#50 3/29/65

Memorandum 65-13

Subject: Study No. 50(L) - Lessor's Rights Upon Lessee's Abandonment

Accompanying this memorandum is a study by Professor Verrall of the U.C.L.A. Law School. Please read the study. We will discuss it and this memorandum at the next meeting.

Were one to try to surmise what a lessor's rights might be under the law insofar as his lessee is concerned, one might suppose that the lessor would be in an enviable position. He draws the leases. He is organized. He has a strong and active lobby at the Legislature. Yet, perusal of the study prepared for the Commission by Professor Verrall and the article on lessors' remedies that appeared in the Southern California Law Review--Joffe, Remedies of California Landlord Upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34 (1961)--will reveal that the lessor's lot frequently is not a happy one. These studies reveal that the law relating to lessors and lessees is based on archaic common law concepts of the nature of real property and has little relation to the normal expectations of the parties involved. Unfair results to either or both parties are not uncommon.

First, the lessor may expose himself to liability for forcible entry and detainer if he erroneously concludes that the lessee has abandoned the property and reenters the property; and as Joffe's article points out, vacation of the premises, surrender of the key, and nonpayment of rent constitute no sure indication of abandonment.

Second, assuming that the landlord has correctly determined that the lessee has abandoned, his remedies leave much to be desired from both his own standpoint and that of the lessee. The studies point out that the doctrine of anticipatory breach has not been applied to lessor-lessee cases (except where a mining lease is involved). Neither has the doctrine of mitigation of damages. The lessee owns an "estate" and it is that "estate" which produces the rent. The lessee's abandonment constitutes an offer to surrender his "estate"; and if the lessor accepts, the "estate" and the rental obligation flowing from it are extinguished.

<u>What are the lessor's common law remedies in the face of abandonment?</u>

1. He may let the property remain vacant and subject to the lessee's interest. In this event, the lessee remains liable for the rent and may be sued therefor as it comes due. The lessor has no duty to mitigate damages by attempting to find a new lessee.

2. He may reenter the property and use it himself or lease it to a new tenant. This course of action constitutes an acceptance of the lessee's offer to surrender his interest; hence, the lessee's interest is extinguished, and no further rental obligation is owed. The lessor is entitled to no damages even though he is unable to rent the property.

3. He may relet the property as self-appointed agent for the lessee. This course of action involves many problems. Authority for this course of action lies largely in dicta, although the volume of such dicta is probably sufficient assurance that the remedy is available. The lack of definitive cases stems from the fact that the courts are quick to hold that the lessor has accepted the lessee's surrender and has thus extinguished the terms and the rental obligation flowing from it. But, apparently, if the lessor sufficiently communicates his intent to the lessee, he may relet the premises for the lessee's account and hold the lessee liable for the differences between the rental reserved in the original lease and the rental reserved in the new

lease. If rentals in excess of this amount are collected from the new lessee, the excess belongs to the abandoning lessee. The cause of action against the defaulting lessee for rental deficiencies does not accrue until the end of the term.

To what extent may lease provisions be used to alter the above rules?

Civil Code Section 3308 provides that the lease may provide for the contractual anticipatory breach measure of damages--i.e., the difference in value at the time of the termination of the lease of the value of the reserved rentals and the reasonable rental value of the remainder of the term. This cause of action would accrue at the time of breach.

The lease may not provide for acceleration of rental upon the lessee's default--this is an improper provision for liquidating damages under the California cases. But if advance rentals are paid--such as the final two or three rental installments--the lessor may keep these regardless of the actual loss suffered by him.

The lessor's problems in regard to reentry possibly may be solved by lease provisions. A provision in the lease for the self-help remedy of reentry confers no right upon the lessor to reenter the property unless the lessee voluntarily permits such reentry or the lessee has in fact abandoned the property. However, it may be possible for the lease to define abandonment in such a way that the lessor can know with some certainty when an abandonment has occurred.

What legislative remedies, if any, should be proposed to cope with the above problems?

One remedy was suggested by Justice Cardozo when he first gave voice to the thoughts that eventually led to the establishment of the New York Law Revision Commission:

I have seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents. . . . Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. . . .

. . . I do not seek to paralyze the inward forces, the "indwelling and creative" energies, that make for its [the law's] development and growth. My wish is rather to release them, to give them room and outlet for healthy and unhampered action. The statute that will do this . . . is something different from a code . . . . Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free. [Cardozo, A Ministry of Justice, 35 HARV. L. REV. 113, 114-117 (1921).]

What is suggested here is that there be no attempt to detail the rights of lessors and lessees. Instead, a statute might free the courts from the rigors of common law real property principles and offer to them the more flexible principles of contract law. The statute might declare, in effect, that leases are to be construed as contracts. Contract remedies would be available for enforcement, and the contractual measure of damages would be recoverable for breach.

The criticism of such a statute would be, of course, that it is imprecise. A person would not be able to turn to the statute to determine his rights. Its lack of detail might cause difficulties in obtaining enactment, because legislators and lobbyists would be uncertain as to the results of the legislation.

On the other hand, to be said for such a statute is that it would accept and apply a well-developed body of law. The Supreme Court has already applied this law to mining leases. The doctrine of anticipatory breach would be applicable as it is to mining leases and contracts generally. The defense of mitigation of damages would also be available as it is in contract actions generally. The availability of other remedies--such as specific performance--would be determined under applicable contract law principles.

A more modest legislative change is suggested by Professor Verrall. He suggests modifying Civil Code Section 3308 to make its provisions available to all lessors unless the lease otherwise provides. This legislative remedy would not require the lessor to terminate a lessee's interest after abandonment and mitigate the accruing damages; but the practicalities of the usual situation would virtually require the lessor to do so.

Similar to the suggestion made by Professor Verrall would be a statute providing specifically that the damages to which a lessor is entitled for abandonment of a lease are the difference in value between the remainder of the term and the reserved rental obligation.

Another form of statute might spell out the lessor's and lessee's rights in somewhat more detail. Such a statute would have virtue in that the concerned parties might look to the statute to determine what their respective rights are. Such a statute might provide, for example, that upon abandonment of a leasehold by the lessee, the lessee's interest in the property is terminated (without acceptance by the lessor). (In comparable contract law, a contractor cannot continue performance after repudiation by the opposite party and thus enhance the damages.) Upon termination of a lessee's interest in violation of the lease agreement (the statute might include termination of the lessee's interest by the lessor for material breach of the lease, such as for nonpayment of rent), the lessor is entitled to recover the value of the remainder of the rental obligation. The lessee is entitled to have offset against these damages any amount that the lessor could reasonably be expected to realize from re-leasing the property. Liquidated damage provisions or advance payment of rent provisions, etc., would be void to the extent that they exceeded the amount of the damage suffered.

Respectfully submitted,

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(#50(L)) 12/18/62

A STUDY TO DETERMINE WHETHER THE LAW RESPECTING THE RIGHTS OF A LESSOR OF PROPERTY WHEN IT IS ABANDONED BY THE LESSEE SHOULD BE REVISED*

*This study was made for the California Law Revision Commission by Professor Harold E. Verrall of the School of Law, University of California at Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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* This study was made at the request of the California Law Revision Commission by Professor Harold E. Verrall of the School of Law, University of California at Los Angeles. The opinions, conclusions and recommendations are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions and recommendations of the Law Revision Commission.

GENERAL STATEMENT OF THE PROBLEM

When the owner of land gives possessory enjoyment to another in return for a price periodically payable, the courts generally look on the transaction as essentially a conveyance of an estate to that other person and the reservation of a rent to the owner. Historically, when the return was periodic, it was considered a rent produced by the estate; and should the estate either physically or legally be wiped out, of necessity the rent produced by that estate would end. A rent also was considered an interest in real property that on the due day would become a chose in action against the person then holding the estate which produced it. The tenant of that estate became a debtor in the amount of the rent falling due--and this was true even though the transaction raising the estate and the rent contained no provision in the form of a promise to pay. Where a promise to pay is included in the lease transaction, the courts hold it was a promise to pay the rents which the estate produced. When the estate terminated, the rent ceased to exist and the promise was fully executed. This meaning of the promise to pay was far more restricted than the meaning of analogous promises in instalment purchase or in employment cases. It is against this general and simplified background that we consider the lessor's problems when his lessee abandons the premises and repudiates the lease transaction.

When the lessee abandons the premises and indicates an intent to repudiate the relationship, his act does not end his estate or end the lessor-lessee relationship.[1] The lessee's acts legally show he offers to surrender his estate. If, then, the lessor does acts which amount to an acceptance of this surrender, the estate and the relationship come to an end. So when the lessor resumes possession for his own benefit, or, as the courts say, "in his own right," the estate is ended and the lessor-lessee relationship is ended.[2] The courts say there is a surrender by operation of law, one of the types of conveyance excepted from the statutes of frauds.[3]

A lessor, faced with the situation of an abandoning and repudiating lessee, finds himself in a difficult position. To resume possession beneficially is to work a surrender by operation of law; to allow the premises to remain vacant is to risk abnormally high depreciation of the premises, reduction or loss of insurance protection under some contracts, and the availability and solvency of the lessee when the rent falls due. There has been common recognition that the position of the lessor in this situation is one of hardship.[4] Provisions in leases have been enforced to aid the lessor in minimizing his losses without discharging the lessee from his rent obligations.[5] Many courts have even gone beyond this and without support in any lease provision have permitted the lessor to relet the premises to reduce his rent losses and still to hold the lessee for the deficiencies.[6] This is at least a partial recognition of contract doctrines concerning the minimizing of damages on breach. In discussing the lessor's remedies, either in cases involving contract provisions permitting reletting or in cases recognizing the right of the lessor to minimize damages, the courts are not always clear in explaining what they really are deciding. For instance, they state that the lessor may relet and hold the lessee for any deficiency. Does this mean the lease transaction is ended and in determining damages the rent on reletting is only a pro tanto satisfaction of the damages, or does this mean the original lease obligations are still enforceable with rent on reletting being credited to the lessee? If the first alternative is accepted and the lessor relets at an increased rent, he would keep the profits. If the latter is accepted, then the collected rental in excess of the rent originally reserved, plus expenditures made necessary by the default of the lessee, would belong to the lessee.

THE FUNDAMENTALS TO AVOID CONFUSION

When a lessee abandons the premises and repudiates the lease, fundamentally two things can happen: (1) The lessor-lessee relation can continue with the lessor taking such courses as the law permits, or (2) the lessor-lessee relation can end with the lessor electing among the remedies permitted by law. Which of the two developments transpires depends on what the lessor elects to do. Some of the confusion in the statements of the law concerning the remedies of a lessor grows out of a failure to keep these fundamentals in mind. Even the courts in their statements of the remedies available to the lessor have not been careful of their terminology and have contributed to the confusion. Illustrative is the opinion in the oft-cited case of Respini v. Porta.[1] This was an action by a lessor to recover rent due at the time of a tenant's abandonment of the premises. Here a chose in action for matured rent had legal existence at the time the lessor resumed possession and relet at a reduced rent. The first quarter of the period covered by the reletting was the same quarter for which the lessor sued to recover the rental sum. The Court held the lessor had to credit the lessee with the sum received and could recover judgment only for the difference, as that was the extent of his damage. The action covered no other claim. The Court went beyond a discussion of the pleaded cause of action and the lessee's right to have his liabilities reduced by the credit claimed. It stated, "under the circumstances" the lessor could relet and insist that the original lease continue in effect. In a paragraph following its statement to this effect, the Court said that the lessor properly acted in reletting and continued:

> In cases of this kind the landlord is not entitled to recover for rent of the premises after the abandonment of them by the 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 letting.[2]

The two paragraphs are difficult to reconcile unless "the circumstances" mentioned were that the acts of the parties showed an intent on the part of the lessee to authorize the lessor to relet, with the lessee to remain liable to perform the rental provisions of the original lease as modified by the special contract.

REMEDIES AVAILABLE TO THE LESSOR WHEN THE LESSEE ABANDONS

The common statement of the lessor's remedies when his lessee abandons is:

> Upon surrender of possession by the lessee before the expiration of the lease term, the lessor had three remedies: (1) To consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to treat the lease as terminated and retake possession for its own account; or (3) to 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.[1]

Treat the Lessor-Lessee Relation as Continuing and Enforce the Lease Provisions as They Fall Due

Recognition of the availability of this course of action is principally in dicta, but the California Supreme Court has decided on its recognition.[2] However, in this action the Supreme Court has not considered whether the developing recognition of the contractual character of the modern lease requires some limitation on the availability of the remedy. Society is interested in the exploitation of property which does not result when the lessee abandons and repudiates, and the lessor refuses to resume control. In the area of contract law, there is a developing law placing on the promisee the obligation to take reasonable action to minimize damages. Failure to extend this doctrine to the lessor-lessee transaction would seem difficult to justify. Perhaps the transition would be easier and less confusing should the action be legislative as contrasted with judicial. Legislation will not be mechanical, both because some limitations on the applicability of the doctrine may be necessary, and because a statement of some satisfactory criterion for determining what conduct of a lessor is unreasonable is not easily drafted. This matter was considered by the New York Law Revision Commission in 1960, and again in 1961. A few paragraphs from its recommendations show some of these problems. The quotations following are from New York State legislative documents:

> A few American jurisdictions have held that the landlord is under a duty to relet, and may recover only the difference between the agreed rent and the amount that would have been realized by reasonable diligence in reletting. The Commission believes that this minority rule is unsound in treating the landlord's action, in effect, as an action for damages for breach of an executory contract and imposing on him a duty to seek a new tenant. On the other hand, the New York rule reaches an unjust result in permitting the landlord to ignore or refuse opportunities for reletting, without limitation by any rule of reasonableness, and still hold the tenant for the full amount of rent. The Commission believes that the tenant should be permitted to show, as a defense or partial defense to an action for rent, that opportunities to relet all or part of the premises were offered to the landlord, for all or part of the period for which recovery of rent is sought, and that the landlord unreasonably failed or refused so to relet. Under the amendment proposed by the Commission, the defense would be effective to the extent of the amount that the landlord might reasonably have been expected to receive as a result of the reletting, less the reasonable expenses thereof. The abandoning tenant would have the burden of proof on the question whether opportunities for reletting were offered to the landlord and the amount that would have been obtained by reletting, and also on the question of unreasonableness. This burden of proof would not be satisfied merely by proof that the landlord had failed to make efforts to relet.
>
> The provisions proposed by the Commission would apply notwithstanding any provision of the lease. Thus, a clause in the lease negating any duty to relet, or prohibiting assignment or subletting by the tenant, would not be a ground for denial of the defense.
>
> The present rule that reletting by the landlord evidences acceptance of surrender and terminates the lease, in the absence of consent of the tenant or a provision in the lease authorizing the landlord to relet, should be changed in order to permit the landlord to relet in mitigation of the tenant's liability for rent, whether or not an express provision is contained in the lease.[3]
>
> The rule that the landlord has no duty to relet is especially harsh where the tenant is forbidden by the lease

to sublet the premises or to assign his term, and the landlord, by his privilege of reletting, thus controls the only means by which the premises can be made to yield a pecuniary benefit to be applied on the obligation for rent. The Commission believes that it should be changed in at least these cases.

In the statute proposed this year, the provision creating a defense to an action upon the tenant's liability for rent is limited to cases where the tenant is prohibited by the lease from assigning or subletting. In such cases the proposed statute provides an affirmative defense or partial defense to an action against the tenant upon his liability for rent for any period in which the landlord is authorized to relet for the account of the tenant. As in the statute proposed in 1960, the tenant would be required to show that an opportunity to relet was offered to the landlord and that the landlord unreasonably failed or refused so to relet, and the defense would be effective to the extent of the amount that the landlord might reasonably have been expected to receive as a result of the reletting. The tenant would, of course, have the burden of proof on all elements of the affirmative defense.

A major criticism of the statute proposed in 1960 was the absence of any statutory criterion for determining whether the conduct of the landlord in refusing or neglecting an opportunity for reletting was unreasonable. The statute proposed by the Commission this year specified a number of factors to which consideration is to be given in making this determination. Since these tests may be inappropriate or inadequate for determining whether a landlord should be compelled to accept a prospective tenant of a one-family or two-family dwelling, the proposed statute also makes the provision creating an affirmative defense in favor of the tenant inapplicable to residential leases of such dwellings, using the definitions employed in the Multiple Dwelling Law and Multiple Residence Law to exclude such dwellings from regulations under those statutes.

The proposed statute also provides that the defense it creates cannot be waived by any provision of the lease and cannot be limited by any provision of the lease setting unreasonable standards for reletting. This limitation, invalidating a contractual privilege of the landlord to act unreasonably, is necessary to prevent frustration of the statute.[4]

The 1960 recommendations were withdrawn from the legislature when attention was directed to the fact that hardship would result to many lessors unless the recommended statute were limited in its operation and unless it stated some criterion of reasonable conduct to minimize damages. The 1961 recommendations attempted to meet the 1960 criticisms, but the legislature did not enact the proposed law. Apparently, it did not consider the hardships to have been adequately cared for, or, if cared for, that the coverage of the more limited statute warranted enactment.

Treat the Lessor-Lessee Relation as Ended and Resume Possession for His Own Account

When the lessor, following an abandonment by the lessee, does an act evidencing a resumption of control of the premises--an act inconsistent with the lessee's rights of enjoyment--the courts find he has elected this second course of conduct. They talk in terms of surrender or surrender by operation of law. Presumptively, the lessee's acts show an intention to give up his possessory property and an act in execution of that intent, and the lessor's acts show an intention to assume possession beneficially.[5] This amounts to a surrender by operation of law ending the estate of the lessee. Certainly the lessor, both as a matter of law at times and as a matter of contract at other times, can do limited acts which would raise the presumption just referred to when in fact he does not intend to resume beneficial possession, and he is permitted to explain his acts. These situations are few and require an exercise of extreme care on the part of the lessor not to go beyond the uncertain line between authorized acts and acceptance of a surrender. Due to storm or other casualty, or to acts or nonacts of the lessee amounting to waste, repairs or reconstruction may be necessary. The courts say that acts of the lessor clearly directed to remedying this type situation are not to be held to complete a surrender.[6] And when the parties have contracted that the lessor may do certain acts which would otherwise amount to an acceptance of a surrender, he can show the acts to be authorized by the lessee and not inconsistent with the continuation of the estate of the lessee.[7]

When the lessor resumes possession in his own behalf and treats the lessor-lessee relation as ended, he may still recover damages for breaches of the lease provisions prior to the abandonment by the lessee.[8] His acceptance of the surrender, however, normally operates as a release of the lessee from all executory provisions of the lease.[9] In other words, he loses the benefits the lease provisions promised him. With promisees in sales contracts and employment contracts getting the benefit of their bargains by way of damages on breaches by promisors, it is to be expected that lessors would seek to avoid the release effect of their recognition of total breach by their lessees. A new contract at the time of the surrender is a possibility,[10] but, as a practical matter, the negotiation of a new contract with a defaulting lessee is not to be expected.

A second means of protecting the lessor is to include in the original lease a contractual provision to survive the termination of the lessor-lessee relations, enforceable at the end of the period of the original letting or periodically. The recognition and enforcement of such contractual provisions is considered later in this study.[11] Many times, and particularly where the lease was negotiated without the assistance of a lawyer, this means of protection is not available to a lessor. If has been contended that he can "qualify" his conduct of completing the surrender so that it will not operate as a release of the lessee from his obligation to pay rental losses sustained by the lessor during the remaining part of the stated period of letting. The extent to which this course is available to a lessor, independent of contract, will be considered next.

Treat the Lessor-Lessee Relation as Ended and Sue for Damages, Including Loss of Rental Value for Remainder of the Period of Letting

The generality voiced in several of the cases is that the lessor has three courses to follow when his lessee repudiates and abandons: First, he can sit back and enforce the lease provisions as they fall due; second, he can resume possession in his own right, terminating the lessor-lessee relation and releasing the lessee from further liability; or third, he can relet for the lessee's account and have damages in the difference between reserved rentals and rentals on the reletting.[1] Some of the cases cited in support of the third course are cases recognizing special contracts covering the abandonment situation.[2] Actually, then, the third course is not a single course. For convenience of treatment, the course resting on contract in the original lease, or at the time of reletting, will be separately considered later in the study[3] as a fourth course available to the lessor.

Following a lessee's repudiation and abandonment, acts by a lessor to relet and minimize his risk of loss can involve a continuation of the original lessor-lessee relation or can mark a termination of that relation. If the former is true, then the reletting is an act by the lessor as agent of the lessee and the reletting is a subletting. Certainly in the lease or in a new contract the lessee can make the lessor his agent. Barring such conventional act, a few courts have permitted the lessor to assume to be a self-appointed agent.[4] In general, the courts have found no such agency and have held lessor protection must be on some other theory, if at all.[5] There is no indication in the California Supreme Court cases that the Court supports the self-apppointed agency theory, but there is chance language in the appellate cases,[6] referred to by the Supreme Court, which seems to be at variance with this conclusion and which seems to have been accepted by some members of the bar.[7] Detailed consideration of the language in four cases is merited.

The Language of the Opinion in Dorcich v. Time Oil Company. Dorcich v. Time Oil Company[1] was an action for all damages sustained or to be sustained during the entire term of the lease, brought during the term after abandonment and repudiation by the lessee, and after a reletting by the lessor not under any lease authorization or any other authorization by the lessee. The trial court found that the lessor, by reletting without prior notice to the repudiating lessee, had accepted a surrender, terminated the lease, and released the lessee from further liability thereunder. The reported position of the trial court was that, had notice been given the lessee, the lessor could have held the lessee to the lease provisions.

There is no question of the theory of the appellant in Dorcich v. Time Oil Company.[2] It was that the lessor, by proper showing of an intention not to accept a surrender, could have the lease continue after a reletting to minimize damages. Support was found in Respini v. Porta,[3] in the continued use of the word "unqualifiedly" in Bernard v. Renard[4] and Rehkopf v. Wirz,[5] and in other respectable authorities.[6] The district court of appeal decided that the trial court properly found a surrender and resultant release of the lessee. The opinion seemed to support the trial court's assumption that a lessor, by proper notice, could avoid a surrender and relet to minimize damages; in other words, the lessor, without the benefit of a lease provision, could act as a self-appointed agent for the abandoning lessee. The cited authorities hardly go so far. The case of Kulawitz v. Pacific Woodenware and Paper Company [7] did not define what it listed as the third course available to the lessee. In stating this third course, it did not refer to the lessor's action as one for damages but merely as one for the difference between the two rentals, and cited Siller v. Dunn [8] (also referred to in the Dorcich case). The Siller case stated the third course available to the lessor was an action for damages, and held that the lessor had not acted under a lease provision preserving the liability of the lessee for payment of rentals on abandonment of the premises, but had accepted a surrender and released the lessee. The court in the Dorcich case found language in prior California cases in support of the right of the lessor to relet without obtaining authority from the lessee by evidencing his intention to minimize damages. A short consideration of this support is stated in the following three paragraphs.

Welcome v. Hess [9] held the facts supported a surrender by operation of law. In stating this conclusion, language was used which was quoted in the Dorcich case as supporting the right of a lessor to relet and still hold the lessee liable for performance of the lease provisions:

> In taking possession the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of the term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent.[10]

This language followed an express disapproval of the right of a lessor to make himself an agent to relet on behalf of the lessee [11] and was immediately preceeded by the statement: "But this case hardly comes up to the authorities we have criticised."[12]

Bernard v. Renard[13] found the facts of the case supported a holding of a surrender. In considering Welcome v. Hess,[14] the Supreme Court said:

> The real thing there decided was that where the premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let and the actual reletting thereof to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term.[15]

In both Boswell v. Merrill[16] and Rehkopf v. Wirz,[17] the court found the facts supported a surrender. Boswell quoted from Rehkopf, and this quotation also was referred to in the Dorcich case:

> 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. [Citing a case.] 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 the tenant. [Citing two cases, including Welcome v. Hess.] An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistant with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.[18]

The court in Dorcich v. Time Oil Company[19] also cited four annotations to the American Law Reports, where the cases considering the effects of a reletting after a tenant's abandonment are collected. It intimated, to say the least, that in a proper case, California might recognize that the lessor could relet and still not discharge the lessee from the obligations of the lease, even when the lease contained no provision authorizing such reletting.

The Language of the Opinion in Rognier v. Harnett. Rognier v. Harnett[1] was an action in the alternative: for rent for the last ten months of the term or for damages in an equal amount. The action was commenced at the end of the term. During the term, the lessee had vacated the premises and the lessor had acquiesced in the surrender and resumed possession. The court noticed that the case was like Baker v. Eilers Music Company,[2] where it was said: "A lessor who takes possession of property delivered to him by his tenant and does so unqualifiedly, thereby releases his tenants."[3] No recovery was allowed the lessor. In commenting on the abandonment and repudiation type of case, the court said:

> Even where premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit, as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or reletting on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term.[4]

The Language of the Opinion in Baker v. Eiler Music Company. Baker v. Eiler Music Company[5] was a case in which the lessor had resumed possession "unqualifiedly" after the tenant had abandoned, and had later sued for rentals due after that resumption of possession. In discussing the lessor's remedies the court said:

> A lessor who takes possession of property delivered to him by his tenant and does so unqualifiedly, thereby releases his tenants. He may accept possession of the property for the benefit of the tenant and relet the same; in the latter case he has no action except one 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.[6]

Language of the Opinion in Rehkopf v. Wirz. Rehkopf v. Wirz[7] was a case in which the lessee abandoned and repudiated the lease at the end of the first of three years of the term, and the lessor relet at a reduced rent for a term extending beyond the original term. The lessor, immediately after reletting, sued for damages in the amount of the rental deficiencies for the unexpired portion of the original term. In affirming the nonsuit granted by the trial court, the court said that on abandonment and repudiation by the lessee, the lessor could relet and sue for damages if he made it known to the lessee that his acts were to minimize the lessee's liabilities. If he did not notify the lessee of the purpose of his acts, then he would release the lessee from further liability. The court then said:

> An unqualified taking of possession by the lessee and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.[8]

Later in its opinion, the court noticed that Auer v. Penn,[9] stated that if the lessee abandoned and the lessor relet, the lessor's acts raised no presumption of acceptance of a surrender since they were for the advantage of the tenant. It continued: "Referring to that case and that proposition, the Supreme Court of California in Welcome v. Hess . . . , declared that while there are many cases which hold to this view, 'the weight of authority and the better reason is the other way.'"[10] The Supreme Court in Welcome v. Hess[11] did not restrict its disapproval of the Pennsylvania case to disagreement with it on the point of the nonexistence of a presumption of acceptance of surrender. Indeed, the Supreme Court noticed that in Auer v. Penn[12] the landlord expressly refused to accept a surrender and notified the lessee that he would relet and then hold him for deficiencies in rentals. Then it ended its reference to Auer v. Penn[13] with the statement: "While there are many cases which hold to this view, the weight of authority and the better reason is the other way."[14] And, with respect to a lessor reletting, the court later stated: "The assertion that the reletting is for the interest of the tenant is gratuitous and unwarranted, though if it were true, how would that fact tend to show authority in the landlord to dispose of the tenant's property?"

Legal Existence of the Conclusion Concerning the So-Called Third Course. In developing a third course open to a lessor when his lessee abandons and repudiates, the courts undoubtedly have been influenced by the hardship to the lessor if he has to avoid all interference with the land except to prevent waste, or has to resume control and release the lessee from further liability under the lease. He should be allowed to act in a way reasonable to the lessee and in keeping with the interest of the social order in nonwasteful exploitation of land, without releasing the lessee from liability for breach of his agreement. In other words, the lessor should be permitted to act as a reasonable person without losing the benefit of his bargain.

The language of the opinions just considered indicates that the lessor, by "qualifying" his conduct to show no intent to release the lessee from all further liability, may resume control of the premises and still preserve at least some of the legal relations between himself and the lessee. It is possible to read into the language an assumption that the relation of lessor and lessee as a property matter ends but the relation as a contract matter continues. If this were true, then periodic enforcement of the contract as each rental payment came due would seem proper, credit being given for rents received on the reletting. The courts have clearly held that such periodic enforcement is not part of the course open to the lessor unless expressly provided for in the lease.[1] A better reading of the opinions just considered would be to find the court as merely saying the lessor can act in a reasonable way and still have the benefit of his bargain, and chance verbiage should not be given too much weight.

The remedy open to the lessor who follows the so-called third course is an action for damages[2] and not a series of actions for damages unless the parties have contracted for piecemeal recovery by the lessor.[3] Influenced by New York cases, the Supreme Court has held that the amount of damages the lessor will suffer because of the breach of the lease transaction by the lessee remains rather uncertain for the period of the original letting and should be held speculative until the end of the term. The action for breach then becomes complete, matures or commences, only at the end of the term of the original letting.[4] In holding that the parties can contract for piecemeal actions, the court basically permits the lessor to accomplish by contract what the courts could not give him. In addition, by the enactment of Civil Code Section 3308, the Legislature has recognized that damages can be computed at the time the lessee abandons and the lessor resumes control. Damages do not seem to be too speculative for computation at the time of breach in employment and sales contracts having a degree of similarity to the lease transaction.[5] Legislation to change the view that the action matures only at the end of the term, should such a change appear needed, would be required. Section 3308 of the Civil Code provides an early remedy in one situation, and the courts are not likely to hold that a similar remedy is available in other situations. Indeed, the unverified report is that Section 3308 as originally introduced in the State Legislature covered all cases of abandonment and repudiation by lessees, but the more limited section to cover only cases where a lease provision so permitted was enacted. The courts very properly could hold that they should not now change the ruling.

One of the surprising things about the many California cases dealing with the remedies available to the lessor is the ease with which the courts have found surrenders with resultant releases. On appeal, the courts can only see if there was some evidence to support such a finding, and on such evidence affirm the trial court. It is then that they refer to the third course open to a lessor. Cases actually recognizing the lessor's right to have the benefit of his bargain are most difficult to find. The wealth of dicta, plus what can be considered a holding in a case or two, supports the availability of the third course. In Treff v. Gulko,[6] the California Supreme Court held an action during the period covered by the lease was premature. It said the action matured at the end of the period of the letting. It is arguable that this is a holding of the availability of the remedy. Eleven years later, in Gold Mining and Water Co. v. Swinerton,[7] the Court noticed the existence of dicta in support of the remedy and noticed doubts about the availability of the remedy--doubts which were probably based on the absence of clearcut holdings by California appellate courts--and decided that the remedy was available in a mining lease case and matured at the time of the repudiation. The court found a mining lease in a class by itself and did not decide that the remedy was available in cases of ordinary leases. De Hart v. Allen[8] held that an action for damages for rental deficiencies following an abandonment by the lessee and a reletting after notice by the lessor matured at the end of the term of the lease, even though the abandonment was more than the period of limitations prior to bringing the action. This seems a clear holding that the remedy of damages is available to the lessor, and that his action matures at the end of the period of the letting. The cited cases are support not in their holdings, but in their dicta. It is to be noted that the Court did not mention the terms of the lease but stated a theory as though it were applicable in all cases except those covered by special contract provisions. The one difficulty in unquestioned acceptance of this case arises when it is noted that briefs on appeal quote the lease provision that the lessee was to be liable for all rental deficiencies in case of abandonment and reletting.[9] This particular lease provision did not seem to meet the conditions of Civil Code Section 3308 and did not provide for periodic recovery.

The Hardship of the Delayed Maturity of the Third Course Cause of Action. Relying on a New York case,[10] the California Supreme Court has held that an action for damages for complete breach of a lease matures only at the end of the term.[11] The reasoning is that rentals recoverable by the lessor during the remainder of the term after abandonment may fluctuate, and whether there will be a net loss thus remains speculative until the end of the term. The risk of the future solvency of the lessee and of his availability for the service of process remains with the lessor. An attempt to reduce this risk by a lease provision maturing the cause of action on the complete breach and stating the measure of damages as the difference between the reserved rentals and the reasonable rental value of the premises was refused recognition in Moore v. Investment Properties Corporation,[12] on the ground that the provision amounted to a liquidated damages provision in violation of Civil Code Sections 1670-71. This conclusion seems at variance with the dictum in Phillips-Hollman, Inc. v. Peerless Stages, Inc.[13] that the action matured at the end of the term unless there was a provision in the lease to the contrary. It also seems inconsistent to the reasoning of the Court in Treff v. Gulko[14] that, because damages are speculative, the action for damages does not mature until the end of the term. If damages are so difficult to establish fairly that the maturing of the action must await the ending of the period of letting, it would seem difficult to say the case is not one where "from the nature of the case, it would be impractical or extremely difficult to fix the actual damage"[15] --the one case in which liquidated damages are permitted. In 1937, the Legislature made this problem moot with the passage of Section 3308 of the Civil Code.[16] This section permits the inclusion in the lease of a provision giving the lessor an additional remedy to those given by law: an action at the time of breach with damages being the difference between reserved rentals and the reasonable rental value of the premises. This legislative recognition of the need for and fairness of an immediate action on abandonment and repudiation might lead the court to apply the doctrine of Gold Mining and Water Co. v. Swinerton[17] to leases other than mining leases. In support would be the dicta in earlier cases.[18] Against such a course would be the fact that the contrary position taken in Treff v. Gulko[19] prior to the legislation was not challenged by the Legislature and was given continued recognition in De Hart v. Allen.[20] The reduction of the hardship of the lessor who is not protected by a good lawyer at the time of the drafting of the lease probably lies with the Legislature. An amendment to Section 3308 could give the additional remedy to all lessors.

Enforce Contractual Provisions in the Lease Covering Abandonment or New Contracts Entered into at the Time of Abandonment

At the time of abandonment, the lessee and lessor may enter into a new contract authorizing the lessor to lease to a third person and providing for liability on the part of the lessee for any deficiency in rentals. In Respini v. Porta,[1] there is recognition that such an understanding could be expressed or could be implied in fact. The theory of the Court was that the circumstances surrounding the vacation of the premises by the lessee raised an authorization of the lessor to act as agent of the lessee in reletting. The want of cases considering this point indicates that California attorneys have not found exploratory litigation in this area economically sound. In New York, cases are plentiful.[2] Illustrative would be cases to the effect that if the lessor personally faces the abandoning lessee saying he will relet and hold the lessee for rental deficiencies, an implied in fact agency agreement can be found from mere silence on the part of the lessee;[3] but if the lessor writes a letter to the lessee to the same effect, a failure to respond does not raise a new agreement.[4]

Lease provisions intended to give the lessor protection should the lessee abandon and repudiate are being used with some success. Some of these should be shortly considered. In this area it should be remembered that basically the lessor is supplying a capital asset to the lessee and is expecting a fair return for its use. Realistically, the relationship is contractual. Historically, however, the relationship has been fitted into the common law system of estates, and the law of estates has not been renowned for quick changing to meet changing social conditions. Statutory modification has been found and contractual modification has been permitted. The question remains whether the area of permissible modification by contract allows the lessor a reasonable opportunity for safe use of his wealth or whether further statutory modification is necessary.

Conventional Protective Devices--Agency to Relet. In Phillips-Hollman, Inc. v. Peerless Stages, Inc.,[5] the Court reviewed New York cases containing so-called survival clauses and held a lease provision could, and in the instant case did, provide for continued recognition of the rent and covenant liabilities of the lessee after repossession and reletting by the lessor. In Yates v. Reid,[6] the Court quoted a lease provision which authorized a repossession and a reletting without a termination of the lessor-lessee relationship and held such a provision valid. The district court of appeal has in several cases quoted and enforced similar lease provisions.[7]

Both in Yates v. Reid[8] and in Narcisi v. Reed,[9] the lessor, after resuming possession, relet for a period extending beyond the period of the original lease. In both cases, it was contended that the lessor in leasing for such a period could not have been acting as an agent of the lessee and, therefore, had to be acting in his own behalf and inconsistently to a continuation of the lessor-lessee relationship. The contention was denied validity, but one Justice of the California Supreme Court dissented in one of these cases. The lessor could have executed two leases, one for the period of the original letting and one for the extended period. It would seem the contention refused validity by the Court, then, was rather of a mechanical character. Of course, it is possible that a reletting for a period beyond that of the original lease may be shown to have been by the lessor acting for his own benefit and not on behalf of the lessee and, therefore, not under the relet provision of the lease. Such a case might be the execution of a long term lease at a lower rental than the new lessee would have paid for a lease extending only for the period of the original lease.

No California case has been found dealing with the right to any surplus rentals collected by the lessor on reletting. This matter has been considered by the New York courts and the holding has been in favor of the lessee. The surplus rentals are held in the account of the lessee.[10]

The generality voiced in the cases that on abandonment and repudiation by the lessee the lessor can do nothing and enforce the lease provisions as they fall due,[11] is consistent with the historical treatment of the lease transaction. The lessee has a vested property interest--an estate charged with the rent; and the lessor has a vested property interest--the rent issuing periodically out of the estate. Any contract, express or implied, to pay rent is one confirming the existence of these property interests and giving additional remedies to the lessor. In some of the cases where the generality is voiced, the lessor had by lease provision the privilege to act on account of the lessee when the lessee abandoned.[12] Apparently, the contractual rights of the lessor and the changing character of the modern lease to an instrument essentially contractual in character has not been considered sufficient to bring into this area of the law of landlord and tenant the doctrine of minimizing damages. If there is added a lease provision giving the lessor complete control over lease assignments, the reasonableness of the application of the generality seems to become questionable.

Conventional Protective Devices--Acceleration of Rent. A breach of a lease provision followed by a surrender of the estate of the lessee does not effect matured claims of the lessor against the lessee.[1] To the extent that rents were payable in advance and had matured at the time of the surrender, they had ceased to be rents and were matured claims against the lessee.[2] The lessor had causes of action against the lessee and not rents to be affected by the surrender. Can a lessor by a lease provision that all rentals become due on abandonment and repudiation by the lessee, mature all rentals and have a cause of action for the total rental for the term?

Such a lease provision relates not to damages for breach, so as to come within the classification of one for liquidated damages, but relates rather to time of performance. This would seem clear when accompanied by a provision that on abandonment and repudiation by the lessee the lessor would not reenter or do acts of a possessory character other than necessary to prevent waste. Such a provision should not be held to violate Civil

Code Section 1670. An acceleration provision not so restricted might, but would not necessarily, exact a penalty. Thus, an acceleration provision to operate on any breach of an exhaustive list of restrictions on the lessee, many trivial in character but all permitting the lessor to terminate the relationship, probably would be held to be in reality a penalty provision.[3] But, an acceleration provision to operate on breach of a provision for periodic payment of instalments on a lump sum rent for the entire term probably would not be found a penalty provision.[4] This conclusion is disputed by respectable authority[5] on the basis of Ricker v. Rombough.[6] In this case, the acceleration clause (which the lessee claimed was one for liquidated damages and a penalty within the meaning of Civil Code Section 1670) was to operate if the lessee was in default in meeting any of the many restrictions provided in the lease. In other words, it was like the provision held a penalty provision in the New York case noticed above.[7] The court does use language which would lead to the conclusion that an acceleration clause tied into a default in rental instalments alone would be invalid. It distinguished the promissory note acceleration provision on the ground that there the consideration was already paid, while in the rental case it was not yet all received; and the court questioned the validity of the argument that if a lessor could make rent payable in advance, he could accelerate the due dates on a default in instalment payments. The acceleration provision involved was one clearly void. The parties had not made it a series of provisions each applicable to one type of breach of the lease, so the holding was clearly correct. But to say that an acceleration provision on default in the payment of an instalment of a term rental necessarily exacts a penatly is not clear. In Bradner v. Noesun,[8] a five-year lease called for the payment of $36,000 rent payable in monthly instalments. As part of the transaction, the lessee executed a note for $5000 as security for performance of the lease provisions. This note was made payable on or before the end of the five-year period, with the right in the lessor to declare it due on breach of the lease provisions. When rent in amount of the note was due, the lessor declared it due and recovered together with a foreclosure of a chattel mortgage accompanying the note. This at least suggests a rental acceleration device that may be valid--one which accelerates instalment payments of a note given as prepayment of rent. And if this would be valid, then these seems no reason why an acceleration provision tied only to rental payments should not be valid.

Partial prepayment of rent is a common protective device employed by lessors. Where the lease provisions contain no qualifications, these prepayments belong to the lessor as owner and he does not have to account for them unless he wrongfully terminates the lease.[9] Qualifying provisions are not common in residential leases where the prepayment is usually the first and the last months' rentals, but are not uncommon in commercial property leases. Here, large sums may be involved, and provisions may be made for the paying of interest or for the crediting of the interest value of the prepayed sum or for partial repayment in case of termination of the lessor-lessee relationship by reason of some stipulated casualty. Qualifying provisions may raise a constructional problem: whether the parties really meant a prepayment of rent or the posting of a security deposit.[10]

Should the lessor provide for prepayment of all rent and accept a promissory note payable in instalments with an acceleration clause, the case still would seem to be no more than a prepayment case as far as property law controls and a debt payable in instalments as far as the law of bills and notes controls.[11] Other lease provisions operating by way of contract or condition would not be affected by this method of handling rentals. If, instead of the two documents transaction (lease and note), the parties should voice a similar intent in a single document (the lease), it is difficult to conclude their intent could not be recognized. It is only one step from this to hold that an acceleration provision tied into rental payments only is valid.

Conventional Protective Devices--Contracts Guaranteeing Lessor Against Rental Losses. A lease provision can provide that should the lessee abandon and repudiate and the lessor resume control and relet, the lessee agrees to reimburse the lessor for any resultant loss in rentals. Such a contract can call for periodic reimbursement. Such survival contracts have been recognized and enforced. Actions on them are not actions for rent but actions for damages for breach of contract. In Phillips-Hollman, Inc. v. Peerless Stages, Inc.,[12] the Court quoted a lease provision by which the lessee was to be liable for rentals should the lease be determined in any manner provided for therein. After a termination of the lessor-lessee relationship, but before the end of the period covered by the lease, the lessor sued the lessee for rental losses because on reletting he could get only a lower rental. The Court held that the action was for damages and not for rent. It noticed the New York cases holding that the action normally matured at the end of the term when damages ceased to be uncertain but that the parties to the lease could provide for periodic payment of current rental losses, and concluded with the statement that it agreed with the views expressed. The decision was that the particular survival contract involved voiced the intent of the parties that the lessee agreed to pay rental losses sustained by the lessor periodically as they were suffered. Opinions in later cases voice approval of this decision.[13]

Conventional Protective Devices--Liquidated Damages. The problem of liquidated damage provisions was noticed earlier in this study.[14] Lessors attempted to avoid their position of hardship in having to wait to the end of the term for their action for damages to mature by lease provision maturing their claims on the date of abandonment and stating as a measure of damages the difference between the reserved rentals and the reasonable rental value for the rest of the term. In Moore v. Investment Properties Corporation,[15] such a provision was held to amount to one for liquidated damages in violation of Civil Code Section 1670. Civil Code Section 3308 now permits such a lease provision. Provisions other then those permitted by this section still have to satisfy the test of Section 1671 or be held void as in violation of Section 1670. In Green v. Frahm,[16] the lease provision called for a deposit to secure rent and the performance of covenants. The lease was for ten years and the deposit was equal to six months' rentals. The Court held this provision, which would give the deposit to the lessor in case the lessee breached the terms of the lease, exacted a penalty and was void because the fixing of damages for breach of an obligation to pay rent is not "impractical or extremely difficult." In Knight v. Marks,[17] the lessor claimed a similar deposit provision was valid because he had improved the premises for letting to the particular lessee and the character of the improvements limited the number of persons available as lessees. The lessor, however, did not prove a case within his contention but only a case of breach of the agreement to pay rent. The conclusion stated was that a liquidated damages provision to operate on breach of the rent provision of the lease was void.

Nothing in the above or other California cases indicates that a liquidated damages provision, except one within the coverage of Civil Code Section 3308, is a usable device to protect a lessor against a lessee who abandons and repudiates.[18] Certainly, in an exceptional case involving wasting assets, goodwill, percentage rentals, or some similar element, a provision for liquidated damages might be drafted which would bring it within the exception noticed in Civil Code Section 1671.[19] Those cases are few and far between.

Conventional Protective Devices--General Conclusions. When the lessee abandons and repudiates, the courts say that the lessor can treat the lessor-lessee relation as continuing, can sit back and wait for rent to accrue, and can on each due date sue for the rentals. This course involves the risks of the solvency and availability of the lessee and of the rapid depreciation of the property because of lack of use. Contract provisions contemplating a continuation of the lessor-lessee relation and directed to minimizing these risks of the lessor are recognized. Such provisions can make the lessor an agent for the lessee in controlling the premises and, particularly, in subleasing or assigning the leasehold estate. If the provisions permit and the act is one of subletting, then the lease provisions continue fully enforceable against the lessee, and the agent lessor should have to account for rentals received on the sublease. If the provisions permit and the act is one of assignment, then the original lessee would continue, somewhat as a surety, to be liable on all of the lease contracts. Should the assignment contemplate that the assignee pay less than the original rent and the transaction not amount to a novation, the lessee would continue to be liable on the lease contracts. Whether sublease or assignment be involved, the liabilities of the original lessee would continue to mature as provided for in the lease and would be enforceable periodically.

Rent acceleration provisions also involve an understanding that the lessor-lessee relation continue, at least momentarily, beyond the breach by abandonment and repudiation. The theory of their operation is that the rents mature by acceleration prior to the termination of the relation so as to be all presently collectible, whether the lessor elects to treat the relation as continuing or as ended. The availability of this device, however, is questionable, as the courts have a pronounced feeling that it involves the exaction of a penalty within the meaning of Civil Code Section 1670.

The other conventional protective devices mentioned above contemplate a termination of the lessor-lessee relation. These are the provisions protecting the lessor against rental losses on his resumption of control and reletting following abandonment by the lessee. Such contracts may meet the conditions of Section 3308 of the Civil Code, or may be contracts permitting one action at the end of the term for net rental losses or piecemeal actions during the period covered by the original lease.

Without such provisions, apparently the lessor can end the estate of the abandoning lessee and, by notice or other qualification of his conduct, preserve a claim for rental deficiency following his reletting. The action he would have would mature at the end of the original term.

Whatever claims a lessor can establish may be given added value occasionally by the addition of a security deposit, a third-party guarantee, or a security lien provision in the lease transaction. These devices are not always available to a lessor in the modern market and, because they relate to the value and not to the existence of remedies, it has not been thought necessary to consider them in this study.

RECOMMENDATIONS

There seems no reason to change some of the principles controlling the courses open to the lessor. If he elects to accept the surrender tendered by the abandoning lessee and to release him from all further liability, this cannot be challenged. Of course, if the uncertainties of other remedies force him to accept the surrender and to release the lessee, the changing of the other remedies is easy to justify. But taken alone, the surrender and release course cannot be challenged. If the lessor elects to include and to enforce lease provisions (a) permitting him to act as agent for subletting and to enforce the original lease as its provisions mature, (b) permitting him to relet and sue for damages either periodically or at the end of the term as stated in the lease provisions, or (c) permitting him to elect the remedy authorized by Civil Code Section 3308, reasons to question this course of action are difficult to find. But, where he elects to sit back and do nothing until performance of a lease provision matures, or where he elects to end the relationship and to get in damages the value of his bargain unaided by special lease provisions, the fairness of the controlling principles can be challenged. Certainly if he elects the former of these two courses because the latter is too uncertain or too hazardous to risk, it is difficult to question the fairness of his conduct in doing nothing to minimize the damages chargeable to the lessee. Presently, there is uncertainty in the availability of the latter course of action and, even if it were made certain, then it is hazardous to elect because the cause of action matures only at the end of the original period of letting.

Dicta is plentiful that the lessor can qualify his resumption of control and preserve the benefit of his bargain. This means he can sue the lessee at the end of the term for any rental deficiency. The cases in which this course is declared available are cases where the holding below was surrender and release and this was affirmed on appeal, or cases where there was a lease provision justifying the action. The mere absence of clear-cut holdings that the remedy is available to the lessor would not warrant legislative action. But this, plus the wholly unsatisfactory character of the action, dependent as it is on the availability and solvency of the lessee at the end of the term, does indicate a need for legislative action. And if there is legislative action giving the lessor an adequate action for damages, the conditioning of this remedy by the requirement of a good faith attempt to minimize damages would seem only fair and reasonable. This would, in effect, deny the lessor the privilege of sitting back and doing nothing while waiting for rent to fall due. This is not a course of conduct customarily taken by lessors. It involves loss of goodwill value of rental property, more than normal rate of depreciation because of want of occupancy, and, among other things, risks of continued availability and solvency of the lessee should litigation be necessary. If, as it seems to have been New York experience, difficulty is found in setting up standards to determine when a lessor is acting properly in minimizing damages and no statute requiring the lessor to act to mimimize damages be enacted, this should not prevent making the lessor's remedies more certain and more fair. Can this be done?

In the enactment of Section 3308 of the Civil Code, problems of election of remedies as well as problems of damages were covered. There is no reason to interfere with the over-all operation of this statute. To give all lessors this elective remedy, now available to lessors represented by counsel conversant with the statute, would end most of the uncertainty and hardship. This could be done by adding after the first clause of the statute: "<u>and in the absence of lease provisions expressly negating or qualifying such intent of the parties, shall be held to agree.</u>"

Section 3308 of the Civil Code permits a remedy in addition to remedies now or hereafter given to the lessor. Presently, there is some uncertainty of his right to terminate the relationship, with the qualification that after the lessor has relet and the period of the original letting has come to an end, the lessee shall be liable for any rental deficiencies. The remedy under Section 3308 is one on which the period of limitations would start from the moment of election by the lessor. The qualified reletting remedy is one which matures so as to start the period of limitations only at the end of the period of the letting. A legislative declaration that the lessor, by communication or attempted communication of an intent to hold the lessee for rental deficiencies, can preserve lessee liabilities to this extent would clear up some uncertainty over the availability of this remedy. It may not be necessary. The courts at least say this remedy is open to the lessor. Perhaps the best course would be to recommend no legislation at the present time. This would be particularly true if

Section 3308 of the Civil Code were amended to give all lessors except those releasing their rights an immediate action for damages, which would include the bargain value of the lease transaction.

At first blush, and as an abstract problem, a statute making the doctrine of minimizing damages applicable to lease cases would be fair and equitable. If the lease contained a restraint on assignments and on subletting, the conclusion would be even more evident. On reflection and on an attempt to draft such a statute, the problem becomes rather complex, and the fairness of the conclusion becomes doubtful. Should the statute impose a duty on the lessor to relet and a burden on him to show he did acts and that his acts were reasonable? Or should the statute allow the lessee a defense and place on him the burden of establishing the facts that the lessor could have but didn't mimimize damages? Both types of statutes can be supported. Should a lease provision negating or qualifying the applicability of the doctrine be recognized? And how do you state a measure to determine whether the lessor acted reasonably in reletting or in failing to relet? What might be reasonable in a case of a single-family residence might not be so reasonable in the case of a high-rise apartment development, a farm, a factory, or corner business structure. Such legislation should not be lightly recommended or hurridly enacted. More hardship could result from enactment of a poorly worded statute than could be cured by even a perfect law. A review of the cases shows few lessors refusing to relet or to make beneficial use of the premises. Unless abusive conduct calls for legislative action--and the cases do not establish that as a fact--the enactment of a highly complex statute has only abstract fairness in its favor. It is doubtful that a case can be made calling for legislation on this matter.

FOOTNOTES

(General Statement of the Problem)

1. See Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930).
2. Rognier v. Harnett, 45 Cal. App.2d 570, 144 P.2d 654 (1941); Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056 (1915).
3. CAL. CIVIL CODE § 1091; CAL. CODE CIV. PROC. § 1971.
4. 7 HASTINGS L. J. 189, 196 (1956); Joffe, Remedies of California Landlord Upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34 (1961); McCormick, The Rights of the Landlord Upon Abandonment of the Premises by the Tenant, 23 MICH. L. REV. 211 (1925).
5. Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930); Lee v. DeForest, 22 Cal. App.2d 351, 71 P.2d 285 (1937).
6. 1 AMERICAN LAW OF PROPERTY § 3.99 (1952).

(The Fundamentals to Avoid Confusion)

1. 89 Cal. 464, 26 Pac. 967 (1891).

2. Id. at 466, 26 Pac. at 967.

(Remedies Available to the Lessor)

1. Kulawitz v. Pacific Woodenware § Paper Co., 25 Cal.2d 664, 671, 155 P.2d 24, 25 (1944), citing Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932), and Siller v. Dunn, 103 Cal. App. 154, 284 Pac. 232 (1930).

2. _In re_ Bell, 85 Cal. 119, 24 Pac. 633 (1890); Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944); De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945).

3. N.Y. LAW REVISION COMM'N, Legis. Doc. No. 65(A) (1960).

4. N.Y. LAW REVISION COMM'N, Legis. Doc. No. 65(D) (1961).

5. Notice the consideration of the problem in terms of presumption by Temple, C., in Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891).

6. See Welcome v. Hess, _supra_ note 5. On surrender as release, see Carter J., in Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 675, 155 P.2d 24, 26 (1944): "The effect of a completed surrender is to terminate the tenancy, to release the tenant from the payment of future rent. . . ."

7. Lawrence Barker, Inc. v. Briggs, 39 Cal.2d 654, 248 P.2d 897 (1952); Yates v. Reid, 36 Cal.2d 383, 224 P.2d 8 (1950); Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4 (1944); Burke v. Norton, 42 Cal. App. 705, 184 Pac. 45 (1919).

8. Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891); Progressive Collection Bureau v. Whealton, 62 Cal.App.2d 873, 145 P.2d 912 (1944); Guiras v. Harry H. Culver & Co., 109 Cal. App. 743, 293 Pac. 705 (1933).

9. Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891); Bernard v. Renard, 175 Cal. 230, 165 Pac. 694, 3 A.L.R. 1076 (1917). See also Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944);

Rognier v. Harnett, 45 Cal.App.2d 570, 114 P.2d 654 (1941).

10. The possibility of such a contract being implied in fact seems recognized in Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891).

11. See text at 000 infra.

(Treat the Lessor-Lessee Relation as Ended and Sue for Damages, etc.)

1. See, for instance, Siller v. Dunn, 103 Cal. App. 154, 284 Pac. 232 (1930).

2. See, for instance, Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930), cited among supporting cases in 30 CAL. JUR.2d Landlord and Tenant § 271, P. 412, 413, n.6, and in Joffe, Remedies of California Landlord Upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34, 39 (1961).

3. See text at 000 *infra*.

4. See Annots., 110 A.L.R. 368 (1937); 61 A.L.R. 773 (1929); 52 A.L.R. 154 (1928); 3 A.L.R. 1080 (1919). In Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891), the Court stated there was no foundation for such an agency in the lessor.

5. See the annotations cited in note 4, *supra*.

6. Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 230 P.2d 10 (1951); Rognier v. Harnett, 45 Cal. App.2d 570, 114 P.2d 654 (1941); Rehkopf v. Wirz, 31 Cal. App. 695, 161 Pac. 285 (1916); Baker v. Eiler Music Co., 26 Cal. App. 371, 146 Pac. 1056 (1915).

7. See Joffe, Remedies of California Landlord Upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34, 39 n.21 (1961).

(The Language in the <u>Dorcich</u> Case)

1. 103 Cal. App.2d 677, 230 P.2d 10 (1951).
2. See Appellant's Opening Brief, pp. 12-14, in Dorcich v. Time Oil Co., <u>supra</u> note 1.
3. 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891).
4. 175 Cal. 230, 165 Pac. 694, 3 A.L.R. 1076 (1917).
5. 31 Cal. App. 695, 161 Pac. 285 (1916).
6. See, <u>e.g.</u>, Annot., 3 A.L.R. 1080 (1917); 32 AM. JUR. <u>Landlord and Tenant</u> § 912, p. 771 (1941).
7. 25 Cal.2d 664, 155 P.2d 24 (1944).
8. 103 Cal. App. 154, 284 Pac.232 (1930).
9. 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891).
10. <u>Id.</u> at 514, 27 Pac. at 371, 25 Am. St. Rep. at 149, quoted in Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 684, 230 P.2d 10, 14 (1951).
11. <u>Id.</u> at 513, 27 Pac. at 371, 25 Am. St. Rep. at 149.
12. <u>Id.</u> at 514, 27 Pac. at 371, 25 Am. St. Rep. at 149.
13. 175 Cal. 230, 165 Pac. 694, 3 A.L.R. 1076 (1917).
14. <u>Supra</u> note 9.
15. 175 Cal. 230, 233, 165 Pac. 694, 695, 3 A.L.R. 1076 (1917).
16. 121 Cal. App. 476, 9 P.2d 341 (1932).
17. 31 Cal. App. 695, 161 Pac. 285 (1916).
18. Boswell v. Merrill, 121 Cal. App. 476, 478, 9 P.2d 341, 342 (1932), quoted in Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 685-86, 230 P.2d 10, 15 (1951).
19. 103 Cal. App.2d 677, 684, 230 P.2d 10, 14 (1951).

(The Language in the _Rognier_ Case)

1. 45 Cal. App.2d 570, 114 P.2d 654 (1941).
2. 26 Cal. App. 371, 146 Pac. 1056 (1915).
3. _Id_. at 374, 146 Pac. at 1058, quoted in Rognier v. Harnett, 45 Cal. App.2d 570, 574, 114 P.2d 654, 657 (1941).
4. Rognier v. Harnett, 45 Cal. App.2d 570, 574, 114 P.2d 654, 657 (1941).
5. 26 Cal. App. 371, 146 Pac. 1056 (1915).
6. _Id_. at 374, 146 Pac. at 1058.
7. 31 Cal. App. 695, 161 Pac. 285 (1916).
8. _Id_. at 696, 161 Pac. at 286.
9. 99 Pa. St. 370, 44 Am. Rep. 114 (1882).
10. Rehkopf v. Wirz, 31 Cal. App. 695, 697, 161 Pac. 285, 286-87 (1916).
11. 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891).
12. _Supra_ note 9.
13. _Ibid_.
14. Welcome v. Hess, 90 Cal. 507, 513, 27 Pac. 369, 370, 25 Am. St. Rep. 145, 149 (1891).

(Legal Existence of the Conclusion, etc.)

1. Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932); Phillips-Hollman, inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930). In the latter case, the Court recognized the validity of such a lease provision.

2. See the two cases cited in note 1, supra. See also Yates v. Reid, 36 Cal.2d 383, 224 P.2d 8 (1950); De Hart v. Allen 26 Cal.2d 829, 161 P.2d 453 (1945).

3. Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930).

4. Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932); De Hart v. Allen 26 C.2d 829, 161 P.2d 453 (1945).

5. Steelduct Co. v. Henger-Seltzer Co., 126 Cal.2d 634, 160 P.2d 804 (1945)(action by employer); Boardman Co. v. Petch, 186 Cal. 476, 199 Pac. 1047 (1921)(action by employee)

6. 214 Cal. 591, 7 P.2d 697 (1932).

7. 23 Cal.2d 19, 142 P.2d 22 (1943).

8. 26 Cal.2d 829, 161 P.2d 453 (1945).

9. See Brief for Respondents, page 2, 1 Civil No. 12744 and S.F. 17155.

10. Hermitage Co. v. Levine, 248 N.Y. 333, 161 N.E. 97, 59 A.L.R. 1015 (1928), questioned in 4 CORBIN, CONTRACTS § 986, P. 954 n.54 (1951).

11. Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932).

12. Moore v. Investment Properties Corp., 71 F.2d 711 (9th Cir. 1934).

13. 210 Cal. 253, 291 Pac. 178 (1930).

14. 214 Cal. 591, 7 P.2d 697 (1932).

15. CAL. CIVIL CODE § 1671.

16. Cal. Stats. 1937, Ch. 504, p. 1494.

17. 23 Cal.2d 19, 142 P.2d 22 (1943).

18. Bradbury v. Higginson, 162 Cal. 602, 608, 123 Pac. 797, 800 (1912); Silva v. Bair, 141 Cal. 599, 603, 75 Pac. 162, 164 (1904); Respini v. Porta, 89 Cal. 464, 466, 26 Pac. 967 (1891).

19. 214 Cal. 591, 7 P.2d 697 (1932).

20. 26 Cal.2d 829, 161 P.2d 453 (1945).

(Enforce Contractual Provisions, etc.)

1. 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891).
2. See, e.g., Gray v. Kaufman Dairy & Ice Cream Co., 162 N.Y. 388, 56 N.E. 903, 49 L.R.A. 580, 76 Am. St. Rep. 327 (1900); Underhill v. Collins, 132 N.Y. 269, 30 N.E. 576 (1892).
3. Underhill v. Collins, supra note 2.
4. Gray v. Kaufman Dairy & Ice Cream Co., supra note 2.
5. 210 Cal. 253, 291 Pac. 178 (1930).
6. 36 Cal.2d 383, 224 P.2d 8 (1950).
7. Narcisi v. Reed, 107 Cal. App.2d 586, 237 P.2d 558 (1951); Brown v. Lane, 102 Cal. App. 350, 283 Pac. 78 (1929).
8. Supra note 6.
9. Supra note 7.
10. Wallach v. Joseph Gerson Corp., 136 Misc. 146, 239 N.Y. Supp. 333 (N.Y. City Ct. 1930).
11. See the text, supra at 000, notecall 2.
12. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944); Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930).

1. Costello v. Martin Brothers, 74 Cal. App. 782, 241 Pac. 588 (1925); Anheuser-Busch Brewing Ass'n v. American Products Co., 59 Cal. App. 718, 211 Pac. 817 (1922).
2. This does not mean that the claim cannot be partially or wholly satisfied by rents or benefits received by the lessor for use of the premises for periods for which the rents were originally reserved. Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891).
3. So held in 884 West End Avenue Corp. v. Pearlman, 201 App. Div. 12, 193 N.Y. Supp. 670 (1922), aff'd without opinion, 234 N.Y. 589, 138 N.E. 458 (1922), citing as analogous and controlling the security deposit case of Seidlitz v. Auerbach, 230 N.Y. 167, 129 N.E. 461 (1920).
4. So held in Belnord Realty Co. v. Levison, 204 App. Div. 415, 198 N.Y. Supp. 184 (1923).
5. See 30 CAL. JUR.2d Landlord and Tenant § 203 (1956).
6. 120 Cal. App.2d Supp. 912, 261 P.2d 328 (1953).
7. See note 3, supra.
8. 123 Cal. App. 684, 12 P.2d 84 (1953).
9. C. M. Staub Shoe Co. v. Byrne, 169 Cal. 122, 145 Pac. 1032 (1915); Harvey v. Weisbaum, 159 Cal. 265, 113 Pac. 656, Ann. Cas. 1912B 1115, 33 L.R.A. (n.s.) 540 (1911); Friedman v. Isenbruck, 111 Cal. App.2d 326, 244 P.2d 718 (1952); Ace Realty Co. v. Friedman, 106 Cal. App.2d 805, 236 P.2d 174 (1951).

10. See Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385 (1938).

11. On acceleration provisions in commercial paper cases, see Jump v. Barr, 46 Cal. App. 338, 189 Pac. 334 (1920); Dunn v. Barry, 35 Cal. App. 325, 169 Pac. 910 (1917).

12. 210 Cal. 253, 291 Pac. 178 (1930).

13. See De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945); Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932).

14. See the text, <u>supra</u> at 000-000, notecalls 12-20.

15. 71 F.2d 711 (9th Cir. 1934).

16. 176 Cal. 259, 168 Pac. 114 (1917). See also Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899).

17. 183 Cal. 354, 191 Pac. 531 (1920).

18. See Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385 (1938); Redmon v. Graham, 211 Cal. 491, 295 Pac. 1031 (1931); Bradner v. Noesen, 123 Cal. App. 684, 12 P.2d 84 (1932); E.B. and A.L. Stone Co. v. De Fremery Wharf & Land Co., 61 Cal. App. 347, 215 Pac. 687 (1923).

19. See McCarthy v. Tally, 46 Cal.2d 577, 297 P.2d 981 (1956)

APPENDIX

Chronological List of Supreme Court Cases

In re Bell, 85 Cal. 119, 24 Pac. 633 (1890): After the lessee repudiated his lease and vacated the premises, the lessor did not in any way release or discharge him. When during the term the lessee was declared insolvent and his estate taken over under the Insolvent Act of 1880 (Cal. Stats. 1880, Ch. 87, p. 82), the lessor claimed $112.50 rent due and unpaid and $3675 damages for breach of the lease, determining the damages by computing the difference between what he could relet the premises for and the reserved rent. The Court held the claimed damages were not a "debt due" within the meaning of the Act. In its opinion, the court said, on repudiation and abandonment by the lessee, a lessor could enforce the lease provisions as they fell due or could relet for the benefit of the original tenant.

Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488 (1891): This was an action for a quarterly rental due at the time the lessee abandoned and repudiated brought against the lessee after the lessor had relet at a reduced rental for a new term, which included the quarter covered by the action. The Court held that the lessee was entitled to have credited against the claim for the rent due at the time of his abandonment rental received by the lessor for the covered period. The language of the opinion indicates that the circumstances surrounding the vacation by the lessee and the reletting by the lessor raised an authority in the lessor to act in behalf of the lessee.

The Court cited some precedents from sister states permitting reletting on behalf of the lessee, even without a lease provision or a new understanding giving the lessor such authority.

Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145 (1891): This was an action for damages after the lessee abandoned and repudiated and the lessor relet for a period in excess of original term. The acts of the lessor were held to have completed a surrender by operation of law and released the lessee from further liability for failure to perform the lease provisions. The Court expressly rejected the precedents permitting a lessor to relet and still have the original relation of lessor-lessee continue.

Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797 (1912): This was an action for damages in the sum of six months' rentals, two due prior to an alleged repudiation by the lessee and four due because of such an alleged repudiation. The action was brought before the rental for the last four months fell due according to the terms of the lease and was on the theory that the cause of action was for damages for breach of the agreement. The Court held that the lessor did not state a cause of action for breach of the lease contract in that he did not state facts showing a repudiation and abandonment by the lessee and resultant damages sustained by the lessor.

Oliver v. Loydon, 163 Cal. 124, 124 Pac. 731 (1912): This was an appeal from a judgment of the trial court that the complaint of a lessor did not state a cause of action. The complaint alleged a one-year letting, the lessee entering possession and ever since remaining in possession, and the lessee renouncing and repudiating the lease. The lessor alleged that reletting was not possible for the seven remaining months of the term. When the lessor brought his action, no rent was unpaid according to the lease provisions and the lessee was still in possession. The Court said that if the action were viewed as one for rent, no rent was due, and this would be true even if the lessee had repudiated the lease and abandoned the premises, which the complaint stated he had not done. Viewed as an action for damages, the Court said no cause of action was stated since the lessor affirmatively stated the lessee had completed no actual repudiation but had only threatened to breach the lease.

Bernard v. Renard, 175 Cal. 230, 165 Pac. 694, 3 A.L.R. 1076 (1917): The lessee tendered a surrender of a ten-year term, and the lessor made several short term leases while searching for a new lessee and then sold the premises. The lessor then sued for rent for about a twenty-month period of the ten-year term. This was the period prior to the sale of the premises. The Court held that the lessor in reletting the premises unqualifiedly accepted the surrender of the lessee and released him from all further liabilities under the lease.

Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930): During the term, the lessor sued the lessee for the difference between reserved rentals and rentals received from reletting for a period down to the commencement of the action. The lease contained a provision permitting the lessor to terminate the lease if the lessor defaulted in payments of rent and another provision permitting reletting should the lessee abandon or the lease otherwise be terminated during the term, in which case the lessee was to be liable for the balance of the term for the difference between the rentals reserved and those collected on reletting. The Supreme Court reversed the trial court's judgment that the action was premature. The Court held that the parties to a lease could express an intent that the lessee's periodic liabilities for rent should continue after his abandonment and the lessor's reletting, and that the provision in the lease here involved voiced such an intention.

Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932): During the term, the lessee abandoned the premises and defaulted in rental payments. After a period of vacancy, the lessor secured a tenant and leased to him for a period extending beyond the original term. Then, prior to the end of the original term, he sued for damages in the amount of the difference between the reserved rentals and the amount received on the reletting for the period down to the commencement of the action. The Court said the action was one for damages and, as there was no lease provision permitting holding the lessee liable for periodic deficiencies in rentals collected by the lessor, the action accrued only at the end of the original term.

Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22 (1943): The Court held a lessee of a mining lease had totally breached it by an anticipatory repudiation; noticed the dictum from Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797 (1912), that on abandonment and repudiation by the lessee the lessor cannot in advance recover the full reserved rentals, but can recover the difference between such reserved rentals and what he may be able to rent the premises for during the rest of the term; found some doubts had been voiced about such an action; and concluded that the weight of American authority permitted such an immediate action, but whatever that rule might be in ordinary lease cases, mining lease cases were in a class by themselves and, therefore, the action was permissible.

Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4 (1944): This case involved a lease with a special provision authorizing reletting under which the lessor purported to act. The reletting was for a period beyond the original term. This was held not to discharge a guarantor of rent.

Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944): This case involved a lease with a special provision authorizing reletting. A majority of the Court found the record established an eviction of the tenant by the lessor; one justice found it showed the lessor had accepted a surrender and released the lessee from further liability; two justices dissented. The majority opinion, citing Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932), noticed the lessor had a third remedy: the resumption of control by reletting, with an action for the difference in rentals. This would indicate it considered this third remedy an action for damages, and not one for rent or one on a special lease provision such as involved in the instant case.

De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945): After the assignee of the lessee abandoned and repudiated the lease, the lessor first sued and recovered periodically rent from the lessee, and later, after notice, relet at a reduced rental. Within four years after the end of the term, the lessor then sued for damages in the difference between the resumed rentals and those obtained on reletting. The Court held this action for damages matured at the end of the term and not periodically during the term. The Court, noticing the lease did not contain a provision controlling periodic recovery of deficiencies, said the lessor could relet on behalf of the lessee and sue for the deficiency at the end of the term. The supporting cases: Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932); Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 291 Pac. 178 (1930); and Oliver v. Loydon, 163 Cal. 124, 124 Pac. 731 (1912). Briefs in the case show that the lease did contain a relet provision and that this provided that "the lessee agrees to satisfy" the deficiency.

Yates v. Reid, 36 Cal.2d, 224 P.2d 8 (1950): Following abandonment and repudiation by the lessee, the lessor resumed possession and operation of the leased resort for one year and then relet at a reduced rent for a period in excess of the original term. Thereafter, the lessor notified the lessee of a termination of the lease and sued for damages in the difference between the reserved rentals and those provided on the reletting. The action was commenced before the end of the original term of letting. The lease did contain a limited relet provision and a provision that a reentry by the lessor was not to terminate the lease unless he gave written notice to that effect. The trial court held the lessor completed a surrender by operation of law in his reentry and operation of the resort. On appeal, the Supreme Court held that the lessor's acts were justified as within the authorization of the lease agreement and, after reletting and termination by notice, the lessor could sue for damages, crediting the lessee with benefits received from the operation of the resort and with rentals received on the reletting.