McGeorge Law Review

Volume 2 | Issue 1 Article 16

1-1-1971

Landlord-Tenant Legislation: Revising an Old Common Law Relationship

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Landlord-Tenant Legislation: Revising an Old Common Law Relationship

Pursuant to the California Law Revision Commission's recommendations, legislation was introduced which would require the landlord to mitigate damages arising when the tenant abandons or is justifiably evicted from the leasehold. The author traces the development of landlord-tenant law from early common law to recent enactments. In analyzing the recent legislation he attempts to indicate the practical effect of the changes made as well as point out the merits and possible deficiencies which may be encountered.

In California, pursuant to an 1872 enactment by the legislature, the Civil Code specifies that a lease is a contract.[1] The courts, however, have refused to acknowledge this position. Rather, they have adopted the majority position that a lease has a duel identity. For example, in 1942 the California Supreme Court referred to a lease as both a contract and a conveyance when it stated:

> While it is true that a lease is *primarily a conveyance* (emphasis added) in that it transfers an estate to the lessee, it also presents the aspect of contract. . . . This dual character serves to create two distinct sets of rights and obligations—"one comprising those growing out of the relation of landlord and tenant, and said to be based on the 'privity of estate', and the other comprising those growing out of the express stipulations of the lease, and so said to be based on 'privity of contract.'[2]

Serious problems have developed due to the fact that property law concepts have become hopelessly entwined and confused with contract law theories.

In an attempt to alleviate this problem, the California Legislature, in 1970, enacted legislation which adds to, and amends current sections of the California Civil Code.[3] This legislation, which will

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[1] CAL. CIV. CODE § 1925: "Hiring is a contract by which one gives to another the temporary possession and use of property, other than money for reward, and the latter agrees to return the same to the former at a future time."

[2] Medico-Dental, Etc., Co. v. Horton & Converse, 21 Cal. 2d 411, 418 (1942). *See also* Samuels v. Ottinger, 169 Cal. 209, 211 (1915).

[3] A.B. 171, CAL. STATS. 1970, c. 89.

become operative on July 1, 1971, provides that contract principles will apply to leases when (1) a tenant breaches his lease and abandons the property before the end of the term, or (2) his right to possession is terminated by the landlord due to a breach of the lease.[4]

To fully appreciate the changes made in the law by this new legislation, it is necessary to examine more completely the present status of the law and its development from the early common law.

Surrender at Common Law

The common law provided that the tenant was the title holder for the duration of the lease, because a lease was considered a conveyance of an estate in real property. The tenant did not have a mere contractual right to the use of the property; instead he held title and had the absolute right to the use of the property until the lease terminated.[5] Termination was usually accomplished by natural expiration; *i.e.*, the lease ended automatically on the day specified in the lease.[6]

Infrequently, leasehold estates were also terminated by surrender—the voluntary or involuntary relinquishment of the possessory estate to the owner of the reversion or the remainder.[7] Voluntary surrender, which arose from a mutual agreement between the parties to terminate the lease, was the rarest of the two types of surrender[8] because the effect was to extinguish all enforceable duties, including the tenant's duty to make any further rent payments.[9]

Involuntary surrender (surrender by operation of law) was the more prominent type of surrender. It occurred when the tenant abandoned the leasehold and the landlord subsequently took possession of the premises for his own benefit.[10]

In *Welcome v. Hess*, the California court stated:

> The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has ac-

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4 *Id.*

5 Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should be Revised*, 54 CALIF. L. REV. 1141, 1143 (1966).

6 *Id.*

7 BURBY, REAL PROPERTY §§ 82, 83, at 181-187 (3d ed. 1965).

8 Kreling v. Walsh, 77 Cal. App. 2d 821, 832 (1947); Steel v. Thompson, 59 Cal. App. 191, 192 (1922).

9 3 THOMPSON ON REAL PROPERTY § 1505 (1940).

10 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 280 (7th ed. 1960).

> cepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. Admit that he may take such care of the property as will prevent waste, still he must not interfere with the right of the tenant to the absolute dominion and control. If he does so interfere, it is an eviction, and the tenant will be released.[11]

Such a surrender by operation of law is valid even though oral. The statute of frauds is not applicable because the surrender is a result of an estoppel, not a reconveyance. The landlord is estopped from denying his acceptance of the surrender due to his conduct—that of taking unqualified possession of the leasehold for his own benefit.[12]

Abandonment by Tenant—Present Law

When the tenant abandons the leasehold, under the present law, the landlord has three remedies from which to choose,[13] assuming the lease contains no accelerated damages provision.[14] First, the landlord may leave the premises unoccupied; the lease would remain in existence and he could sue for each installment of rent as it became due.[15] The rationale behind this remedy is that the tenant is the owner of the property and no collection can be made for future rent until it falls due.[16] This concept is based on the common law principle that rent did not accrue from day to day, but only became due on the day fixed for payment in the lease.[17] Consequently, the landlord was forced to bring a series of actions in order to be fully compensated for his damages. Unfortunately, the landlord was without assurance that he would ever be able to collect the rent as it becomes due since the tenant may not be solvent at a later date or he may leave the jurisdiction of the court. In California, where title is in the tenant for the duration of the lease, the courts do not apply the theory of anticipatory breach of

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11 Welcome v. Hess, 90 Cal. 507 (1891).

12 *Id.* at 513.

13 Treff v. Gulko, 214 Cal. 591, 598 (1932); Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 671 (1944). *See also* Comment, *The California Lease—Contract or Conveyance?* 4 STAN. L. REV. 244 (1952). Further, for a comprehensive analysis of current California law in the area of termination of a lease see Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should be Revised,* 54 CALIF. L. REV. 1141 (1966).

14 CAL. CIV. CODE § 3308 states:

> The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee; the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term, or any shorter period of time over the then reasonable rental value of the premises for the same period.

15 Treff v. Gulko, 214 Cal. 591, 598 (1932); Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 671 (1944).

16 Phillips—Hollman, Inc., v. Peerless Stages, Inc., 210 Cal. 253, 258 (1930).

17 Silveira v. Ohm, 33 Cal. 2d 272, 275 (1949).

contract to lease agreements.[18]

Under the second alternative, as espoused in *Treff v. Gulko*, the landlord has the option of repossessing the leasehold and treating the lease as terminated.[19] This amounts to a surrender by operation of law because the act of repossessing for the landlord's benefit, coupled with his dominion and control over the demised premises, is inconsistent with the tenant's property right.[20] The landlord is not entitled to any rent or damages other than those rents accumulated prior to the date of repossession by him.[21] Obviously, if the landlord immediately rents to a new tenant for the remainder of the term and for the same amount of rent as the terminated lease, he is not damaged and this remedy is satisfactory.

Under a third remedy the landlord may assert his right by re-entering the premises, taking possession, and reletting for the benefit of the tenant who has vacated the leasehold.[22] He may also "hold the tenant for damages for the difference between the rentals provided for in the lease and what in good faith he was able to procure from a reletting."[23] In order to take advantage of this remedy and avoid a surrender by operation of law, the landlord must notify the tenant that he is taking possession of the leasehold and reletting for the tenant's benefit.[24] This notification is necessary due to the fact that although the tenant has abandoned the leasehold, his title continues for the term set forth in the lease unless the landlord accepts the surrender.[25]

Presently, the California courts refuse to award damages until the end of the lease even when there has been a reletting[26] (in the absence of a clause in the lease pursuant to Civil Code section 3308).[27]

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[18] 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 283 (7th ed. 1960).

[19] Treff v. Gulko, 214 Cal. 591, 598 (1932); Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 671 (1944).

[20] Dorich v. Time Oil Co., 103 Cal. App. 2d 677, 688 (1951).

[21] 3 THOMPSON ON REAL PROPERTY § 1505 (1940).

[22] Treff v. Gulko, 214 Cal. 591, 598 (1932); Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 671 (1944).

[23] Treff v. Gulko, 214 Cal. 591, 598 (1932).

[24] Dorich v. Time Oil Co., 103 Cal. App. 2d 677, 684 (1951). *See also* Rehkopf v. Wirz, 31 Cal. App. 695, 696 (1916), where it is stated:

> Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. . . . But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases his tenant.

[25] Dorich v. Time Oil Co., 103 Cal. App. 2d 677, 684 (1951).

[26] Treff v. Gulko, 214 Cal. 591, 593 (1932); Phillips—Hollman, Inc. v. Peerless Stages, 210 Cal. 253, 258 (1930).

[27] *See* note 14 *supra*.

This is because they consider liability for damages as single and entire, not multiple and several.[28] Therefore, any damages are determined as of the termination date of the original lease.[29] Currently, there appears to be little justification for this approach. Since the landlord has relet the demised premises, damages are ascertainable—the difference between the rentals in the two agreements. The landlord is not going to be unjustly enriched if he is permitted to collect all future damages at the time of judgment. He is merely realizing the benefit of his bargain with the breaching tenant, a monetary sum equivalent to the amount the landlord would have received had the tenant not breached the lease. By allowing the landlord to obtain the benefit of his bargain at the time of judgment, the necessity of resorting to a multiplicity of suits, and the possibility that the tenant will no longer be solvent or subject to the court's jurisdiction is eliminated.

One possible exception to the argument that damages would be completely ascertainable might be the situation where the landlord relets for a period less than the balance of the remaining term of the breached lease. However, there is a statutory exception to this result on damages that should be noted. The landlord may sue immediately for all damages, present and future, if an accelerated damages provision is included in the lease pursuant to Civil Code section 3308.[30]

Eviction of the Tenant—Present Law

When the tenant commits a breach that is sufficiently material to justify termination of the lease, the landlord once more has three remedies. First, he may consider the breach to be partial. The landlord is not required to terminate the lease, but rather, he may continue it and sue for all damages caused.[31] However, election of this remedy places the landlord in a position of dealing with a tenant who has proven himself unreliable.

Second, the landlord may terminate the lease and evict the tenant;[32] however, eviction results in a cessation of further rent,[33] because the lease is terminated. Thus the remedy of eviction is inadequate for the same reason as in abandonment cases; the landlord is damaged and is without redress for his losses. An exception is the situation where

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[28] Treff v. Gulko, 214 Cal. 591, 593 (1932); citing with approval the New York case of Hermitage Co. v. Levine, 248 N.Y. 333 (1928).

[29] Treff v. Gulko, 214 Cal. 591, 593 (1932); Phillips—Hollman Inc. v. Peerless Stages, 210 Cal. 253, 258 (1930).

[30] *See* note 14 *supra.*

[31] Bank of America Etc. Assn. v. Moore, 18 Cal. App. 2d 522, 526, 528 (1937).

[32] CAL. CODE CIV. PROC. §§ 1161, 1174.

[33] Costell v. Martin Brothers, 74 Cal. App. 782, 786 (1925).

the landlord can immediately rent to a new tenant at a higher rental in which case it would be advantageous to evict the original tenant.

Finally, in certain instances, the landlord may evict the tenant without terminating the lease.[34] Section 1174 of the Code of Civil Procedure[35] provides that there is no termination of the lease unless the notice required for an action of unlawful detainer[36] specifies that the landlord is terminating the lease. Further, if in the lease there is a provision for re-entry and reletting at the tenant's expense, this provision will be valid and controlling.[37]

There are no cases that have discussed the issue of when the cause of action for damages arises, but assuming the courts would follow the rationale of the abandonment cases, they would undoubtedly hold that damages do not accrue until the termination date provided for in the lease.[38]

THE LAW AS OF JULY 1, 1971

Section 1951.2 of the New Legislation

Assembly Bill 171[39] adds several sections to the Civil Code and the Code of Civil Procedure and amends section 3308 of the Civil Code. Civil Code section 1951.2[40] makes the most significant changes in the previously existing law. Section 1951.2(a) cuts through the problems of the current law relating to abandonment by the tenant and justifiable eviction by the landlord and declares that in either instance, the lease terminates, except where lease provisions authorizing the tenant to assign or sublease his interest pursuant to new section 1951.4 are incorporated.[41] The tenant has no further obligations except as provided in the remainder of section 1951.2. Section 1951.2(d) elimi-

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[34] The landlord may evict by use of an unlawful detainer if necessary. *See* CAL. CODE CIV. PROC. § 1174.

[35] CAL. CODE CIV. PROC. § 1174 provides:

> and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement if the notice required by Section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election the lease or agreement shall not be forfeited.

[36] CAL. CODE CIV. PROC. § 1161 requires a three day notice for an unlawful detainer action.

[37] Lawrence Barker, Inc. v. Briggs, 39 Cal. 2d 654, 664 (1952). *See also* Burke v. Norton, 42 Cal. App. 705 (1919).

[38] Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should be Revised*, 54 CALIF. L. REV. 1141, 1170 (1966).

[39] A.B. 171; CAL. STATS. 1970, c. 89, introduced by Assemblyman James A. Hayes, Republican, Long Beach, California.

[40] CAL. CIV. CODE § 1951.2.

[41] CAL. CIV. CODE § 1951.2(a):

nates any future uncertainty as to whether there has been a surrender by operation of law, since it specifically provides that any attempt by the landlord to mitigate damages by reletting the premises to a second tenant, for example, does not waive the landlord's right to a judgment for damages.[42] Contrary to the common law, this section permits the landlord to collect damages even though the lease has been terminated. At common law, once the lease was terminated, all rights to damages or rent subsequent to the termination were forfeited;[43] and to prevent termination by operation of law, notice to the tenant was required.[44] The statute makes no mention of any notice requirement to the breaching tenant in order to hold him liable for future damages; however, since the lease is now terminated and because damages are recoverable as a matter of law, there should be no necessity for notice.

Section 1951.2(a)(1) allows recovery of the amount of unpaid rent that was accumulated up to the termination of the lease.[45] This provision merely codifies the common law which entitled the aggrieved landlord to all unpaid rents which accrued prior to the ending of the lease, even though the lease was terminated.[46]

Section 1951.2(a)(2) permits the landlord to collect the amount of rent that would have been earned between the time of termination of the lease and the day of judgment,[47] less any amount which the *tenant* proves could have been reasonably avoided by the landlord. In order to be assured of collecting damages, the landlord must make reasonable attempts to relet the premises. Should he be successful in rerenting, he must obtain as high a rental as possible. If the landlord relets immediately at a greater rental, he is not damaged, and the breaching tenant is released from all obligations under the contract.

Finally, section 1951.2(a)(3) provides that the landlord may recover the amount of rent that would fall due between the time of judg-

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Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates.

[42] CAL. CIV. CODE § 1951.2(d): "Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages under this section."

[43] *See* note 21 *supra.*

[44] *See* note 24 *supra.*

[45] CAL. CIV. CODE § 1951.2(a)(1): "The worth at the time of award of the unpaid rent which had been earned at the time of termination . . ."

[46] *See* note 21 *supra.*

[47] CAL. CIV. CODE § 1951.2(a)(2):

The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided. . . .

ment and the termination date set forth in the lease, less the amount the tenant proves could be reasonably avoided.[48] This recovery may occur at the time of judgment, provided that (1) the parties so stipulated to acceleration in the lease, or (2) the landlord has relet the premises.[49] In the absence of (1) or (2) above, the landlord must wait until the termination date stipulated in the lease before bringing his cause of action because should he finalize his judgment prior to the termination[50] date in the lease, his damages which would accrue subsequent to the termination date would be forfeited. The landlord now has only one cause of action. Previously, the landlord was permitted to bring a series of actions under the rationale that the lease continued in existence. Since the lease now terminates as a matter of law under Civil Code section 1951.2(a) only one action may be maintained.

Thus section 1951.2(a)(3) does not entirely resolve the resulting inequities under the common law approach (damages not accruing until the end of the stipulated term of the lease) unless there has been a reletting of the leasehold between the termination date and the time of judgment or there is a damage acceleration clause in the lease. As a practical matter, nearly all leases contain an acceleration clause and therefore, in most instances, full recovery for all damages may be obtained at the time of judgment regardless of whether there has been a rerental.

Section 1951.2(a)(3), as originally introduced would have permitted the landlord to recover at the time of judgment the amount of damages which would have accrued subsequent to the date of judgment, less the amount the tenant proves could be reasonably avoided.[51] As introduced, the section would have permitted the landlord to be fully

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[48] CAL. CIV. CODE § 1951.2(a)(3):
Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided. . . .

[49] CAL. CIV. CODE §§ 1951.2(c)(1), (2):
The lessor may recover damages under paragraph (3) of subdivision (a) only if: (1) The lease provides that the damages he may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss for the same period that the lessee proves could be reasonably avoided; or (2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good faith effort to mitigate damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

[50] Note, however, there is a two year statute of limitations for an oral lease and a four year statute of limitations for a written lease. *See* CAL. CODE CIV. PROC. §§ 337.2 and 339.5.

[51] A.B. 171, as introduced January 14, 1970.

compensated at the time of award, even if there had been no rerenting or accelerated damages clause in the lease.[52]

The more restrictive provision finally enacted was apparently the result of fear that the landlord could collect his judgment for the balance of the term and then immediately relet the leasehold at a tidy profit.[53] It would appear that the anticipation of an unjust enrichment to the landlord was unfounded. If the landlord were in a position where he could immediately rerent after the breach, but waits until the day after judgment, it could most likely be shown by the defaulting tenant that the landlord was not reasonable in his attempt to mitigate damages. Testimony of a reputable real estate broker could be introduced to show that the landlord was unreasonable and was attempting to commit a fraud upon the court. Such testimony if accepted by the trier of fact, would probably sustain the tenant's burden of proof. Once the landlord was shown not to have been reasonable in his efforts to rerent, his award would be reduced by an amount found by the court to be a reasonable rerental value of the premises during the period that it was permitted to remain unoccupied.[54] If the tenant, upon his own initiative, were able to procure a satisfactory sub-tenant, this substitute tenant would be sufficient proof that the landlord was not acting reasonably.[55]

Conceivably this amendment could work against the tenant. One can conjure two hypothetical situations where the outcome could work to the tenant's detriment. First, consider the situation where the tenant abandons a five-year leasehold after two years. The landlord immediately relets for two years; thus leaving the last year's rental not mitigated since the new lease is only for two of the remaining three years. At the end of the third year the landlord brings suit for the full five years. Is he entitled to the fifth year's rent even though his damages are the amount of rent in the breached lease? If one construes section 1951.2(a)(3)[56] literally, the landlord should be entitled to the full five years rent. The section does not require the landlord to relet for a period at least as great as the unexpired term before he may collect for future rents. Second, assume the landlord, to insure his ability to recover all damages at the time of judgment, relet the premises to the *first* applicant, regardless of the difference in

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52 *Id.*

53 Interview with James Reed, Legislative Assistant to Assemblyman Hayes.

54 Note that the section, as introduced, allowed the landlord his rents less the amount the tenant could prove the landlord should have been able to save by obtaining a subsequent tenant.

55 See the discussion of reasonableness infra.

56 CAL. CIV. CODE § 1951.2(a)(3).

rentals. If the new rent was less than that called for in the lease the landlord would hope to obtain the difference as damages. The tenant would have almost an insurmountable task of proving that the landlord's effort was not reasonable, lacking some evidence of collusion and fraud.

Mitigation of Damages—Reasonableness

The majority view seems to be that the standard for the landlord's efforts to mitigate damages is similar to that of the proverbial reasonable man in negligence cases.[57] California apparently differs from this general rule of reasonableness for mitigating damages. In a 1968 case, the court stated the standard to be:

> (Mitigation) does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness . . . must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . The standard by which reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. . . . It is sufficient if he acts reasonably and with due diligence, in good faith.[58]

The court in stating that "[t]he standard by which reasonableness of the injured party's efforts is to be measured is not so high as the standard required in other areas of law" cited *McCormick on Damages*[59] where it is stated:

> the standard of due care in determining liability in tort for negligence should be much stricter than the standard of reasonableness in choice of expedients to reduce or avoid damages applied against a person against whom a wrong has been committed.[60]

Thus, by merely requiring due diligence (in good faith) the court apparently has established a lesser standard for the reasonable man who mitigates damages when compared to the reasonable man in negligence cases. Regardless of the California position the question of

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[57] 21 A.L.R. 3d 542.
[58] Green v. Smith, 261 Cal. App. 2d 392 (1969).
[59] Green v. Smith, 261 Cal. App. 2d 392, 397 (1969), citing with approval McCORMICK ON DAMAGES 134 (1935).
[60] McCORMICK ON DAMAGES 134 (1935).

reasonableness is for the trier of fact.[61] The trier of fact must examine all facts as they appeared to the landlord and then make a subjective determination whether the landlord was reasonable.

Burden of Proof as to Reasonableness

The burden of proof as to the landlord's reasonableness in mitigation of damages is on the breaching tenant.[62] The one exception to this requirement is when the landlord has relet and is attempting to collect damages that would become due after judgment.[63] In that case the burden of proof is on the landlord to prove that he was reasonable. Shifting this burden onto the landlord seems to be inequitable. Presumably in most cases, the tenant's conduct is responsible for the breach but under this exception, the innocent landlord is charged with the burden of establishing that his conduct was reasonable. Once the landlord has relet, there should be a rebuttable presumption he was reasonable. If the tenant is not satisfied with the landlord's efforts, then the tenant should have the burden to show the landlord could have done better.

Exception to the Requirement of Mitigation of Damages

Civil Code section 1951.4 provides that when the tenant unjustifiably abandons the premises, the lease continues and the landlord may collect the rent as it becomes due without attempting to mitigate damages if the lease provides for the right on the part of the tenant to sublease or assign.[64] Generally the lease will contain standards and conditions for subleasing which allow the landlord to use discretion in

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[61] *Id.* at 397.

[62] Sections 1951.2(a)(2), (3), require the landlord to use reasonable efforts in mitigating damages. They also place the burden of proof on the tenant.

[63] *See* CAL. CIV. CODE § 1951.2(c)(2).

[64] CAL. CIV. CODE § 1951.4:
(a) The remedy described in this section is available only if the lease provides for this remedy. (b) Even though a lessee of real property has breached his lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following: (1) Sublet the property, assign his interest in the lease, or both. (2) Sublet the property, assign his interest in the lease, or both, subject to standards or conditions, and the lessor does not require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment. (3) Sublet the property, assign his interest in the lease, or both, with the consent of the lessor, and the lease provides that such consent shall not unreasonably be withheld. (c) For the purposes of sub-division (b), the following do not constitute a termination of the lessee's right to possession: (1) Acts of maintenance or preservation of efforts to relet the property. (2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease.

accepting a subtenant or assignee. In the absence of such standards, the previously enumerated tests of reasonableness would apply. This Civil Code provision is most useful when:

> [T]he lessor does not have the desire, facilities, or ability to manage the property and to acquire a suitable tenant and for this reason desires to avoid the burden that Section 1951.2 places on the lessor to mitigate the damages by reletting the property. . . . (Also), a lessor could, in reliance on the lessee's rental obligation under a long-term lease, construct an improvement to the specifications of the lessee for the use of the lessee during the lease term. The remedy available under section 1951.4 retains the substance of the former law and gives the lessor, in effect, security for the repayment of the cost of the improvement in those cases.[65]

Section 1952(c)[66] expressly states that the landlord is not entitled to the benefits of this provision when he evicts the tenant unless the tenant obtains relief from forfeiture pursuant to Code of Civil Procedure section 1179.[67] It would appear that the reasoning behind the inapplicability of the above provision when the landlord evicts the tenant is that eviction automatically terminates the lease.[68] Once the lease is terminated, the tenant has no leasehold interest which is capable of being transferred.

Objection to Mitigation of Damages

In *Wohl v. Yelen*,[69] the court set forth three objections to requiring the landlord to mitigate damages when the tenant abandons or is evicted from the premises, with cause, prior to the termination of the lease. In order to determine the sufficiency of the future California law one should analyze it in relation to the objections set out in *Wohl*.

The first objection put forth is that the landlord is forced to continually search for new tenants,[70] in order to mitigate his damages. One can argue that any effort by an innocent landlord, even if it only amounts to placing a "for rent" sign in the window, is too great a burden. In fact, some courts have taken the position that a default-

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[65] *Calif. Law Rev. Comm. Recommendation relating to Real Property Leases* 157, 168, 169 (Nov. 1969).

[66] CAL. CIV. CODE §§ 1952 (c).

[67] CAL. CODE CIV. PROC. § 1179 provides that the court may relieve a tenant against forfeiture of a lease, and restore him to his former estate under certain conditions.

[68] CAL. CIV. CODE § 1951.2(a).

[69] Wohl v. Yelen, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1959). *See also* Groll, *Landlord—Tenant: The Duty to Mitigate Damages*, 17 DEPAUL L. REV. 311 (1967-68); Comment, *The Landlords Duty to Mitigate by Accepting a Proffered Acceptable Subtenant—Illinois and Missouri*, 10 ST. LOUIS L.J. 532 (1965-66).

[70] Wohl v. Yelen, 22 Ill. App. 455, 464, 161 N.E.2d 339, 343 (1959).

ing tenant, by his own wrongdoing, should not be allowed to impose any duty on the landlord.[71] This approach appears to be unduly harsh, since public policy favors rerenting.[72]

The California law lessens the landlord's burden of mitigation in that the statute permits the landlord to recover reasonable expenses incurred in preparing the property for reletting.[73] Further, the burden of proof is placed on the tenant to show that the expenses incurred in preparation to the reletting by the landlord were unreasonable. By allowing recovery for expenses incurred in reletting and shifting the burden of proof to the defendant tenant, the court has palliated the severity to the landlord, and it appears that there will be no objections to the requirement that the landlord seek a new tenant.

The second objection in *Wohl v. Yelen* is that there might be an unwilling acceptance of a surrender (by the landlord) due to a surrender by operation of law.[74] California disposes of this objection by now providing that no attempt to mitigate damages may constitute an acceptance of a proffered surrender.[75]

The third and final objection made is that mitigation might cause the landlord to accept someone else in what was a personal relationship.[76] Some lease interests will undoubtedly be based on important personal relationships between the landlord and tenant; however, these generally will be for reasons other than business or commercial use and therefore would not be as likely to result in litigation under these code sections. Though business and commercial leases are at times initiated as a result of a personal relation between the landlord and the tenant in today's modern world the overwhelming majority of leases are made without regard to a personal relationship.[77]

A problem related to the personal relationship argument is the determination of suitability of a prospective subtenant. The general rule is that a landlord should not be forced to rent to a substitute tenant who would put the premises to a different use.[78]

> [N]or is the landlord obligated to alter or increase his obligations (*e.g.*, extending the length of the lease term) in order to secure a

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71 21 A.L.R.3d 539, and the cases collected therein.

72 *Id.* at 540.

73 These expenses are impliedly recoverable by reason of § 1951.2(a)(4) which allows recovery for any other amount necessary to compensate the lessor for all the detriment proximately caused by the tenant's breach.

74 Wohl v. Yelen, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1959).

75 CAL. CIV. CODE § 1951.2(d).

76 *See* note 74 *supra.*

77 Comment, *The Landlords Duty to Mitigate by Accepting Sub-Tenant—Illinois and Missouri,* 10 ST. LOUIS L.J. 532, 536 (1965-66).

78 Groll, *Landlord-Tenant: The Duty to Mitigate Damages,* 17 DEPAUL L. REV. 311, 319 (1967-68).

replacement tenant.[79]

> Where there is a question of suitability, the subtenant's credit, past performance, and general business reputation, as well as the proposed use and the mechanics thereof, are several factors which might be used to weigh subtenant acceptability. One factor may be determinative in one case and meaningless in another.[80]

The suitability of a subtenant is most likely to create difficulties when the leasehold is one requiring special abilities and equipment or usage of available equipment. For example, if the leasehold is a business office, there should be little or no difficulty in obtaining a replacement tenant. On the other hand, if the premises were altered for use by an arc-welder, it may be extremely difficult to obtain a suitable replacement. Since the majority of leaseholds are merely office space or apartment houses, this objection does not appear to present a problem of such significance to warrant invalidating the law and disposing of the necessity for mitigating damages.

Effect of Other Sections of the New Legislation

Additional observations concerning the effect of this new legislation must be made at this juncture. Section 1951.2(a)(4) allows recovery of any other damages which are proximately caused.[81] This section allows the landlord to recover for such sundry items as physical damage to the premises, expenses in retaking, making repairs, reletting the premises and any other damages necessary to make him whole, subject to the landlord's proving they were directly the result of the breach and not caused by some extraneous force.

Further, there is nothing in section 1951.2 which effects the grounds justifying the landlord's eviction of the tenant.[82] Also section 1951.2 does not affect the offsetting claim a defaulting tenant may have against the landlord, should the landlord fail to meet all of his obligations.[83]

A question also arises as to whether a landlord may obtain specific performance of a lease. Section 1951.8[84] provides that section

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79 *Id.* Footnotes omitted.

80 Comment, *The Landlords Duty to Mitigate by Accepting a Proffered Acceptable Sub-tenant—Illinois and Missouri,* 10 ST. LOUIS L.J. 532, 539 (1959).

81 CAL. CIV. CODE § 1951.2(a)(4):

> Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

82 For these grounds see 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 276-278 (1960).

83 *California Law Revision Commission Recommendation relating to Real Property Leases* 164 (Nov. 1969).

84 CAL. CIV. CODE § 1951.8.

1951.2[85] does not bar equitable relief where it is appropriate; therefore, specific performance depends upon satisfying the traditional equitable requirements of an inadequate remedy at law.

Finally section 1951.5 provides that Civil Code sections 1670 and 1671 which pertain to liquidated damages apply to a lease of real property.

> The amount of the lessor's damages may be difficult to determine in some cases since the lessor's right to damages accrues at the time of the breach and abandonment or when the lease is terminated by the lessor . . . . This difficulty may be avoided in appropriate cases by a liquidated damage provision . . . . Under former law, provisions in real property leases for liquidated damages upon breach by the lessee were held to be void . . . . However, such holdings were based on the former rule that the lessor's cause of action upon breach of the lease and abandonment of the property or upon termination of the lessee's right to possession was either for the rent as it became due or for the rental deficiency at the end of the lease term. So far as provisions for liquidated damages upon a lessor's breach are concerned, such provisions were upheld under the preexisting law if reasonable. . . . Nothing in Section 1951.5 changes this rule.[86]

SUMMARY

There should be no difficulty in implementing the recent legislation. Section 1952.2 of the Civil Code provides that *none* of the requirements in sections 1951 to 1952 apply to any lease executed before July 1, 1971, or "[a]ny lease executed on or after July 1, 1971, if the terms of the lease were fixed by a lease, option, or other agreement executed before July 1, 1971."[87]

Possibly the most important factor will be the situation where the landlord desires to keep the lease in effect pursuant to section 1951.4. The landlord must allow the tenant to sublet or assign his interest in the lease, and must not impose any unreasonable standards or conditions upon the tenant regarding letting or assigning the lease.[88]

In order to collect future damages when suing for a breach of the lease, a clause stipulating to future damages in case of a breach should be included in the lease.[89] This clause would be similar to the

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[85] CAL. CIV. CODE § 1951.2.

[86] *Calif. Law Rev. Comm. Recommendation relating to Real Property Leases* 157, 170 (Nov. 1969), citations omitted.

[87] CAL. CIV. CODE § 1952.2(a)(b).

[88] Cosksan, *Recovery Based on Future Rent After Lessee's Breach*, 44 L.A. BAR BULL. 199, 228 (1968-69).

[89] CAL. CIV. CODE § 1951.2(c)(1).

clause now utilized in most leases pursuant to Civil Code section 3308.

Civil Code section 3308, as amended, does not apply to a lease of real property unless the lease was executed before July 1, 1971 or its terms were fixed by any agreement executed before July 1, 1971.

Under section 1951.2(a)(4) the landlord will be allowed to recover damages for all detriment proximately caused by the tenant's breach. Careful drafting will require inclusion and exclusion of specific factors which may be the cause of disagreement should the tenant breach.[90]

The new legislation appears to be easily adaptable to modern leases. Requiring the landlord to mitigate damages when a tenant breaches is a desirable result that should have been in effect long ago.

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[90] Cosksan, *supra* note 88, at 228.