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Landlord-Tenant: The Duty to Mitigate Damages

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LANDLORD–TENANT: THE DUTY TO MITIGATE DAMAGES

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ASSUME THAT a tenant enters into a lease of certain premises for a one year term, September 1, 1967 to August 31, 1968, at a stipulated rental of two hundred dollars per month. On February 1, 1968, the tenant decides that he wishes to move out of his current premises. Naturally, he wishes to avoid his obligations under his current lease to pay the monthly rental. This is not an uncommon situation. A tenant, by reason of changed circumstances, the availability of more suitable or preferable premises or like reasons, can find himself in this position. Faced with this dilemma, his current obligations under the existing lease and his desire for new premises—what legal courses of action are open to the tenant?

SURRENDER

The simplest solution for the tenant is to effectuate a surrender; that is, the tenant can end his lease obligations by having an agreement with his landlord to this effect.[1] Since an agreement gave rise to the creation of the landlord-tenant relationship, and this agreement was, at least in part, a conveyance, an agreement can give rise to the termination of relationship, and constitute a reconveyance to the landlord. Such a surrender, however, cannot be forced upon the landlord by the unilateral action of the tenant; it can only occur by reason of an agreement between the parties to put an end to the landlord-tenant relationship.[2]

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[1] 32 AM. JUR. *Landlord & Tenant* § 900 (1941): "A surrender of a tenancy . . . is a yielding up of the tenancy to the owner of the reversion or remainder, wherein the tenancy is submerged and extinguished by agreement. A surrender may be either by agreement of the parties or by operation of law."

[2] 32 AM. JUR. *Landlord & Tenant* § 901 (1941): "A surrender . . . occurs only through the consent or agreement of the parties evidenced either by an express agree-

On this basis, if the tenant can persuade his landlord to consummate a surrender, and the technical requirements are properly satisfied,[3] the tenant, from and after the date of surrender, is relieved of future liability under the lease.[4] While this solution may be the simplest in theory and most advantageous to the tenant, he may have difficulty in obtaining the consent of his landlord.

ABANDONMENT

Suppose the tenant, unable to obtain the agreement of the landlord to a surrender, decides to abandon the leased premises and renounce his obligations under the lease. Can the tenant expect that his landlord will take positive action to find a replacement tenant, so that he will not be liable for the full two hundred dollars per month rent?

Obviously, if the lease contains a provision obligating the landlord to find a replacement tenant and thereby lessen the tenant's liability, he must pursue such course of action.[5] In the absence of such provision, however, the overwhelming majority of courts hold that the landlord may let the premises lie idle and collect the rent in full from the abandoning tenant.[6] The landlord need take no positive action.

In *Goldman v. Broyles*,[7] the tenant abandoned the premises prior to the end of the lease term and sought release from the landlord for future rent. The landlord refused. The facts further indicate that while the demised premises laid unoccupied, a third party approached the landlord, making inquiry as to renting them. The landlord told the third party "that he had nothing to do with the renting of the

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ment or by an unequivocal act inconsistent with the terms of the lease and with the relation of landlord and tenant . . . ."

[3] A Statute of Frauds may be applicable so as to require the surrender of an interest greater than one year to be evidenced by a writing; *e.g.*, ILL. REV. STAT. ch. 59, § 2 (1965).

[4] As to release of the tenant's liability for subsequently accruing rent, *see* Annots., 18 A.L.R. 971 (1922) & 58 A.L.R. 906 (1929). As to release of the tenant's liability for covenants which depend upon the continuation of the tenancy, *see* Annot., 51 A.L.R. 1062 (1927). As to the tenant's liability for past breaches, *see* Annot., 51 A.L.R. 1064 (1927).

[5] Harmon v. Callahan, 214 Ill. App. 104, 121 N.E. 194 (1919); *see generally* Annots., 40 A.L.R. 198 (1926) & 126 A.L.R. 1224 (1940).

[6] *See generally* Annots., 40 A.L.R. 198 (1926) & 126 A.L.R. 1224 (1940). As to the Illinois position, the Supreme Court of Illinois has indicated its acceptance of the majority view, *Selz v. Stafford*, 284 Ill. 610, 120 N.E. 462 (1918).

[7] 141 S.W. 283 (Tex. Civ. App. 1911).

premises and referred him to the appellant [tenant]."[8] In the action, the landlord sought recovery from the tenant for the full rent for the full balance of the lease term. The tenant argued that the court, in arriving at a verdict, should deduct that amount for which the landlord, by the use of ordinary care, could have rented the premises to another party. The court replied: "We hold . . . as a matter of law that where a tenant breaches the contract, the landlord is not obliged to endeavor to let the premises for the benefit of the tenant who refuses to continue in occupancy under the lease."[9] Therefore, where the tenant abandons the premises, prior to the expiration of the term, the landlord may let the premises lie idle and collect the rent in full from the tenant, even though rerenting is possible. In the cited cases, the landlord was relieved of the responsibility of rerenting even though a third person voluntarily presented himself to the landlord.

A small minority of courts have concluded that the landlord has a duty, when faced with an abandonment of the demised premises by the tenant, to lessen the tenant's rental liability.[10] The view apparently stems from an application of the contract rule of avoidable consequences.[11] Under this rule, the non-breaching plaintiff cannot recover those damages which he could have prevented by using reasonable means.

In *Lawson v. Callaway*,[12] the Supreme Court of Kansas declared that the minority rule prevailed in Kansas, and cited the line of cases which constituted its authority. The court said, "It is a general rule that after a wrong has been committed it is the duty of the injured party to make reasonable efforts to prevent an increase or extension of the injury, and, if he fails to do so, he cannot recover for such increased injury."[13] Applying that principle to the landlord-tenant relationship, the court stated, "When a tenant abandons leased premises and ceases to pay rent, a landlord is not privileged to collect stipulated rent in full if he can make the premises earn something by reletting them."[14]

[8] *Id.* at 285.

[9] *Id.* at 286.

[10] *See generally* Annots., 40 A.L.R. 193 (1926) & 126 A.L.R. 1221 (1940).

[11] McCormick, Damages § 127 (1935).

[12] 131 Kan. 789, 293 P. 503 (1930).

[13] *Id.* at 790, 293 P. at 504.

[14] *Id.*

While the minority view, which compels the landlord to take positive action to lessen the tenant's liability, may have merit, objection has been raised to its adoption. In an Illinois case,[15] the court set forth three objections: "(1) The lessor would be required to seek out new tenants continually; (2) the lessor's action might be held to constitute an unwilling acceptance of the surrender; and (3) the lessor would be required to accept in a personal relationship a party he does not wish to accept."[16]

As to the first objection, even the minority cases, which imposed upon the landlord the duty to seek out a replacement tenant, do not relieve the tenant, completely, of his lease obligations.[17] In such cases, the tenant is liable to the landlord for that amount over and above the rental that was, or could have been, secured from a replacement tenant. At least one author has suggested that the action of the landlord in reletting should be viewed as an agency.[18] The landlord, charged with his legal obligation, relets on behalf of the abandoning tenant. This reletting transaction thereby takes the form of a forced assignment or sublease.[19] On this basis, the economics of the situation should be such that the imposition of this duty on the landlord should not necessarily provoke tenants into abandonment.

As to the second objection, the cases present a very muddy picture. Under common law principles, if a tenant stops paying rent, but does not physically abandon the premises, the landlord cannot terminate the lease, unless such power has been specifically granted by a lease provision or by statute.[20] The landlord's remedy is to sue, at law, for damages. If, however, the tenant abandons the premises in addition to his failure to pay rent, the landlord has the right to reclaim possession and terminate the lease.[21] This action of the tenant is viewed as

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

[16] *Id.* at 464, 161 N.E.2d at 343.

[17] *Supra* note 10.

[18] McCormick, *The Rights of the Landlord upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211, 213 (1925).

[19] 2 TIFFANY, LANDLORD & TENANT § 1341 (1910).

[20] *Id.* at § 194; however, many states have statutes allowing the landlord to terminate the tenancy for non-payment of rent; *e.g.*, ILL. REV. STAT. ch. 57 (1965).

[21] 32 AM. JUR. *Landlord & Tenant* § 518 (1941): "If the tenant wrongfully abandons the possession of the demised premises, the landlord may re-enter and terminate the lease and in so re-entering, he is not guilty of trespass. The relinquishment of possession by the tenant and the resumption of possession by the landlord operate generally as a surrender by operation of law." *See generally* Annot., 4 A.L.R. 673 (1919).

an offer to effect a surrender, which the landlord can accept. The landlord can accept by the resumption of possession. Once the landlord does resume possession, a surrender by operation of law has occurred, and the tenant is relieved of his obligation as to subsequently accruing rent. It has been held, however, that where the landlord has entered upon the demised premises for the purpose of taking steps to preserve the premises or make repairs, such action does not constitute a resumption of possession so as to give rise to a surrender.[22] It is generally held that any action by the landlord, which is inconsistent with the continuation of the landlord-tenant relationship, constitutes an acceptance of the tenant's offer and results in a surrender by operation of law.

Based upon the notion of surrender by operation of law, there is a divergence in the courts as to the legal consequences of a landlord's reletting the premises after abandonment.[23] Can it not be said that the landlord's action in reletting is an act inconsistent with the continuation of the landlord-tenant relationship, since it deprives the tenant of future access to the premises, and therefore, such action should constitute an acceptance of the proferred surrender? This is a view accepted by more than one court.[24] Once this view is accepted, obviously, the notion of reletting in mitigation of damages is lost.

In *M.L. Improvement Corp. v. State*,[25] the landlord in question leased certain property to the State of New York. Prior to the expiration of the lease term, the tenant abandoned the premises; in addition, the tenant sent a letter to the landlord which stated, in part, that the landlord "was at liberty to let the premises on the best terms and conditions obtainable."[26] The landlord did not relet. When sued for rent, the tenant contended that the verdict should be reduced, since its damages might have been reduced or eliminated had the landlord relet. The court responded, "The claimant [landlord] was under no duty to relet the premises for the benefit of the state [tenant] . . . ; and if it had done so . . . its action would have amounted to an ac-

[22] *See generally* Annot., 110 A.L.R. 372 (1937).

[23] *See generally* Annots., 3 A.L.R. 1080 (1919); 52 A.L.R. 154 (1928); 61 A.L.R. 773 (1929); 110 A.L.R. 368 (1937).

[24] *Id.*

[25] 118 Misc. 605, 194 N.Y.S. 165 (1922), *aff'd* 204 App. Div. 733, 199 N.Y.S. 263 (1923).

[26] 118 Misc. 605, 194 N.Y.S. 167 (1922).

ceptance of the proferred surrender, and the state would have been released from further liability."[27]

The aforementioned case is indicative of a line of New York cases, which appear to pronounce that a surrender will result from the landlord's reletting, unless the landlord takes this action pursuant to a specific agreement with the abandoning tenant. In *Hodgkiss v. Dayton-Brower Co.*,[28] the tenant abandoned the demised premises, and the landlord informed the tenant of an intention to hold him liable for rent "and to relet for the latter's account."[29] The landlord did relet. The court found that a surrender had been effectuated, and stated:

> The lease in the case at bar does not provide for a reletting for the account of the defendant [tenant] in the event of an abandonment, and so the tenant cannot be said to have acquiesced in the proposal of the landlord for its benefit. The landlord's statement to the tenant of intention to hold it liable for rent and to relet for the latter's account does not sustain an implied agreement for such reletting.[30]

A second line of cases has taken the position that the landlord, when faced with an abandonment of the demised premises, may relet, and such action will not constitute an acceptance of the proferred surrender; no surrender will occur if the landlord notifies the tenant of (1) the landlord's refusal to accept, and (2) his intention to relet for the tenant's account.[31] The Supreme Court of Missouri, in *Von Schleinitz v. North Hotel Co.*,[32] sustained this view by stating:

> [U]pon the abandonment of the premises by a tenant the landlord may refuse to accept a surrender, and *after notice to the lessee of his intention to do so*, relet the premises for the best rent obtainable, and recover the difference between the rent reserved in the lease and the rent received from the subsequent tenant . . . .[33]

Still another series of cases hold that the question of surrender turns on the intention of the landlord at the time of reletting.[34] In *McGrath v. Shalett*,[35] the Supreme Court of Errors of Connecticut summarized the various methods employed by courts in dealing with the problem:

[27] *Id.*

[28] 93 Misc. 109, 156 N.Y.S. 907 (1915).

[29] *Id.* at 908.

[30] *Id.*

[31] *Supra* note 23.

[32] 323 Mo. 1110, 23 S.W.2d 64 (1929).

[33] *Id.* at 1133, 23 S.W.2d at 75, as quoted from 16 R.C.L. 970-72 (1929).

[34] *Supra* note 23.

[35] 114 Conn. 622, 159 A. 633 (1932).

In some states, a reletting terminates the leases as a matter of law. A second line of authorities hold that this result follows unless there is notice to the tenant of the landlord's refusal to accept the surrender and of his intention to relet. The third school does not set up any arbitrary standard, but holds the question of acceptance to be one of intention and a question of fact.[36]

The question under this third view thus becomes—did the landlord relet for his own account or for the account of the tenant?

In *McGrath*, after abandonment, the landlord notified the tenant that "strict compliance with the terms of the lease would be insisted on."[37] The landlord then allowed a charitable organization to occupy the premises. Thereafter, the premises were altered and relet. At least part of the premises were relet for a longer period than the original lease term. The landlord never notified the tenant that the premises were being relet on his account. The court sustained a lower court finding that there was no acceptance of the surrender in fact. Viewed as a whole, the result has merit. The tenant notified the landlord and subsequently vacated while the rent was still unpaid. The landlord communicated his intention to hold the tenant to the lease; thereafter the landlord relet. Should the fact of reletting, even if coupled with a failure to notify the tenant specifically that such action is not an acceptance of surrender, necessarily be construed as an acceptance? The court answered in the negative. In addition, the court said: "[The landlord] should not be penalized for attempting to minimize the damages. . . ."[38]

In contrast to the approaches thus far set forth, one court[39] analyzed the problem as follows:

A tenant may not, by abandoning the premises and ceasing to pay rent, relieve himself of obligation to pay rent. He cannot reap an advantage from his own breach of the contract. If he desires to surrender, he must secure the landlord's consent, and, if he alleges surrender, he must establish unequivocal manifestation of consent on the part of the landlord to termination of the relation of landlord and tenant.[40]

The court continued by stating, "The tenant does not need to be told what his obligation is. He knows it is to pay rent to the end of the term, according to the covenant in the lease. Therefore, reletting does not establish release of obligation to pay rent, and notice of reletting

[36] *Id.* at 625, 159 A. at 634.

[37] *Id.* at 623, 159 A. at 633.

[38] *Id.* at 626, 159 A. at 634.

[39] Guy v. Gould, 126 Kan. 25, 266 P. 925 (1928).

[40] *Id.* at 25, 266 P. at 925.

is not necessary to prevent surrender."[41] It should be pointed out, however, that the court rendering this language was the Supreme Court of Kansas, and this court has placed a positive duty upon the landlord to relet in mitigation of the tenant's damages.[42] Once placing the responsibility upon the landlord to seek out a replacement tenant, the court could not reasonably take the position that such releting could easily be construed as an acceptance of the tenant's proferred surrender.

In attempting to draw a conclusion from the multitude of cases which have been rendered on this point, one can assert that the contract rule of avoidable consequences should have a place in the solution to the problem. If in a case involving a breach of contract, the plaintiff must make reasonable efforts to curtail his loss, it can be argued that a landlord should be forced to the same efforts. Therefore, it would seem that when a tenant has breached his agreement and repudiated the lease, that the landlord should be permitted, if not encouraged or required, to make similar efforts to relet the premises.[43]

If the landlord does pursue such a course of action—should the tenant be heard to complain? Such action is in the interests of the tenant, as his damages are reduced or eliminated. It is frequently argued that if the landlord does relet, such action is inconsistent with the continuance of the landlord-tenant relationship. Yet a tenant who has abandoned the premises cannot genuinely be disturbed. His possession has been only constructively infringed upon. Where a tenant voluntarily assigns his leasehold interests to another, his possession comes to an end, and yet, his contract duties (one of which is his duty to pay rent) remain.[44] Could not the abandonment and renunciation be viewed, not only as a proferred surrender, but also as an offer for the landlord to assign on the tenant's behalf? If the tenant has abandoned and the landlord relets, the landlord should suffer no penalty other than crediting the tenant with the rent so received.

The writer suggests that one motivating factor in those decisions which have construed the landlord's releting action as a surrender has been a sense of protection for the tenant. The courts may be

[41] *Id.*

[42] *Supra* note 12 and corresponding text.

[43] Helzinger v. Novak, 172 Minn. 369, 215 N.W. 515 (1927).

[44] Mayer v. Dwiggins, 114 Neb. 184, 206 N.W. 744; *see generally* 32 AM. JUR. *Landlord & Tenant* § 356 (1925).

prompted to act on behalf of the tenant, as the party with the lesser economic bargaining power. Such decisions, however, may have the overall effect of discouraging landlords from taking steps to relet, lest their conduct be construed as a surrender and release the tenant from future rent liability. This approach works to the detriment of tenants as a group, even though it may be applauded by the particular tenant at bar. Would not tenants be in a better position if the landlord did mitigate the damages? Would landlords be in a worse position?

The third objection rendered to the imposition of the mitigation of damages rule in the area of landlord-tenant is that the lessor would be required to accept in a personal relationship a party he does not wish to accept. While this argument has, on its face, some merit, it must be considered in the full light of the problem. It has been suggested that the personal element is even more important in an employment contract, and yet the courts have held that a wrongfully discharged employee must mitigate his damages by accepting similar available employment.[45]

In this regard, the obligation to mitigate damages should not be interpreted to compel the landlord to relet to *any* replacement tenant. The landlord should have the right to refuse to allow possession of his property to fall into certain hands. There should be some bounds to his obligation. Case law has established limits to the landlord's obligations in those situations where the lease specifically provides that on abandonment of the demised premises by the tenant before the expiration of the term, the landlord has a duty to use diligence to procure another tenant.[46] Pursuant to this contract duty, the cases hold, generally, that the landlord need not relet to a tenant who would use the premises for a purpose different than that contemplated in the original lease;[47] nor is the landlord obligated to alter or increase his obligations (*e.g.*, extending the length of the lease term) in order to secure a replacement tenant.[48] The limits, so defined, should be as applicable where the law imposes the duty to relet as when the lease imposes the duty.

[45] *Supra* note 15.

[46] *See generally* Annot., 115 A.L.R. 206 (1938).

[47] In *Allen v. Saunders*, 6 Neb. 436 (1877), the court held that the landlord was obligated to relet the premises, if he could reasonably do so, but he was not bound to relet to a tenant who would use the premises for a different purpose, if the landlord in good faith thought the changed use would damage the premises.

[48] Woodbury v. Sparell Print, 198 Mass. 1, 84 N.E. 441 (1908).

Finally, it is asserted that the relationship of landlord-tenant is more than a personal relationship, it is a business relationship. This discussion involves the business of the landlord. In defining the obligation of the landlord, emotional arguments relating to the personal nature of the relationship should be set aside as less than determinative. In all events, it is not suggested that the landlord *must* accept a replacement tenant, or any particular replacement tenant. If, however, a substitute tenant can be found, who will use the premises for the purposes initially contemplated and will let under terms which do not enhance the landlord's obligation, then the landlord should be obligated to relet or credit the abandoning tenant with the rent which would have been received.

ASSIGNMENT AND SUBLEASE

It appears that a tenant's expectations regarding action to be taken by the landlord after his abandonment are diminished. The question next presenting itself is—what unilateral action can be taken by the tenant? Can he find his own replacement tenant?

A basic incident of the tenant's leasehold interest is the right to transfer, and this right can be exercised without securing the consent or approval of the landlord.[49] Therefore, a tenant can seek out his own replacement tenant and assign his interest to that new tenant.[50] Such action will not operate as a surrender, and will not terminate the tenant's obligations under the lease. The tenant remains liable on the lease as a contract, and should the assignee fail to fully perform, the landlord has a remedy against the tenant.[51] However, the tenant, by assigning, can cause another (namely, the assignee) to be legally bound to perform.[52] On this basis, a solution could be for him to find his own replacement tenant and assign his leasehold interest.

There is one important caveat to this straightforward solution, and that is the legal import of a restriction on the right of assignment contained in the lease. It is not uncommon, in fact it is most common, for

[49] 32 AM. JUR. *Landlord & Tenant* § 319 (1941).

[50] No distinction will be made in the text between assignment and sublease. For a discussion of this distinction, *see* 1 AMERICAN LAW OF PROPERTY § 3.57 (A.J. Casner ed. 1952).

[51] *See generally* 36 A.L.R. 311 (1925).

[52] To what extent an assignee becomes bound to perform, *see* 1 AMERICAN LAW OF PROPERTY §§ 3.61, 9.4 (A.J. Casner ed. 1952). To what extent a sublessee becomes bound to perform, *see id.* at § 3.62.

leases to contain a covenant which provides, in substance, that the tenant may not assign his interest without the prior written consent of the landlord. If the tenant's lease contains such a restrictive provision, he must once again approach his landlord before he is free to avoid any of his lease obligations, and of course, the landlord need not be cooperative. In this regard, it has been suggested that a landlord, who finds himself in this most advantageous position, has the right to arbitrarily refuse to give his consent.[53] It has been held that irrespective of the identity of the proposed assignee, the landlord may refuse to grant his consent, and that the result is not changed by a showing that only whim motivated the landlord.

Though clauses restricting the right of the tenant to assign are upheld as to basic validity, they are not favored. The English courts announced their disfavor at an early date in *Dumpor's Case*.[54] In that case, the court announced that the landlord, by granting consent to an assignee on one occasion, thereby waived the restriction, so that the tenant or the assignee were free to reassign without the consent of the landlord.

Along the same line, there is authority to the effect that even though the restriction specifically requires the *written* consent of the landlord, his conduct and/or his oral acquiescence can be effectual.[55] In *Cohen v. Todd*,[56] the lease contained a covenant which forbade any assignment without the written consent of the lessor. The tenant assigned without consent. The assignee paid the rent to the landlord, which was accepted. The court held that the landlord waived his rights under the restrictive covenant, and said: "A covenant against assignment without the written consent of the lessor is one inserted for the lessor's benefit, and he may waive the requirement of written consent by his conduct."[57] As to the conduct sufficient to constitute a waiver, the court stated: "When, with knowledge of the . . . assignment, he [the landlord] receives rent from the . . . assignee, such conduct, unexplained, is conclusive evidence of a waiver, for it is a recognition of the assignee as a tenant."[58]

[53] *See generally* 32 AM. JUR. *Landlord & Tenant* § 343 (1941).

[54] 4 Coke 119b, 76 Eng. Rep. 1110 (1603).

[55] Katz v. Miller, 148 Wis. 63, 133 N.W. 1091 (1912).

[56] 130 Minn. 227, 153 N.W. 531 (1915).

[57] *Id.* at 229, 153 N.W. at 531.

[58] *Id.*

In *Mattox v. Wescott*,[59] the court went to the point of holding that a provision in a lease prohibiting assignment without the lessor's written consent can be waived by an oral acquiescence in the assignment. The court concluded that since the restriction was for the landlord's benefit, it could be waived by him, and further, that if the tenant has entered into a binding assignment based upon the landlord's oral consent, it has been so waived.

In an attempt to establish a policy in favor of the application of the mitigation of damages rule to the landlord-tenant relationship, at a time when the authorities appear to run to the contrary,[60] an Illinois court, in *Wohl v. Yelen*,[61] seized upon the notion of waiver to diminish the scope of a lease covenant prohibiting assignment or sublease without the landlord's written consent. The facts indicate that the tenant, faced with a lease provision requiring the landlord's written consent to assign or sublease, approached the landlord requesting such consent. The landlord, orally, indicated that he *would* consent to a sublease, provided the tenant could find one at the same rental. The landlord furnished the tenant with a "For Rent" sign, which was posted on the demised premises. Upon the tenant's finding, and presenting to the landlord, a prospective subtenant, the landlord refused permission to sublet.

The court, after reviewing these facts, held that the conduct of the landlord amounted to a waiver of his right to enforce the restrictive provision. His conduct was such that the landlord was estopped to deny the validity of the oral agreement and was bound to a waiver of the covenant against assignment. The court was clearly motivated to this result by its apparent approval of the application of the duty to mitigate damages to the landlord-tenant relationship. The court indicated that in circumstances such as were presented in this case, "He [the landlord] is bound to accept the sublessee tendered, unless he had some valid objection to the new tenant."[62] This statement is not

[59] 156 Ala. 492, 47 So. 170 (1908).

[60] As to the general view, *see* Annots., 40 A.L.R. 198 (1926) & 126 A.L.R. 1224 (1940). As to the Illinois position, the Supreme Court of Illinois has indicated its acceptance of the majority view, *Selz v. Stafford*, 284 Ill. 610, 120 N.E. 462 (1918). For a discussion of the Illinois cases, *see* Comment, *Landlord's Obligation to Mitigate when Tenant Abandons*, 1960 U. ILL. L.F. 332.

[61] *Supra* note 15.

[62] *Supra* note 15 at 461, 161 N.E.2d at 342.

consistent with the notion of waiver as such, since if the landlord had waived his right to enforce the restrictive provision, then it is waived; the landlord could not thereafter block the sublease, even if the proposed subtenant was objectionable. The court's statement is, however, consistent with the notion that, even with a restrictive provision, the landlord *ought not* to be able to prohibit assignment or sublease unless there is a legitimate reason to so prohibit.

Following the lead of the *Wohl* case, the same Illinois court dealt with a similar situation in *Scheinfeld v. Muntz T.V.*,[63] in which premises were leased to Muntz T.V. for a ten year term. The lease contained a covenant which forbade assignment or sublease without the landlord's written consent. About four years after the inception of the lease term, Muntz, with the written consent of the landlord, sublet the premises to one Breuer.[64] Sometime thereafter, Breuer sought to sublet the premises, for the same use, to one Calument; it requested the consent of Muntz and the landlord; the landlord refused consent. Breuer then vacated the premises and announced that it considered its obligations under the lease to be ended. In considering the extent of liability of the abandoning tenant, the court stated:

> [T]he contractual rule compelling mitigation of damages applies to leases. In doing so we emphasize that the validity of the provisions of the lease and sublease in the present case prohibiting assignment and subletting without the landlord's consent and giving the landlord the option to rerent on such terms as he sees fit, is not in question. We do not mean that the landlord must accept any subtenant submitted by the lessee, that he must release the lessee from further responsibility for rent or that he must rent his property for a purpose which might damage it. The landlord's duty to mitigate damages does not prevent him from exercising his choice of tenants in rerenting the premises. But when the duty to mitigate is raised by the tender of suitable sublessee, the option of the landlord lies between consenting to the sublease or crediting the tenant with the amount which would have been paid by the subleasee had he been accepted. The landlord may not arbitrarily reject a suitable subleasee and yet continue to hold the tenant liable for the whole rental in default.[65]

With this decision, the Illinois court dealt the most decisive blow to the effective scope of this type of covenant. The court, in effect, took a position in favor of the imposition of a duty upon the landlord to lessen the liability of the abandoning tenant. The thrust of the holding

[63] 67 Ill. App. 2d 8, 214 N.E.2d 506 (1966).

[64] The written consent given by the landlord specifically prohibited further assignment without the landlord's consent, so as to avoid the rule in *Dumpor's Case*, *supra* note 54 and corresponding text.

[65] 67 Ill. App. 2d 8, 16, 214 N.E.2d 506, 511 (1966).

is limited, however, by the court's suggestion that the duty to mitigate arises only upon the tenant's profer of an acceptable subtenant. Where the tenant profers a subtenant, the landlord need not accept; that is, he need not consent to an assignment or sublease to any particular subtenant. However, if the landlord arbitrarily refuses consent, then he must credit the abandoning tenant with the rent that would have been received had he consented.

Following the same trend in Illinois cases, *Reget v. Dempsey-Tegler & Co.*[66] presented the issue of what constitutes reasonable refusal of consent to a proposed sublease, such that the landlord will not be bound to credit the abandoning tenant with the rental which would have been received from the subtenant. The facts indicate that the premises were leased to the tenant, an investment broker. The lease specifically provided that the premises were to be used for no other purpose, and assignments and subleases were forbidden without the written consent of the landlord. The tenant abandoned the premises, and thereafter proposed a sublease, which was refused by the landlord. The landlord did not dispute his obligation to accept a subtenant, but argued that this particular subtenant was unsuitable. The landlord argued that his investigation revealed that the credit of the proposed subtenant was bad, and that the subtenant intended to use the premises for a purpose other than that originally contemplated (*i.e.*, a beauty shop).

The court replied with three important statements. First, the court said: "We believe the sublessee's credit is a meaningful factor in the lessor's determination of the proferred subtenant's acceptability."[67] Second, the court said, "[A] landlord should not be required to relet the premises for a different purpose if he reasonably believes that such use will damage the premises."[68] Finally, the court indicated that the burden was upon the tenant to establish the acceptability of the proferred subtenant, and without such a showing, the landlord was not obligated to either accept the subtenant or credit the abandoning tenant with the rent that would have been received.[69]

[66] 70 Ill. App. 2d 32, 216 N.E.2d 500 (1966).

[67] *Id.* at 37, 216 N.E.2d at 503.

[68] *Id.* at 38, 216 N.E.2d at 503.

[69] As to the instances when the landlord will be legally justified in refusing his consent, and such refusal will not bind him to credit the tenant with the rent which would have been received, *see* Annot., 115 A.L.R. 206 (1938); *supra* notes 47, 48 and corresponding text.

While the Illinois courts have not, as such, repudiated the rule that a landlord, armed with a covenant in the lease which prohibits assignment or sublease without his written consent, has an unrestricted right to refuse to grant consent to a proposed assignment or sublease, the rule has been severely limited. If the tenant profers an acceptable subtenant, who has adequate credit and who will use the premises in a manner not inconsistent with the original tenancy, then the landlord is under a duty to mitigate. The landlord has the duty to *at least* credit that tenant, should he abandon the premises, with the rent which would have been received from the subtenant.

CONCLUSION

While there has been considerable concern expressed about the landlord-tenant relationship,[70] the law has changed only slightly over the years. It appears that we have only begun to see movements undertaken on behalf of the rights of tenants. If this concern is legitimate, then a re-evaluation must be had of those legal principles now governing the relationship.

One principle which can be subjected to criticism involves the landlord's legal obligation when he is faced with an abandonment of the premises by the tenant. With only slight variation, the courts have held that a landlord may let the premises lie idle and collect the rent in full from the abandoning tenant. The landlord need take *no action* to find a replacement tenant, and thereby make the premises productive. In fact, some courts have gone to the extreme of invoking the arbitrary rule that if the landlord does relet to a replacement tenant, such action will constitute a "surrender," and the tenant will be relieved of liability for subsequently accruing rent.

While it can be argued that the landlord should not be placed under a positive duty to relet, it is urged that if the landlord does wish to pursue such a course of action, then the law should encourage, and not penalize him. Where it can be shown from an examination of all the facts and circumstances that the landlord's action was to relet in mitigation of damages, then such action should not constitute a surrender. Once the law favors such action, then and only then will landlords

[70] *See* PROJECT ON SOCIAL WELFARE, HOUSING FOR THE POOR: RIGHTS AND REMEDIES (1967) (published by New York University School of Law under a research grant of the Office of Economic Opportunity).

begin to think and act along those lines. This is a small step to be taken where the courts do not wish to swallow the whole apple and compel landlords to relet.

As to that situation where the tenant profers an acceptable subtenant, it is asserted that the Illinois courts have, and are, pursuing a wise course. The landlord should not be able to arbitrarily block, through a covenant against assignment, a proposed assignment or sublease, without suffering the economic consequences thereof.