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Review of Recent California Decisions in the Law of Porperty

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A Review of Recent California Decisions in the Law of Property

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THE relation of landlord and tenant seems to be unusually productive of litigation. This is due in the main to two reasons: the forms of leases are still imperfectly standardized, notwithstanding centuries of experience in drafting, and the character of a lease continues to remain amphibious because of certain historical developments in English law of the thirteenth century—sometimes being viewed under the category of contract, sometimes under that of property. The period of time under review affords illustration of the unsettled character of the landlord-tenant relation, presenting a considerable number of cases in this field, many of them, however, devoid of interest save for the litigants. A few only are here mentioned. *Harrelson v. Miller & Lux*[1] brings up the perpetually recurring question whether a given arrangement constitutes a lease or something less permanent in character—in this instance a cropping agreement. The Supreme Court determined that the instrument involved in the litigation was a lease, mainly, though not solely, for the reason that the occupier was given exclusive possession. The court in the opinion in Harrelson v. Miller & Lux also decided several points of interest in respect to farming leases, particularly one with regard to the right of a tenant to pasture straw and stubble, where the lease is made solely for "farming." Not only did the court sustain the tenant's right to pasture, but the grant by the tenant to a third person of the right was held not to be in violation of a covenant against subletting. The case affords valuable material for those drafting leases, and ought to be of importance both to landowners and tenants. Unfortunately, if one may judge from the cases involving questions in this depart-

[1] (1920) 182 Cal. 408, 188 Pac. 800. In view of the decision in Suwa v. Johnson (Aug. 31, 1921) 36 Cal. App. Dec. 42, to the effect that leases to subjects of Japan are not void under the initiative legislation of 1920, or even voidable as between the parties, but subject to attack only by the state through the Attorney-General, the possibility of the evasion of the purposes of the act through the employment of cropping agreements lends additional importance to the Harrelson case. It may be a matter of some interest to note that in 1680, under the Statute of 32 Henry 8, c. 16, s. 13, forbidding leases of houses for the exercise of trade to alien artificers, the court suggested means to avoid the statute, saying: "Yet there are other ways to evade it, as to make an agreement for so long as you and I please, at the rate of 20 l. per annum . . . or you shall have my house for so long as you and I please for such much as it is worth." Pilkington v. Peach (1692) 2 Show. K. B. 135, 89 Eng. Rep. R. 841. Though somewhat aside from the general question, it is worthy of comment in view of the Eighteenth Amendment that under

ment of law, the oversights or mistakes of one draftsman do not seem to afford experience for his successors. There is need for a collection of forms in conveyancing, affording tested precedents applying to modern and local conditions.

The lease in the Harrelson case was made "solely" for the purpose of farming; in *Security Trust and Savings Bank v. Claussen*,[2] the lease was of premises to be used for the purpose of a retail liquor business. The latter expression indicated a permissive rather than an exclusive purpose; the passage of an ordinance forbidding the conducting of such business did not, therefore, affect the interest, and the tenant remained liable for the rent. Section 1939 of the Civil Code, not referred to in the opinion, seems pertinent to the case. That section says: "When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does . . . . the latter may treat the contract as thereby rescinded."

The result in *Gantner & Mattern Company v. Isaacs*[3] suggests the desirability of legislation authorizing trustees to give leases which will survive performance of their trusts. Such legislation is not unusual in other states. The provisions of Section 863 of the Civil Code, vesting the whole estate in the trustee, subject only to the execution of the trust, apparently do not empower trustees to make leases to extend beyond the trust term. In the case mentioned, the District Court of Appeal held that a lease made by a trustee of real property who was acting for the benefit of the creditors was ended by the termination of the trust. The inconvenience of such a doctrine—which, indeed, scarcely seems to be a necessary one—requires remedial legislation.[4]

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this Statute of Henry 8, a vintner was held not to exercise an "art" or "mystery". Chief Justice Pemberton who, if we may believe Lord Campbell, was exceptionally well qualified to testify concerning the tavern keeper's profession (2 Campbell, Lives of the Chief Justices, p. 26) said " . . . the mystery of a vintner chiefly consists in mingling of wiues, and that is not properly an *art* but a *cheat*." Bridgham v. Frontee (1685) 3 Mod. 94, 87 Eng. Rep. R. 60. In 1900, the successors of Chief Justice Pemberton and his associates were again called upon to define an "artificer" and decided that a barber was not "a tradesman, artificer, workman, or laborer, or any other person whatsoever," under the Sunday observance statutes. H. Dickens, Q. C., and W. Shakespeare, counsel for the appellant, contended for the literal meaning of the words, but the arguments of these gentlemen, whose names ought to have carried some weight in respect to the meaning of the English language, were apparently overborne by those of Montague Shearman, who very appropriately was retained as counsel by the barber. Palmer v. Snow [1900] 1 Q. B. 725. "Sociological jurists" may find some connection between the personal habits and inclinations of the judges and the decisions in these two cases.

[2] (1919) 30 Cal. App. Dec. 840, 187 Pac. 140. See also, Harris v. Bissell (1921) 36 Cal. App. Dec. 231.

[3] (1920) 33 Cal. App. Dec. 18.

[4] 1 Tiffany, Landlord and Tenant, p. 205, § 22.

The need of a careful consideration of the difference between a covenant for the renewal of a lease and a covenant for its extension was brought out in *Realty & Rebuilding Company v. Rea.*[5] The lease there provided that the lessees might take an extension for an additional three years by giving certain notice. Sureties on the original lease continued to remain bound, where the notice was properly given. Had the covenant been one to "renew" the lease, rather than to "extend" it, they would of course have been discharged.

The last-named case also considers the effect of the usual covenants to repair and to surrender at the end of the lease in good condition. It decides that neither of these covenants requires the tenant to rebuild a building entirely destroyed by fire, without his fault, though to reach this result the court is obliged practically to overrule an important case, Polack v. Pioche.[6] It is interesting to note that to annul the effect of the decision in the last-named case, without too violent a wrench, the Supreme Court resorted to section 1644 of the Civil Code in respect to the interpretation of contracts, a legislative declaration not in force at the time when Polack v. Pioche was decided, remarking, "There is no apparent reason why a lease of real property should not be construed as any other contract pursuant to the Code provisions." Though such a method of approach causes a temporary shock to one familiar with the ordinary covenants in leases as interpreted by the courts of common law, it is probably a sane one. The design of the Civil Code is obviously that the contract of hiring should be treated in the main like other contracts; the simplification and unification of the law that will be brought about by subsuming the landlord-tenant relation under the obligation concept rather than under the dominion concept will ultimately work for better results.[7] Meanwhile it is of interest to observe how far the law has travelled in its desire to carry out the "intent of the parties" principle, a fundamental postulate of modern society. Under feudal principles, it was at least questionable whether a tenant for years was not liable, even without fault, and independently of stipulation, for permissive

[5] (1920) 61 Cal. Dec. 11, 194 Pac. 1024; same case in Dist. Ct. of Appeal (1920) 31 Cal. App. Dec. 315, 188 Pac. 621. See comment on case, 9 California Law Review, 497.

[6] (1868) 35 Cal. 416, 95 Am. Dec. 115.

[7] The sections of the Civil Code on Hiring, §§ 1925 et. seq., deal with the hiring of both real and personal property. They are found in Division III of the Civil Code, "Obligations," not in Division II, "Property."

waste, where buildings were destroyed by fire.[8] In the classical period of our law, where the written word controlled with almost absolute tyranny, the tenant was held to the letter of his promise. The modern law, more completely disregarding form and seeking its principles in the ordinary conduct of human beings, looks rather to the presumed understanding of words by the parties "in their ordinary and popular sense." It is, of course, not a light thing to overrule doctrines established by earlier decisions, particularly in property law; but few, we think, will be found to grieve for the death of so technical a doctrine as that of Polack v. Pioche.

In *Exchange Securities Company v. Rossini*[9] the lessor covenanted with the lessee that, before selling to a third person the property leased, she would give the tenant an option for a limited period to purchase the property at the price offered by the intending purchaser. This she omitted to do, but sold the property in violation of the terms of the lease. It was held by the District Court of Appeal that the tenant continued to remain liable for rent and for the performance of the terms of the lease. His remedy was an action against the lessor for damages caused by the breach, not a rescission of the lease.

The Rossini case is of interest in another respect. Though the point is not discussed or mentioned in the decision, the case on its facts is some authority for the proposition laid down in an earlier decision by the District Court of Appeal to the effect that "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."[10] The landlord, in Exchange Securities Company v. Rossini, followed this dictum, leasing the property to a new tenant, at the same time notifying the former tenant that she was doing so for his account. The court, without discussion, assumes that an action lay for the difference between the amount received from the new tenant and the amount of rent fixed by the lease. But is this proposition so

[8] See, e. g., Parrott v. Barney (1868) 1 Deady 405, Fed. Cas. No. 10773a, where, under statutory provisions subsequently adopted in the code, tenants, though without fault, were held liable for the destruction of a building where a third person caused nitro-glycerine to be introduced. See also, 1 Tiffany, Real Property (2nd ed.) §§ 287-8.

[9] (1919) 30 Cal. App. Dec. 732, 186 Pac. 828.

[10] Rehkopf v. Wirz (1916) 31 Cal. App. 695, 161 Pac. 285. See also, Williams v. Hawkins (1917) 34 Cal. App. 146, 166 Pac. 869.

firmly settled that it may be assumed as axiomatic? However convenient the rule may be, it still lacks, we believe, distinct recognition by the Supreme Court. Bradbury v. Higginson,[11] cited by Rehkopf v. Wirz as the sole authority for the proposition quoted, notwithstanding some general language, does not involve the question, while in Bernard v. Renard,[12] though the Supreme Court cites with approval Rehkopf v. Wirz, the relation of the dictum in that case to the decision in Welcome v. Hess[13] is not discussed. The last-named case, on the other hand, flatly decides that where a landlord rents premises abandoned by the tenant there is of necessity a surrender by operation of law. The lease is thereby terminated and no action can lie upon it. The reason is that inasmuch as a new relation of landlord and tenant is created, the landlord is estopped to deny that the old lease continues; or, as Chief Justice Best put the matter in a leading English case: "Can a landlord have two tenants, and be receiving rent from one and at the same time holding the other liable?"[14] We believe that the effect of the decision in Welcome v. Hess is misunderstood by the court which decided Rehkopf v. Wirz, and was not sufficiently considered in Bernard v. Renard. Certainly Justice Temple's remarks concerning the case of Auer v. Penn[15] (erroneously referred to as Auer v. State), the parent of the legal proposition expressed in the quotation made above from Rehkopf v. Wirz, indicate a total dissent from that decision. He says, referring to Auer v. Penn, where the landlord pursued the course recommended in the Rehkopf case, "the weight of authority and the better reason is the other way." Welcome v. Hess, as we read it, holds that a surrender by operation of law is effected where the landlord relets the leased property after the tenant vacates it. It is true that in that case there was no notice to the tenant of an intent to hold him to the lease; it is also true that the new lease was for a term extending beyond the date of the original term. But fundamentally the case rests upon the fact that the act of the landlord in reletting the premises was inconsistent with the coexistence of the original term. For example, the court says: ". . . While it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their

[11] (1912) 162 Cal. 602, 123 Pac. 797.
[12] (1917) 175 Cal. 230, 165 Pac. 694, 3 A. L. R. 1076.
[13] (1891) 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.
[14] Walls v. Atcheson (1826) 11 Moore 379, 28 Eng. Rep. R. 657.
[15] (1882) 99 Penn. 370, 44 Am. Rep. 114.

acts shall have that effect. It is by way of estoppel." In view of the clear enunciation by the Supreme Court in Welcome v. Hess of the traditional doctrine, those advising landlords as to their rights and remedies upon the abandonment by tenants of leased premises must feel some hesitation in following the dictum in Rehkopf v. Wirz. Possibly Welcome v. Hess may push the logic of the common law to an extreme; possibly it should be limited in its application; but until the Supreme Court speaks more positively than it has yet done, those who must advise on such matters will feel some hesitation in recommending clients to follow the course pursued in Auer v. Penn and Exchange Securities Company v. Rossini, merely because of the dicta in Rehkopf v. Wirz, Bradbury v. Higginson and Bernard v. Renard. Some authorities upon both sides of this controverted question are cited in a note.[16]

The close distinction between express surrenders and surrenders by operation of law is one reason for the confused state of the decisions in California upon this topic. An express surrender can be made only by a formal writing, in cases where the term of the lease is for more than one year. The language of the Code of Civil Procedure is clear: "No estate or interest in real property, other than for leases for a term not exceeding one year . . . can be . . . surrendered . . . otherwise than by operation of law, or a conveyance or other instrument in writing . . ." [17] It is therefore only where the surrender is by operation of law that in the case of leases for more than one year any effect can be given to the express agreement of the parties. It is well settled that a mere agreement to surrender, even though followed by the tenant's removal from the premises, is not a surrender so long as the landlord does not resume possession. When he does resume exclusive possession, however, the surrender is complete. He has in effect ousted the tenant. But the surrender in such a case is

[16] In accord with Welcome v. Hess, Gray v. Kaufman Dairy Co. (1900) 162 N. Y. 388, 76 Am. St. Rep. 327, 56 N. E. 903, 49 L. R. A. 580; Walls v. Atcheson (1826) 11 Moore, 379, 28 Eng. Rep. R. 657; Hotel Marion Co. v. Waters (1915) 77 Ore. 426, 150 Pac. 865; note in 14 Michigan Law Review, 82. *Contra*: Auer v. Penn (1882) 99 Penn. 370, 44 Am. Rep. 114; Brown v. Cairns (1898) 107 Iowa 727; Oldewurtel v. Wiesenfeld (1903) 97 Md. 165, 54 Atl. 969. See, on the whole subject, 2 Tiffany, Landlord and Tenant, §190, p. 1338, and the following notes: 114 Am. St. Rep. 720, 13 L. R. A. (N. S.) 400, 14 Ann. Cas. 1088, 3 A. L. R. 1080.

[17] Cal. Code Civ. Proc. § 1971; Cal. Civ. Code § 1091. Justice Temple in Welcome v. Hess, supra, n. 13, refers to the Statute of Frauds at p. 512, as follows: "Under the Statute of Frauds it [the surrender] can be done only by express consent of the parties in writing, or by operation of law . . . "

not by reason of an agreement or by acceptance of an offer to surrender, but because of the fact that having ousted the tenant the landlord is estopped to assert that the lease is still in force. In other words, the doctrine of surrender by operation of law is independent of agreement by the parties, even though in fact there be such agreement. Language such as this from Bernard v. Renard therefore serves only to confuse: "Of course, such a letting without any act or word to qualify its effect would have very clearly shown an acceptance of the surrender." [18] Or again, the following language from Rehkopf v. Wirz: " If done [if possession be taken by the landlord] pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant." [19] And the writer of a valuable note in American Law Reports, Annotated, is guilty of the same confusion between surrender by agreement and surrender by operation of law.[20] In truth, in these cases the question of acceptance is immaterial; it is the conduct of the landlord that estops him from asserting the continuance of the former lease.

It is very easy to slip over from language involving the phraseology of acceptance to the doctrine of Auer v. Penn. But the court that undertakes to sustain the view expressed in that case should at least offer some reason for making an exception to the general rule that a surrender takes place where a landlord relets the premises. Certainly in Exchange Securities Company v. Rossini, the implied assent of the tenant could not be urged as giving authority to the landlord to make the new lease on his behalf, for the tenant there repudiated the lease because he believed it to have been broken by the landlord. If Auer v. Penn expresses the better rule, let it be adopted, but let it be adopted only after consideration of the existing law in regard to surrender and in regard to the creation of new obligations, and let it also be adopted after a consideration of the difficulties inherent in its application—such difficulties, for example, as arise where the landlord relets, after notice, at an advanced rental and upon more favorable terms. Should the landlord in such case be entitled to keep the benefits, or do they belong to the former tenant?[21] Until the law is settled with greater certainty, it is obviously the part of wisdom to insert in leases some provision respecting the authority of the landlord to

[18] (1917) 175 Cal. at p. 234, 165 Pac. 694.
[19] (1916) 31 Cal. App. at p. 696.
[20] 3 A. L. R. 1080.
[21] As to which question, see note in 30 Harvard Law Review, 766.

make a new lease on behalf of the tenant, where the latter abandons the premises. Unless the new lease be made by the landlord in the name of the former tenant, it is difficult to avoid the conclusion that the original lease is surrendered.

It may not be improper in connection with the principles just discussed to call attention to *Automobile Truck, Tractor and Implement Company v. Salladay.*[22] The lessee of an automobile took possession of the same upon default on the part of the hirer in the payment of the rent; he then sued for rentals accruing after the date of retaking. Mr. Justice Prewett said: "Our attention has not been drawn to any California case wherein personal property was involved which fully covered this principle. No difference however in this regard can be discovered between leases involving real property and those involving chattels. Each party is estopped to claim both the possession of the leased property and compensation for its use. Each when he voluntarily terminates the lease, and by regaining the property, places it out of the power of the lessee to use it, terminates the lease for all purposes." Would the lessor have had different rights and remedies if he had notified the lessee of his intent to make a new lease on his account?

On the other hand, it is worthy of comment that the seller in case of a conditional sale of chattels may, under some circumstances, retake possession of the chattel sold and at the same time pursue his remedy for the purchase price.[23] In the case cited in the note, the Supreme Court, speaking through Mr. Justice Wilbur, said: "The recovery of possession of the property and of the purchase price thereof are not always inconsistent remedies under such contracts. In recent decisions of the court we have pointed out that the retaking of possession by a seller under a conditional sale for default of the purchaser is not always to be considered an election to waive pursuit of the purchase price, and may be entirely consistent with the rights of the purchaser to recover such price." There are of course obvious differences between conditional sales of chattels and leases of chattels; possibly also there are inherent differences in some respects between leases of land and leases of chattels. It would, however, be most desirable if a systematic and harmonious body of doctrine could be established covering the rights and remedies of vendors and lessors, both of real and personal property.

Somewhat akin to the question of surrender discussed above is

[22] (Nov. 15, 1921) 36 Cal. App. Dec. 709.
[23] Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 183 Pac. 451.

that of constructive eviction. *Veysey v. Moriyama*[24] and *Parish v. Studebaker*[25] recognize the prevailing rule that the tenant cannot recover damages for any disturbance of his possession on the part of the landlord rendering the premises unsuitable for occupancy, unless the tenant surrenders his possession. The principle seems just and is well settled by authority.

The latter of the two cases illustrates the inutility of a prevailing practice on the part of landlords for the purpose of securing themselves in the payment of their rentals. In Parish v. Studebaker, $1600 was received by the landlord from the tenant under a written agreement, to bear interest at 6 percent per year, the said sum constituting the rental for the last two months of the term. It was provided that the said sum was to be the property of the landlord if the lease were terminated or forfeited without affecting his right to other damages. The court held that this provision could not be resorted to where the damages were fairly ascertainable, and that consequently the tenant was entitled to receive the amount back when the landlord terminated the lease for nonpayment of the rent. On this point the court reaffirms Rez v. Summers.[26]

During the period under review leases were forfeited in three cases by notices requiring immediate surrender of possession, without giving the tenant the alternative of performing a covenant—*Matthews v. Digges*,[27] *Pfitzer v. Candeias*,[28] and *Harris v. Bissell*.[29] With respect to the last two cases there would appear to be no difficulty; the covenants were completely broken and could not be performed, so that a notice to perform would be useless. In each case, the land had already been cultivated by the tenant in a manner contrary to the covenants of the lease. But in Matthews v. Digges the covenant was that the tenant should use reasonable efforts to poison squirrels. The defendant had not done so. The court held that it was impossible for the defendant to perform the condition, and therefore there was no need under subdivision 3 of section 1161 of the Code of Civil Procedure that notice should be given to perform within three days or surrender possession. A mere notice to surrender was all that was required because of the impossibility of performance. It is not quite clear why the defend-

[24] (1921) 61 Cal. Dec. 169, 195 Pac. 662.
[25] (1920) 34 Cal. App. Dec. 193, 195 Pac. 721.
[26] (1917) 34 Cal. App. 527, 168 Pac. 156.
[27] (1920) 31 Cal. App. Dec. 233, 188 Pac. 283.
[28] (1921) 35 Cal. App. Dec. 817.
[29] (1921) 36 Cal. App. Dec. 231.

ant could not have used "reasonable diligence" within the three days; he was not required to poison the squirrels, at all, merely to be diligent in poisoning them. How can Matthews v. Digges be distinguished from Jameson v. Chanslor-Canfield Midway Oil Company,[30] a case not referred to in Mr. Justice Richards' opinion? In the last-named case the Supreme Court held that notice to perform was necessary as a condition precedent to forfeiture under the Code section referred to, in the case of a lease of oil lands where the lessee agreed to drill wells for oil and gas. He could not drill the wells within the three days, but he could at least begin the performance within that time. The court held that a mere notice to surrender possession because the covenants of the lease were not performed was insufficient. Mr. Justice Shaw said: "Statutes of this character are looked upon by the courts in the same light as contracts providing for forfeiture. Concerning the latter it has been said: 'It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised,' and 'that covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.' Randol v. Scott.[31] The defendants acquired no right under section 1161." It is to be regretted that so important a case as Jameson v. Chanslor-Canfield Midway Oil Company, decided by the Supreme Court in August, 1917, dealing with the question decided by the District Court of Appeal in March, 1920, is not referred to by the last-named court, though there is a reference to earlier decisions. Is the omission due to the fact that the syllabus in the Jameson case is imperfect, and that the case is not cited to the point discussed either in the California Current Digest or in the American Digest? Some remarks of Blackstone are pertinent: " . . . Whatever way is made use of, it is incumbent on the promulgators [of the laws]to do it in the most public perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character. and hung them upon high pillars, the more effectually to ensnare the people."[32] The court in the Jameson case, indeed, publicly proclaimed the law; but by reason of clerical or mechanical omission, the law so proclaimed is practically almost as ineffective to warn the public as were the Edicts of Caligula.

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[30] (1917) 176 Cal. 1, 11, 169 Pac. 675.
[31] (1895) 110 Cal. 590, 596, 42 Pac. 977.
[32] 1 Bl. Comm. * p. 46.