or actions as the rent accrues.

On the other hand, a rule which is reasoned in terms of contract obligation is no cure-all for the landlord's problem. At least so long as its basis and limits continue to be only vaguely defined, such a rule may create as many troublesome problems as it is able to solve. Moreover, the remedy itself is not very satisfactory; the landlord must wait until the end of the original term, when his damages will be finally ascertained, before he may bring an action and this may involve a considerable length of time.

After examining all of the cases, the conclusion cannot be avoided that perhaps the analysis employed by the court in *Welcome v. Hess* furnishes the solidest basis for a solution—one that is in keeping with the practicalities of the situation without doing too great violence to legal principle. That is, the nature of a lease as a conveyance is given full recognition but the

²⁸ The latest case available at the time of this comment may be found in *Cook v. Goldsmith*, 133 Cal.App.2d 804, 284 P.2d 542 (1955).

²⁹ See the forceful opinion by Peters, P. J., in *Dorcich v. Time Oil Co.*, 103 Cal.App.2d 677, 230 P.2d 10 (1951).

harshness of surrender by operation of law is mitigated if the landlord gives timely notice of his intention to the tenant.

Such an "intermediate" view is fair to the tenant as well as to the landlord. The requisite notice may well convince the tenant to face rather than spurn his obligation to the landlord, and by his own efforts seek to assign the balance of the term or make a sublease. Or, the tenant may agree that the landlord may proceed and attempt to reduce the liability of the tenant for rent by making an assignment or sublease as the tenant's agent. If these courses fail to lead to a solution, then the courts would be clearly justified in creating some fictional means to equalize the situation of the parties, and allow the landlord to install a new tenant and still be able to recover any deficiency from the old tenant.

In any event, it is for the Supreme Court of California to bring order to the chaos that presently prevails. Hope springs eternal, and perhaps at an early date the court may entertain an appropriate case and, after examining all of the factors involved, set the law straight on this practical problem of everyday occurrence.