9/7/84

Second Supplement to Memorandum 84-68

Subject: Topics and Priorities for 1985 (Landlord-Tenant Law)

At its April 1984 meeting, the Commission determined to retain a consultant to prepare a study on landlord-tenant law. The Commission made this decision in response to a suggestion from the Executive Committee of the Real Property Law Section of the State Bar that this topic be considered by the Commission. Sufficient funds to finance the study were available in the appropriation for the fiscal year that ended June 30, 1984. However, the members of the Commission subcommittee designated for the purpose of approving the consultant recommended by the staff did not complete their investigation of the two consultants suggested by the staff in time to permit a contract to be made. As a result, no contract was made.

The decision to retain a consultant to prepare a background study was not a determination concerning the time when this topic would actively be considered by the Commission. Rather it was a recognition that the topic needs study and that a consultant should be obtained so a study will be available in a few years when the Commission is ready to give active consideration to a new major topic.

The staff believes that this topic is in need of study. For example, we have received a letter from Senator Rosenthal (Exhibit 1 attached) noting a significant and difficult problem in existing law. Exhibit 2 is a recent case where the court points out that an existing California rule is not suited to our present day periodic tenancy relationships but the Legislature rather than the courts must modernize the rule. The rule involved concerns the common problem of a lessee giving 30 days' notice of termination but miscalculating the date of termination.

The letter and the case point out two problems in need of attention. You should read the exhibits attached to determine whether you believe either or both of the problems need immediate attention. However, the staff believes that the position of the State Bar Section is sound--a comprehensive study, rather than a piecemeal study, is the proper approach to take.

Until funds are available to finance a background study on this topic, there is not much the Commission can do to plan for active consider-

ation of the topic. We need a background study prepared by an expert before we can profitably consider this topic. The staff would put this topic in the category to be considered when funds are available to finance background research studies. At that time, the Commission will have to determine the priority to be given to the various topics that are awaiting background studies.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2nd Supp. to Memo 84-68 EXHIBIT 1

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Mar. 22, 1984

The Honorable Herschel Rosenthal
Senator, 22nd District
11340 W. Olympic Blvd.
Los Angeles, CA 90064

Dear Senator:

A serious problem exists under the present landlord-tenant laws.

Under the provisions of the Code of Civil Procedure, Sections 1159 et. seq., the landlord may file an action for unlawful detainer where the tenant has defaulted in rent payments. This is a summary procedure and the legislature has acknowledged this in requiring a 5-day response by the defendant instead of the usual 30days in most civil actions. It has further indicated this summary action, in Section 1179(a), by giving these proceedings precedence over other civil actions.

The problems arise when the landlord, having obtained his judgment and a writ of possession, attempts to evict the tenants. According to Section 715.020(d), if there is a person in the premises who is not named in the writ, all that person has to do is claim a right to possession and the levying officer may not place the judgment creditor in possession. THIS IS SO EVEN IF THE THAT PERSON IS UNKNOWN TO THE LANDLORD AND IS ON THE PROPERTY WITHOUT THE LANDLORD'S CONSENT. THIS PERSON DOES NOT EVEN HAVE TO SHOW THE LEVYING OFFICER ANY IDENTIFICATION TO SHOW THAT HE OR SHE IS ACTUALLY RESIDING IN THE PREMISES.

For example, landlord rents to tenants John and Mary Jones under an oral lease or even under a written lease by the terms of which Jones cannot sub-lease without the consent of the landlord. The lease may even state that the premises will be occupied only by John and Mary. John and Mary fail to pay rent and landlord sues John and Mary for unlawful detainer. Unless the landlord happens to live in the same building only John and Mary are named in the complaint because these are the only persons that the landlord knows about. Even if the landlord names several John Does in the complaint, only John and Mary would be served and the

judgment for the landlord would be against only John and Mary.

When the levying officer arrives to serve John and Mary with the writ of possession a third person hands him an affidavit to the effect that he or she has lived on the premises prior to the time that John and Mary were served and the levying officer, by virtue of 715.020(d), cannot give possession to the landlord. The landlord, who by now has received no rent for several months, has two choices:

1. He can serve this person with a 3-day notice to pay rent or quit and follow up with an unlawful detainer as he did with John and Mary. This means that he has lost at least another month's rent by the time he obtains judgment and a writ of possession against this third person, or

2. He can bring this third person into court on an Order to Show cause why he or she should not be bound under the same judgment as John and Mary under the provisions of Section 989. This method will save the landlord a couple of weeks IF HE CAN SERVE THIS THIRD PERSON. Unless the third person makes an appearance in court, which seldom happens, the landlord cannot prove that the affidavit, made under penalty of perjury, is false and even if he did, a perjury charge against the third person puts no money in the landlord's pocket.

Assuming that the landlord has brought this third person into the action by either of the above methods, and the levying officer is again sent out to possess the property under the writ, there is nothing to prevent A FOURTH PERSON from claiming a right to the property, the same as the third party. All it takes is a piece of paper designated an "affidavit" given to the levying officer to halt the possession of the property.

Unfortunately it is not unusal for 1 or 1 persons to rent an apartment and then bring in additional persons without the knowledge or consent of the landlord. The above example of the Joneses is not hypothetical, it is real.

I sincerely request that you initiate legislation for a change to Section 715.020(d) of the Code of Civil Procedure

to bring it into line with Section 720.610 et. seq., undertakings to release property, and amend the section to read:

> 715.020(d). Where a third person claims a right topossession of the property that has been levied on under awrit of possession, the third person shall file an undertaking with the levying officer in an amount equal to one andone-half times the amount of the judgment. The undertaking shall comply with the provisions of Chapter 6, Sections 720.620 through 720.660 and Chapter 7 of this Code.

I believe this amendment would be equitable for both the tenant and the landlord. If, upon trial or hearing against the third person, the landlord is successful, he has the undertaking from which to recover. If the third person is successful, he or she will recover the costs of the undertaking from the landlord as damages, in addition to his or her costs of suit.

I would appreciate your comments.

Very truly yours,

Edward Firestone

Edward Firestone

EXHIBIT 2

[No. B003866. Second Dist., Div. Four. May 31, 1984.]

LESLIE KAPLAN, Plaintiff and Respondent, v.
SARA E. LOPATIN, Defendant and Appellant.

SUMMARY

A tenant delivered two letters to her landlord stating her intent to terminate a month-to-month tenancy. The letters gave less than the 30-days notice to terminate required by Civ. Code, § 1946, before the stated termination date. Shortly thereafter, the tenant purported to retract her termination, but the landlord refused to consent to the retraction. The landlord subsequently obtained an unlawful detainer judgment. (Municipal Court for the Los Angeles Judicial District of Los Angeles County, No. A 03331, Richard A. Adler, Judge.)

The Court of Appeal reversed. It held that Civ. Code, § 1946, did not alter the common law rule that a notice of intent to terminate a tenancy which fails to state the requisite number of days notice is ineffective to terminate the tenancy. It also held that the tenant's letters did not constitute a written offer to surrender the premises pursuant to Code Civ. Proc., § 1161, subd. (5), which provides that a tenant may lawfully cause a termination of tenancy when he or she "makes a written offer to surrender which is accepted in writing by the landlord." It held that the character of the letters, by which the tenant intended only to give notice to terminate the tenancy, was conclusively established by the pleadings. (Opinion by Woods, P. J., with Kingsley and McClosky, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) Landlord and Tenant § 124—Termination of Tenancy—Notice—Requisites and Effect of Notice—Failure to Provide Requisite Number of Days Notice.—Civ. Code, § 1946, which provides that, as to month-to-month tenancies, at least 30 days written notice is required to terminate the tenancy, does not alter the common law rule that a notice of intent to terminate a tenancy which states less than the legally

required period of notice is wholly ineffective to terminate the tenancy. Therefore, a notice of intent to terminate a tenancy which fails to state the requisite number of days notice cannot serve to terminate the tenancy. Consequently, a tenant's letters to her landlord stating her intent to terminate a month-to-month tenancy, given to the landlord on January 7, 1982, specifying January 31, 1982, as the date of termination, was ineffective to terminate the tenancy.

[See **Cal.Jur.3d**, Landlord and Tenant, § 249; **Am.Jur.2d**, Landlord and Tenant, § 990.]

(2a, 2b) Common and Civil Law § 4—Common Law as Affected by Statute.—Statutes will not be presumed to supersede common law rules unless the statutory language explicitly so indicates or necessarily so implies. The common law is not repealed by implication or otherwise if there is no repugnancy between it and the statute and it does not appear that the Legislature

intended to cover all subjects.

(3) **Statutes § 19—Construction—Effect of Common Law.**—Where there is no express intent to depart from, alter, or abrogate the common law rules, a statute on a subject will be construed in light of the common law decisions on the same subject or closely related subjects.

(4) **Statutes § 19—Construction—Plain Meaning.**—It is not proper statutory construction for a court to add to or take away from the plain meaning of a statute.

(5) **Statutes § 45—Construction—Presumptions—Legislative Familiarity With Common Law.**—In construing a statute, courts must assume that in enacting or amending the statute, the Legislature was familiar with the common law rules on the subject.

(6a, 6b) **Landlord and Tenant § 136—Termination—Surrender—What Constitutes an Offer to Surrender.**—Two letters by a tenant to her landlord stating her intent to terminate a month-to-month tenancy, which were legally ineffective to terminate the tenancy because they failed to provide thirty-days notice of termination as required by Civ. Code, § 1946, did not constitute a written "offer to surrender" the premises pursuant to Code Civ. Proc., § 1161, subd. 5, which provides that a tenant of real property may lawfully cause a termination of tenancy when he or she "makes a written offer to surrender" which is accepted in writing by the landlord. The character of the letters, intended by the tenant to be effective as a notice of termination, was conclusively established by the pleadings. Consequently, no evidence

[156 Cal.App.3d 769]

was admissible, nor could a finding be made, that it was not the tenant's intention that the letters be a notice of termination of her tenancy.

(7) **Pleading § 47—Answer—Admissions—By Failure to Deny.**—Every material allegation of the complaint or cross-complaint not controverted by the answer shall, for purposes of the action, be taken as true.

(8) **Contracts § 26—Construction and Interpretation—Function of Courts—Questions of Fact—Appellate Review.**—Appellate review of a trial court's interpretation of an agreement is governed by the rule that where extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld.

(9) **Landlord and Tenant § 141—Termination—Notice to Quit—Effect of Notice—Withdrawal or Waiver of Notice.**—A party who has given a notice to quit cannot afterwards withdraw or waive such notice without the consent of the other party to the tenancy. A notice once given operates to terminate the tenancy at the time therein specified unless both parties consent that it shall not so operate.

COUNSEL

Anna Burns for Defendant and Appellant.

Honey Kessler Amado for Plaintiff and Respondent.

OPINION

WOODS, P. J.—This is an appeal timely taken by defendant tenant, Sara E. Lopatin, from an unlawful detainer judgment entered on May 17, 1982,[1] in favor of plaintiff, Leslie Kaplan, for possession of residential property located

[1]The Appellate Department of the Los Angeles Superior Court certified for publication its opinion reversing a municipal court judgment for unlawful detainer. This court transferred the case pursuant to California Rules of Court, rule 62(a).

at 659 South Ridgeley Drive, Los Angeles, California, and for damages in the sum of $662. Plaintiff's request to cash defendant's cashier's check of $216 was also granted.

[156 Cal.App.3d 770]

The engrossed settled statement provides us with the following facts:

Plaintiff is the owner of the real property in issue; defendant was plaintiff's tenant, having occupied the premises since December 28, 1970, when she entered into possession pursuant to a lease executed by the defendant and the deceased mother of plaintiff. The original lease executed by plaintiff's mother and defendant provided for an original term of two years, which expired February 28, 1979.[2] Pertinent provisions of the lease provided, "If the lessee shall hold over the term with the consent expressed or implied, of the lessor, such holding shall be construed to be a tenancy only from month-to-month."

Since February 28, 1979, defendant has occupied the premises pursuant to the foregoing lease provisions under a month-to-month tenancy. The lease is silent as to the manner by which the month-to-month tenancy could be terminated.

On Thursday, January 7, 1982, defendant placed in plaintiff's mailbox the following two notes written by defendant of which plaintiff acknowledged receipt: Note No. 1:

"Dec. 31, 1981

"Leslie Kaplan
460 Highland Ave.
L.A. Calif.
"Hi Leslie: I hereby give notice I will vacate my apt. on January 31, 1982. It will be possible for me to move sooner if we agree with regards to a rebate from you if you should wish to rent the apt. sooner so that new tenants can move in by Feb. 1st which will be to your benefit.

(signed) Sara E. Lopatin
"P.S. Dec. 28, 1981 was *11* years I moved in."

Note No. 2:

"Jan. 7—

Hi Leslie:
I thot [*sic*] I enclosed my notice to vacate with my check, but I found it on my table this morning. Anyway I'm so exited and lite [*sic*] headed these past few months (weeks especially) as I'm getting 'married' within a few weeks. We leased a beautiful 2 bedroom apt sooner than expected.

(signed) Sara"

[156 Cal.App.3d 771]

On Sunday, January 10, 1982, defendant telephoned plaintiff several times. Plaintiff eventually returned her calls. During the telephone conversations, defendant stated to plaintiff that she was withdrawing her notice of termination. Plaintiff's response was noncommital, expressing neither consent to, nor rejection on the attempted recall of the notice.

On the afternoon of Sunday, January 10, 1982, defendant mailed to plaintiff the following note written by defendant upon stationery bearing defendant's printed name and address:

"Sunday, Jan. 10, 1982

"Hi Leslie: Referring to our phone conversation; due to unforeseen circumstances within the last few days, I have to change my plans making it necessary to *retract* my moving notice. So as of this writing I will remain here.

Sincerely,
(signed) Sara E. Lopatin"

On Monday, January 11, 1982, plaintiff mailed to defendant the following letter:

"January 11, 1982

"Sara Lopatin
659 South Ridgeley Drive
Los Angeles, Ca. 90036
"Dear Sara,
"I accept your notice to quit and do not and will not consent to a withdrawal of that notice to terminate tenancy. If the premises is not surrendered by January 31, 1982, I will use your written notice as a grounds for an unlaw-

[2]These dates are taken from the engrossed settlement statement. Extensions were apparently granted.

ful detainer action.

Sincerely
(signed) Leslie Kaplan"

Defendant mailed a cashier's check in the amount of $216, covering the rent from February 1, 1982, to February 28, 1982, to plaintiff. This check was received by plaintiff on January 30, 1982, and she retained it.

On February 2, 1982, plaintiff sent defendant a notice to quit the premises by February 7, 1982.

Plaintiff was aware that the cashier's check represented the rent from defendant for the month of February, 1982. Plaintiff made no attempt to

[156 Cal.App.3d 772]

return the check to defendant. Plaintiff never notified defendant that the rent check was unacceptable.

When defendant did not vacate the premises on February 7, 1982, plaintiff filed the instant action for unlawful detainer on February 9, 1982.

We are presented with the following issues:

I. Does Civil Code section 1946 abrogate the common law rule as to the ineffectiveness of a late notice of termination?

II. May the ineffectual notice of termination be deemed to constitute an offer to surrender pursuant to section 1161, subdivision 5 of the Code of Civil Procedure?

III. Whether such an offer to surrender may lawfully be unilaterally withdrawn by the lessee without lessor's consent, and the effect of the lessor's retention without negotiation of the tenant's check?

I

The statute controlling termination of tenancies from month-to-month is section 1946 of the Civil Code, which provides in pertinent part: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; *provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination.* It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof." (Italics added.)

(1a) However, as is explained below, section 1946 is not necessarily controlling as to *all* aspects of termination of periodic tenancies unless the statute clearly manifests an intent to modify or supersede otherwise applicable common law rules.

Section 22.2 of the Civil Code[3] provides: "The common law of England, so far as it is not repugnant or inconsistent with the Constitution of the

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United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

Section 4 of the Civil Code provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

(2a) Case law has established that statutes will not be presumed to supersede common law rules unless the statutory language explicitly so indicates or necessarily so implies.

(3) Where there is no express intent to depart from, alter or abrogate the common law rules, a statute on the subject will be construed in light of the common law decisions on the same subject or closely related subjects. (*Morris* v. *Oney* (1963) 217 Cal.App.2d 864, 870 [32 Cal.Rptr. 88]; *County of Los Angeles* v. *Frisbie* (1942) 19 Cal.2d 634, 639 [122 P.2d 526]; *Loew's Inc.* v. *Byram* (1938) 11 Cal.2d 746, 750 [82 P.2d 1].) **(2b)** Otherwise stated, the common law is not repealed by implication or otherwise if there is no re-

[3]Formerly Political Code section 4468. (Stats. 1850, ch. 95, p. 219.)

pugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject. (*Gray* v. *Sutherland* (1954) 124 Cal.App.2d 280, 290 [268 P.2d 754].)

(1b) Thus, the question is whether section 1946 of the Civil Code evidences a specific intent to abrogate the common law rule as to the ineffectuality of a late notice of termination or evidences a general intent to control the whole subject matter of termination of periodic tenancies so as to supersede the common law by necessary implication.

Under common law in America an untimely notice of termination of a periodic tenancy is not only ineffective to terminate the tenancy as of the end of the period for which it was intended but is wholly ineffectual to terminate the tenancy as of the end of any succeeding period without further timely notice. (*Arbenz* v. *Exley, Watkins & Co.* (1905) 57 W.Va. 580 [50 S.E. 813]; *Grace* v. *Michaud* (1892) 50 Minn. 139 [52 N.W. 390]; note (1956) 8 Hastings L.J. 108, 109-111.)

When enacted in 1872, Civil Code section 1946, which governs the termination of periodic tenancies by notice, followed the basic common law rule to require that a month-to-month tenancy was terminable by a notice which was as long as the period of the tenancy, and which was given so as to expire at the end of the period of the tenancy.

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"As originally enacted in 1872, [Civ. Code, § 1946] declared that: 'A hiring of real property for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.'" (West Annot. Cal. Codes, Civ. Code, § 1946, Historical Note, p. 179 (1954 ed.).)

In 1941 and 1947 Civil Code section 1946 was amended to its present form, which changes the basic common law rule in two ways. The 1941 amendment changed the common law to provide that the notice of termination could be given at any time; the 1947 amendment changed the common law to provide for 30 days as opposed to one month's notice. (*Ibid.*; 8 Hastings L.J. 108 at p. 110.)

Thus, Civil Code section 1946 as amended does *not* expressly abrogate the common law rule that a notice of intent to terminate tenancy which states less than the legally required period of notice is wholly ineffective to terminate the tenancy. (See 8 Hastings L.J. 108 at p. 110, *supra.*) Nor does the statutory language suggest that this common law rule is inconsistent with the scheme of Civil Code section 1946 as amended.

Accordingly, Civil Code section 1946 does not appear to alter the common law rule. Therefore, a notice of intent to terminate tenancy which fails to state the requisite number of days notice cannot serve to terminate the tenancy.

However, in *Kingston* v. *Colburn* (1956) 139 Cal.App.2d 623, 625 [293 P.2d 805], the Third District held that, under section 1946, a notice of termination that is untimely as to the stated termination date (less than 30 days succeeding service) is nevertheless effective to terminate as of 30 days succeeding that service.

In *Kingston*, plaintiff lessor and defendants' tenants entered into a written five-year lease calling for payment of a monthly rent of $125. The tenants vacated the premises, and the lessor sued for the balance of the rents called for by the lease. The trial court denied any recovery. On appeal, the Court of Appeal held that the lease was insufficient under the statute of frauds to constitute a lease for a five-year term, but because defendants had entered into possession and had commenced paying a monthly rental, *they became tenants from month to month.* The opinion points out that on January 11, 1954, defendants gave notice to the landlord that they had vacated the premises on January 9. As to the effect of this notice, the Court of Appeal stated: "As a tenant from month to month under the provisions of section 1946 of

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the Civil Code, defendants could terminate their tenancy 'by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date

of termination.' Necessarily therefore the notice of January 11 was insufficient and not in compliance with the statute so as to terminate the tenancy on January 10, but that is not to say it would not have been effective as of February 10." (*Kingston* v. *Colburn, supra,* 139 Cal.App.2d 623, 625.)

The Court of Appeal then reversed the judgment of the trial court, which had denied all recovery to plaintiff, with instructions to enter a judgment for plaintiff for $125, the amount of one month's rent.

It has been suggested that *Kingston* is distinguishable from the present case on two bases: (1) that *Kingston* was concerned only with the effect of a tenant's premature notice upon his obligation to pay rent, while in the underlying action defendant made no attempt to avoid paying rent due, and (2) in *Kingston* the defendant had vacated the premises prior to giving notice, so that the court did not have before it the question of unlawful detainer, as we have before us. But this attempted distinction overlooks the critical fact that both the duration of the tenant's obligation to pay rent and the landlord's ability to recover possession are dependent upon the same event—whether the tenancy has been terminated. *Kingston* must be recognized as holding that section 1946 of the Civil Code departs from the common law rule as to the effectiveness of untimely notice of termination of month-to-month tenancies.

Kingston did not raise or discuss the question of whether section 1946 abrogated the common law rule. The *Kingston* decision provides a pragmatic solution to the common problem of a lessee giving 30 days notice of termination but miscalculating the date of termination. In such instances, the lessee giving notice expects the tenancy to terminate on the date specified in the notice, and to be responsible to pay rent until a new and effective notice is served. Conversely, a lessor serving notice could contract to lease the premises to a new lessee yet remain obligated to the present tenant until a new and effective notice is served to effect the desired termination.

The *Kingston* rule thus appears more suited to our present day periodic tenancy relationships than the common law rule. The prevailing rule in other jurisdictions is in accord with *Kingston.* (Annot., Notice to Terminate Tenancy (1933) 86 A.L.R. 1346, 1349; 50 Am.Jur.2d 97, Landlord and Tenant, § 1210, pp. 96-97.)

Nevertheless, under the guidelines discussed above concerning determination of abrogation of common law rule by statute, it must be concluded

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that section 1946 of the Civil Code does not expressly or by necessary implication alter or conflict with the common law rule nor does section 1946 reflect a clear intent by the Legislature to control the whole subject of the effect of untimely notices to terminate periodic tenancies. If the Legislature intended that section 1946 effect the rule stated in *Kingston,* it is the exclusive province of that body to express that intent. (*Estate of Horman* (1971) 5 Cal.3d 62, 77 [95 Cal.Rptr. 433, 485 P.2d 785]; *Smith* v. *Anderson* (1967) 67 Cal.2d 635, 645 [63 Cal.Rptr. 391, 433 P.2d 183].) **(4)** It is not proper statutory construction for a court to add to or take away from the plain meaning of a statute. (*In re Andrews* (1976) 18 Cal.3d 208, 212 [133 Cal.Rptr. 365, 555 P.2d 97]; *Great Lakes Properties, Inc.* v. *City of El Segundo* (1977) 19 Cal.3d 152, 155 [137 Cal.Rptr. 154, 561 P.2d 244].) **(5)** Perhaps most significantly, in construing a statute courts must assume that in enacting or amending the statute the Legislature was familiar with the common law rules on the subject. (*Keeler* v. *Superior Court* (1970) 2 Cal.3d 619 [87 Cal.Rptr. 481, 470 P.2d 617, 40 A.L.R.3d 420]; *Baker* v. *Baker* (1859) 13 Cal. 87, 95-96.)

(1c) In this case, defendant's letter of intent to terminate was ineffective as it was given to the landlord on January 7, and it specified January 31 as the date of termination.

II

(6a) Given that the untimely notice did not effect a unilateral termination of the tenancy, the question remains whether the letters of December 31, 1981, and January 7, 1982, constitute a written "offer to surrender" the premises pursuant to Code of Civil Procedure section 1161, subdivision 5 that could be accepted by the lessor.

Section 1161, subdivision 5 of the Code of

Civil Procedure provides that a tenant of real property may lawfully cause a termination of tenancy when he ". . . makes a written offer to surrender which is accepted in writing by the landlord."

Under the facts of the present case, it is arguable that the tenant's two letters could be construed as such an offer to surrender which was accepted by the landlord's letter of January 11. In the early of case *Dorn* v. *Oppenheim* (1919) 45 Cal.App. 312 [187 P. 462], a month-to-month tenant vacated the premises without even attempting to give written notice of termination. The tenant did on two occasions tender the keys to the landlord, which tenders were rejected. *Dorn*, at page 314, characterized this conduct as follows: "The most that can be reasonably claimed for such tender is

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that it was a mere *offer* to terminate the tenancy and surrender possession, which was promptly declined by the landlord." (Italics added.)

It was the position of the majority in the appellate department that, as in *Dorn*, the tenant in the present case committed an "insufficient act" to effect a unilateral termination under section 1946, and that that act may be deemed an "offer to surrender."

While there is superficial analogy between the misfeasance of the *Dorn* tenant and the malfeasance of the present tenant, the analogy is not sustainable. Nor do the underlying findings of fact in the present action allow an appellate court to reevaluate the extrinsic evidence by which the trial court determined that the tenant intended the notice to be one to terminate the tenancy as of January 31, 1982, rather than an offer to surrender on that date. Further, the character of the letters was established by the allegations and admissions in the verified complaint and answer below.

In *Dorn*, the tenant did not attempt to effect a termination under section 1946 by written notice. The only act was the tender of keys evidencing an offer of immediate, unconditional surrender. There can be no dispute as to the characterization of such act. By contrast, in the present action, the tenant attempted to effect a unilateral termination by service of written notice pursuant to section 1946. The mere fact that the letters were legally ineffectual as a notice to terminate does not necessarily require the conclusion they were instead intended and treated as an offer to surrender as of a date certain that would be legally binding upon definite terms if accepted by the landlord.

As was persuasively pointed out in the dissenting opinion in the appellate department:

"[I]t would appear to be clear that the letter [of December 31, 1981,] contains in the first sentence a 'notice I will vacate my apt. Jan. 31, 1982,' and in the second an offer to remove at a date earlier than that specified in the notice 'if we agree with regards to a Rebate from you . . . .' That this is the construction placed upon it by the parties is established by the pleadings.

"In her verified first amended complaint, plaintiff alleged: '6. On or about January 7, 1982, said Defendants delivered to the Plaintiff herein a note, dated December 31, 1981, wherein Defendant LOPATIN gave notice that she will vacate her apartment on January 31, 1982, thereby terminating said tenancy thirty one (31) days after the date of the notice. Defendant LOPATIN further indicated that it would be possible for her to move sooner if she and

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Plaintiff could agree with regards to a rebate for the unused portion of the rent. A copy of said notice dated December 31, 1981, has been attached hereto as Exhibit 'A'.

" '7. On or about January 10, 1982, said Defendant LOPATIN telephoned Plaintiff herein and indicated that she would like to retract her notice to quit said premises and to terminate the tenancy. Plaintiff refused the retraction.'

"In her verified answer, defendant pleaded: 'Defendant admits the allegations contained in paragraphs 1, 2, 6 and 9 of the complaint.' She further pleaded: 'Answering paragraph 7 defendant admits all of said paragraph but denies "Plaintiff refused to accept the retraction," in said paragraph of the Complaint.'

"That 'Defendant LOPATIN *gave notice* that she will vacate her apartment on January 31, 1982, thereby terminating said tenancy thirty one (31) days after the date of the notice' and that on or about January 10, 1982, defendant

telephoned plaintiff 'and indicated that she would like to retract her *notice to quit* said premises and to *terminate the tenancy*.' (italics added) were facts established by the pleadings. As *such, they were not even issues in the trial.*

(7) "'Every material allegation of the complaint or cross-complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true.' (Code Civ. Proc., § 431.20, subd. (a); *Perales* v. *Department of Human Resources Dev.* (1973) 32 Cal.App.3d 332, 341 [108 Cal.Rptr. 167]; *Security Pac. Nat. Bank* v. *Associated Motor Sales* (1980) 106 Cal.App.3d 171, 176 [165 Cal.Rptr. 38].)"[4]

[4]In *Lifton* v. *Harshman* (1947) 80 Cal.App.2d 422, 431-432 [182 P.2d 222], overruled on other grounds on *Pao Ch'en Lee* v. *Gregoriou* (1958) 50 Cal.2d 502, 506 [326 P.2d 135], it was said: "When allegations in a complaint are admitted by the answer (a) no evidence need be offered in their support; (b) evidence is not admissible to prove their untruth; (c) no finding thereon is necessary; (d) a finding contrary thereto is error."

Also in *Stoneman* v. *Fritz* (1939) 34 Cal.App.2d 26, 31 [92 P.2d 1035], the following appears:

"As the delivery of the two deeds to defendant was admitted by the pleadings no evidence should have been received on that question as it was not an issue in the case. Findings of fact contrary to these facts admitted in the pleadings must be disregarded. (21 Cal.Jur., sec. 106, p. 155.) The rule is stated in *Welch* v. *Alcott* (1902) 185 Cal. 731, at page 754 [198 P. 626], as follows:

"'It was said in *Burnett* v. *Sterns* (1867) 33 Cal. 468: "The finding should be confined to the facts in issue. The province of the court in respect of facts is to determine but not to raise the issue." (See, also, *Ortega* v. *Cordero* (1891) 88 Cal. 221 [26 P. 80].) "Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer there is no issue as to the fact. The allegation of fact being admitted it is conclusive. A finding against the admission is therefore outside the issues." (*White* v. *Douglass* (1886) 71 Cal. 115, 119 [11 P. 860].) It was declared in *Estate of Doyle* (1887) [p. 779] 73 Cal. 564, 570 [15 P. 125]: "When a trial is had by the court without a jury, a fact admitted by the pleadings should be treated as 'found' . . . If the court does find adversely to the admission, such findings should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. . . . In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." (See, also, *Hutchison* v. *Barr* (1920) 183 Cal. 182 [190 P. 799]; Sutherland on Code Pleading, sec. 1167.) "There can be no necessity of a finding as to a fact admitted by the pleading."'" (*Back* v. *Hook* (1951) 107 Cal.App.2d 250-251, 252 [236 P.2d 910] accord; *County of Los Angeles* v. *Beverly* (1954) 126 Cal.App.2d 89, 92 [271 P.2d 965].)

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(6b) "The nature of the December 31, 1981, communication as a 'notice that she will vacate her apartment on January 31, 1982, thereby terminating said tenancy thirty one (31) days after the date of the notice' and that thereafter defendant sought to retract her 'notice to quit . . . and to terminate the tenancy' are facts unqualifiedly established by defendant's admission in her answer. The status of the letter as a notice having been admitted by the pleadings, no evidence was admissible, nor could a finding be made, that it was not defendant's intention that the note be a notice of termination of her tenancy. For this court now to undertake to redetermine the factual issue of such intention, completely contrary to such admissions, I submit is without precedent or authority and beyond our appellate powers. (Italics omitted.)

"Had the issue of whether the December 31, 1981, letter evinced an intention to give notice of termination or was only an offer to terminate not been concluded by the pleadings, we would still be powerless to substitute our determination for the finding of the trial judge. (8) 'Our review of the trial court's interpretation of the agreement is governed by the settled rule that where extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld.' (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747 [131 Cal.Rptr. 873, 552 P.2d 1169], and cases collected at p. 747.) Here, the overwhelming weight of the evidence supports the finding of a notice to terminate. The letter itself states 'I hereby give notice I will vacate my apt. . . .' Defendant's January 7, 1982 note states 'I thot [*sic*] I enclosed my notice to vacate with my check, . . .' Her January 10, 1982 note seeks 'to *retract* my moving notice.' In her testimony at trial, defendant stated that

the letter of December 31, 1981, 'gave notice that she would vacate her apartment on January 31, 1982'; that she was 'planning to vacate'; that on January 10, 1982, she telephoned plaintiff and told her 'she was revoking the notice given in her letter dated December 31, 1981, . . . that she would vacate the premises;' and that on the same date she wrote to plaintiff stating that 'defendant had to change her plans and retract her moving notice.' In stating her points on appeal, appellant indicated: '1. The written notice to terminate, dated December 31, 1981, (Exhibit #1) was

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invalid, and could not be used by Respondent as a basis to terminate the tenancy.' Although in her brief on appeal defendant now refers to the letter as an 'offer to terminate,' in oral argument her counsel conceded that, in view of the state of the pleadings, she was bound to treat it as a notice."

Further, no motion was made after trial to conform the pleadings to proof nor was any reliance placed upon the theory of an offer to surrender by the tenant or landlord in the trial court.

III

A. *Revocability of Notice or Offer to Surrender.*

For the reasons that we conclude no effective notice of termination was served and no offer to surrender as of a date certain was made or accepted, it need not be decided whether such notice or offer, if valid, could be unilaterally revoked without the consent of the landlord. However, the law is clear on this question. (9) It is that ". . . a party who has given a notice to quit cannot afterwards withdraw or 'waive' such notice without the assent of the other party to the tenancy, that is, . . . a notice once given operates to terminate the tenancy at the time therein specified unless both parties consent that it shall not so operate." (*Devonshire* v. *Langstaff* (1935) 10 Cal.App.2d 369, at p. 373 [51 P.2d 902], quoting Tiffiny on Landlord and Tenant, p. 1462.)

B. *Significance of Retention of Check for Last Month's Rent.*

Finally, because we have determined that the tenancy has not been terminated by notice or surrender, it is unnecessary to reach the final question of whether the lessor's retention (without negotiation) of the tenant's check for the next 30 days rent constitutes a waiver of any termination or surrender.

Accordingly, the judgment in favor of respondent must be reversed.

Kingsley, J., and McClosky, J., concurred.