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Periodic Tenancies: Effect of Insufficient Notice to Terminate

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> "It is significant that under section 61, subdivision 2 of the Civil Code, a subsequent marriage contracted by a person when the former husband or wife of such person is generally reputed or believed by such person to be dead is valid until its nullity is adjudged by a competent tribunal even if the former husband or wife has not been absent for five years and the general repute or belief proves to be erroneous. It would be anomalous to hold that although in the Civil Code the Legislature sanctions such a marriage and makes it valid until it is annulled (it may never be annulled and may therefore always be valid), in the Penal Code the Legislature makes such a person guilty of bigamy."[15]

Under this newly proclaimed rule, the individual who contracts a second marriage within the five-year statutory period with an honest though erroneous belief that his former spouse has divorced him or is dead is not subject to a bigamy prosecution, and his marriage is valid though subject to a suit for annulment.

The reconciliation of the Penal and Civil Codes in connection with plural marriages, accomplished sub silentio in the *Vogel* case, obviates the necessity of legislative clarification by way of amendment of this vexatious, although thus far academic question. The courts are no longer faced with the problem of construing Civil Code section 61, subdivision 2 with respect to a second marriage contracted within the five-year period in the good faith belief that the former spouse is dead. It is clearly valid, and the individual concerned has a good defense to a bigamy prosecution.

Robert E. Carlson

PERIODIC TENANCIES: EFFECT OF AN INSUFFICIENT NOTICE TO TERMINATE

A well established but seldom applied rule of Real Property law was overlooked by both the court and counsel in the recent California case of *Kingston v. Colburn*.[1]

A tenancy from month to month was entered into between plaintiff landlords and defendant lessees on October 7th, 1952, after entry by lessees under a void lease. On January 11th, 1954, the lessees notified the landlords that they were terminating the tenancy as of January 10th, 1954. Although not stated in the report, the facts show that the landlords brought suit on May 24th, 1954, to recover the rent due from January 10, 1954, to May 10, 1954.

The court, referring to section 1946 of the California Civil Code, stated that as tenants from month to month, lessees could terminate their tenancy "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."[2] The court then concluded:

> "Necessarily therefore the notice of January 11 was insufficient and not in compliance with the statute so as to terminate the tenancy on January 10, but that is not to say it would not have been effective as of February 10."[3]

This writer must take exception to this last statement as being in direct conflict with the common law of our country and as having no support in the statutes or decisions of California.

The question under consideration in this article, then, is: When a notice to

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[15] *Id.* at 803-04, 299 Pac.2d at 854.

[1] 139 Cal.App.2d 623, 293 P.2d 805 (1956).

[2] *Id.* at 625, 293 P.2d at 807.

[3] *Ibid.*

terminate a periodic tenancy is insufficient in length of time to terminate the tenancy on the date designated in the notice, what effect will it have on terminating the tenancy at a future date without any further notice?

Perhaps it would be appropriate at this point to restate briefly the history of periodic tenancies both in this country and in England, and to examine the common law principles governing them. The tenancies in question were formulated in the sixteenth century to replace some of the earlier tenancies at will. Estates at will were, and are now, capable of being terminated by either party without any period of notice,[4] although some statutes provide for a contrary result.[5] Periodic tenancies were designed to give greater stability to the tenancy.

It is a well established principle of common law that when one enters into possession of land under a void lease, said lease reserving a rent payable in monthly installments, and the lessee pays and the landlord accepts one or more monthly installments, a periodic tenancy from month to month is created.[6] A recent California decision in accord with the common law so held.[7]

It is also well established today that a proper notice is necessary to terminate a tenancy from month to month.[8] This doctrine of notice to quit in periodic tenancies has been recognized since the time of Henry VIII, and is recorded in the year books as well as the early English Reports.[9] The requirement of notice to terminate such tenancies is mutual, applying to termination by either the landlord or the tenant.

The California Civil Code, section 1946,[10] is in accord with this common law rule as to the requirement of a notice to terminate and the California courts have so held.[11]

What is proper notice to terminate such a tenancy? English common law is that a weekly or other periodic tenancy is determinable by a notice to quit, which in the absence of special stipulations, should be given so as to expire at the end of any complete period of the tenancy and should be equal to the length of the period.[12] The common law ruling in our country is to the same effect, holding that in cases of tenancies running from month to month, a month's notice is necessary to terminate, and that notice must be directed toward the end of a rental period. This has been shown in numerous early cases.[13]

California statutory law has changed the common law as to notice to terminate tenancies from month to month with respect to the length of notice required

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[4] Buchanan v. Crites, 106 Utah 428, 150 P.2d 100 (1944); Mayo v. Clafin, 93 Vt. 76, 106 A. 653 (1919).

[5] CALIF. CIV. CODE § 789.

[6] Quayle v. Stone, 43 Idaho 306, 251 Pac.630 (1926); State v. Robinson, 143 Ark. 456, 220 S.W. 836 (1920); Goodwin v. Clover, 91 Minn. 438, 98 N.W. 322 (1904).

[7] Psihozios v. Humberg, 80 Cal.App.2d 215, 181 P.2d 699 (1947).

[8] Oesterreicher v. Robertson, 187 Minn. 497, 245 N.W. 825 (1932); Condon v. Barr 47 N.J.L. 113 (Sup. Ct. 1884).

[9] Right v. Darby 1 T.R. 159, 99 Eng. Rep. 1029 (1786); 2 BL. COMM. 147.

[10] "A hiring of real property, for a term not specified by the parties is deemed to be renewed . . . 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 . . . "

[11] Renner v. Hunington-Hawthorne Oil & Gas Co., 39 Cal.2d 93, 244 P.2d 895 (1952); Colyear v. Tobriner, 7 Cal.2d 735, 62 P.2d 741 (1936); Dorn v. Oppenheim, 45 Cal.App. 312, 187 Pac. 462 (1919).

[12] 20 HALSBURY'S LAWS OF ENGLAND (2 ed.) 145, 146.

[13] Phoenixville v. Walters, 147 Pa. 501, 23 A. 776 (1892); Prickett v. Ritter, 16 Ill. 96 (1854); see also cases cited in note 8, *supra.*

and the time when it may be given. Section 1946 of the Civil Code states that 30 days notice must be given and that it can be given at any time. Recent California decisions have applied this statute to tenancies from month to month.[14]

As noted above, notice is still essential to termination and the only statutory changes are those affecting length and time of notice. *Kingston v. Colburn* squarely presents the question whether a notice that fails to meet these statutory standards for the date specified for termination can operate to terminate the tenancy at a later date. The answer to this question is left completely unanswered in both the statutes and previous California cases. Consequently we must look to the common law for our answer.[15] It will not be presumed that the common law was repealed by statutory or constitutional provision unless the language naturally and necessarily leads to that conclusion.[16] The California Statute changed the common law as stated above but did not mention or concern itself with this question. In California the common law is the rule of decision and remains in force except where modified by statute.[17]

The common law answers in the negative, stating that an insufficient notice to terminate the tenancy on the date designated is a nullity for all purposes and will not terminate the tenancy at the end of the subsequent period without further notice.[18] The California Court in the case under discussion, after acknowledging that the notice given was insufficient, concluded, without citing precedent, that the insufficient notice would terminate the tenancy the following month without a new notice being given. The point in question was not mentioned by either party in their briefs, but the court so concluded without citing any previous cases or statutes.

The landmark case stating the American common law on this question is *Arbenz v. Exley, Watkins and Company*,[19] which points out the effect of insufficient notice. There the facts showed that the lessees entered the land in question under a void lease, paying the designated rent and creating a periodic tenancy. In the original suit[20] brought by the lessors, the court ruled that the notice by the lessees that they were abandoning the premises was insufficient to terminate the tenancy because of the common law principles discussed above. The court at that trial awarded the lessors the rent due up to the time of the suit. In a subsequent suit,[21] the lessors sued the lessees again, this time for the rent due from the date of the last suit to the date on which the second action was brought. The court here not only decided that the notice was insufficient to terminate the tenancy at the time indicated by the lessees, but also allowed recovery on a suit brought 38 months later for rent accrued during that time. The conclusion is that the notice was not only insufficient to terminate on the date designated but was a nullity for all purposes and would not terminate the tenancy at a later date.

The court in their opinion asked the question, "Why could not that notice

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[14] Hennessy v. Gleason, 81 Cal.App.2d 616, 184, P.2d 914 (1947); La Cava v. Breedlove, 77 Cal. App. 2d 129, 174 P.2d 880 (1946).

[15] *In re* Elizalde's Estate, 182 Cal. 427, 188 Pac. 560 (1920).

[16] *In re* Sloan's Estate, 7 Cal.App.2d 319, 46 P.2d 1007 (1936).

[17] see note 15 *supra.*

[18] Arbenz v. Exley, Watkins & Co., 57 W.Va. 580, 50 S.E. 813 (1905); Grace v. Michaud, 50 Minn. 139, 52 N.W. 390 (1892).

[19] Arbenz v. Exley, Watkins & Co. see note 18 *supra.*

[20] Arbenz v. Exley, Watkins & Co., 52 W.Va. 476, 44 S.E. 149 (1903).

[21] Arbenz v. Exley, Watkins & Co. 57 W.Va. 580, 50 S.E. 813 (1905).