A STUDY OF ARIZONA LEASE TERMINATIONS

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The Arizona law of lease terminations is sparse, incomplete and, in some areas, ambiguous. To adequately protect either landlord or tenant, a lawyer must be aware of the legal principles from many sources — ancient common law rules, current federal and state statutes, applicable court decisions, and judicial attitudes and trends. This article attempts to bring together a number of factors bearing on termination.

The article begins in Section I with a consideration of the general grounds for terminating a lease in Arizona, followed in Section II by a discussion of particular grounds. Section III discusses the procedures for termination, Section IV the lessee's financial liability upon termination, and Section V the lessee's continuing liability under the conflicting property and contract theories of the nature of a lease agreement.

I. THE GENERAL STATUTORY GROUNDS FOR TERMINATION IN ARIZONA.

A. *Termination at Common Law.*

At common law, termination of a leasehold estate occurs almost entirely by the terms of the lease agreement. The term ends at the date or upon the happening of an event specified in the agreement. Violation of a *covenant* of the lease, a simple promise or undertaking on the part of the landlord or tenant, does *not* give rise to a right to terminate, but only to an action for the damages caused by the breach.[1] Thus, if a tenant merely promises to pay rent, the landlord cannot oust him from possession for failure to make the payments.

However, the lease itself, through the use of clauses other than mere covenants, *can* provide for termination. The lease may contain either a *special limitation,* which operates *automatically* to terminate the leasehold estate upon the occurrence of a particular event,[2] or a

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[1] *See* 1 AMERICAN LAW OF PROPERTY § 3.94 (1952); M. FRIEDMAN, PREPARATION OF LEASES 43 (1962); 1 H. TIFFANY, REAL PROPERTY § 188 (3d ed. 1940); 2 R. POWELL, REAL PROPERTY ¶ 231[3] [a], at 278 (recomp. ed. 1967).

[2] *See generally* 1 AMERICAN LAW OF PROPERTY § 3.89 (1952); 2 R. POWELL, *supra* note 1, ¶ 231[3], at 279-89; 1 H. TIFFANY, *supra* note 1, § 188, at 302.

condition subsequent, which gives the landlord the *right* to terminate, if he desires to do so.[3] Whether a particular provision creates a covenant, a special limitation or a condition subsequent depends upon the intention of the parties, as determined from the entire document and the surrounding circumstances.[4]

A landlord at common law, therefore, may use a specific special limitation or condition subsequent to assure his right to terminate the lease on the occurrence of a particular event, *e.g.*, non-payment of rent.[5] The termination clause may be based more generally upon the tenant's breach of *any* covenant of the lease.[6]

The greatest defect in the common law remedies, from the landlord's point of view, was the relative ineffectiveness of lease covenants. To protect himself, the landlord had to draft his lease provisions very carefully. Even then they were strictly construed by judges who were reluctant to enforce a forfeiture.[7] In addition, the landlord's exercise of his option to terminate under a condition subsequent was made extremely difficult by procedural requirements of notice or re-entry.[8] If the forfeiture was based on non-payment of rent the landlord had to meet very technical demand requirements.[9]

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[3] Also known as "power of termination." 2 R. POWELL, *supra* note 1, ¶ 231[3], at 279. *See generally* 1 AMERICAN LAW OF PROPERTY § 3.94 (1952); 1 H. TIFFANY, *supra* note 1, § 188, at 302. *But see* 2 R. POWELL, *supra* note 1, ¶ 231[3], at 279 ("special limitation" based on landlord's exercise of option).

[4] *See* 1 H. TIFFANY, *supra* note 1, § 190, at 305-07. Courts tend to favor covenants over conditions, 1 H. TIFFANY, *supra* note 1, § 192, at 309-10 (and cases cited n.57) and conditions subsequent over special limitations. 1 AMERICAN LAW OF PROPERTY § 3.94 (1952) (and cases cited n.4). Words commonly considered to create a condition subsequent are "on condition," "provided," and "so that." 1 H. TIFFANY, *supra* note 1, § 190, at 305. "While," "as long as," "until," and "during" usually are found to indicate a special limitation.

Examples of the three types of clauses are:

Covenant: Tenant agrees not to assign or sublet the premises without the written consent of the landlord.

Condition subsequent: This lease shall run for a term of five years from the date of execution, PROVIDED: Tenant does not assign or sublet the premises without the written consent of the Landlord.

or

Should Tenant assign or sublet the premises without the written consent of the Landlord, the Landlord shall be entitled to terminate the lease.

Special Limitation: Should Tenant assign or sublet the premises, the lease immediately shall terminate.

[5] For example of particular events upon which leases commonly have been conditioned, see 2 R. POWELL, *supra* note 1, ¶ 231[3], at 285-87; 1 H. TIFFANY, *supra* note 1, § 188, at 303.

[6] 1 AMERICAN LAW OF PROPERTY § 3.94, at 380 (1952); 1 H. TIFFANY, *supra* note 1, § 188, at 303.

[7] 1 AMERICAN LAW OF PROPERTY § 3.96 (1952); 2 R. POWELL, *supra* note 1, ¶ 231[3], at 279-84; 1 H. TIFFANY, *supra* note 1, at § 215.

[8] 1 AMERICAN LAW OF PROPERTY § 3.94 (1952); 1 H. TIFFANY, *supra* note 1, § 200, at 332.

[9] 1 AMERICAN LAW OF PROPERTY § 3.94 (1952); 1 H. TIFFANY, *supra* note 1, § 200, at 332-33; *see* note 59 *infra*.

B. *The Arizona Statute.*

Apparently recognizing the landlord's difficulties at common law, the Territorial Legislature of 1895 augmented the landlord's remedies by statute.[10] This statute has been changed little since its promulgation; its modern version is § 33-361 A, which provides that:

> when a tenant neglects or refuses to pay rent when due and in arrears for five days, or when tenant violates any provision of the lease, the landlord or person to whom the rent is due, or his agent, may re-enter and take possession, or, without formal demand or re-entry, commence an action for recovery of possession of the premises.[11]

Section 33-361 A creates two statutory grounds for termination — tenant's non-payment of rent for five days after it has become due and tenant's violation of any provision of the lease. The rent arrearage section probably applies to all Arizona leases. There is a contrary argument,[12] but statutory construction,[13] decisional analysis,[14] and relevant but awkward case language[15] would indicate that § 33-361 A applies to every Arizona lease, despite what the particular contract may state to the contrary. Thus, the landlord probably may not enforce a provision that a right of re-entry accrues after rent is in arrears for two

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[10] No. 56, § 2, [1895] Ariz. Laws 76. Another section of this act gave the landlord a lien upon the tenant's personal property found on the premises for unpaid rent. No. 56, § 4, [1895] Ariz. Laws 77 (currently REV. STAT. ANN. § 33-362 (1956)).

[11] ARIZ. REV. STAT. ANN. § 33-361 A (1956). House Bill No. 98, introduced January 19, 1968, would delete the words "re-enter and take possession, or" from line 6, and "or re-enter" from line 7.

[12] This argument emerges from statutory genealogy. Section 33-361 A's precursors in 1901, REV. STAT. § 2693, and in 1913, REV. STAT. § 1552, provided that the landlord "shall have the right by law to re-enter". Section 33-361 A simply says "may" re-enter or commence an action. It could be contended that replacing the word "shall" with the word "may" in the 1928 version of § 33-361 A, § 4325, indicated the intention that 33-361 A's application be within the discretion of the landlord.

[13] Section 33-361 A says nothing about applying only in the absence of a lease termination clause. On the other hand, § 33-343 requires a particular result "unless expressly provided by written agreement." In § 33-343 the legislature showed its awareness of situations where the parties could agree contrary to the statute. Without specific permission to avoid § 33-361 A, the implication is that the parties are powerless to contract away § 33-361 A's application.

[14] If § 33-361 A only applies in the absence of lease termination provisions, the threshold question to every termination case in Arizona would be: does the lease or the statute control? However, none of the cases construing § 33-361 A has ever considered this point. *See* Thomas v. Given, 75 Ariz. 68, 251 P.2d 887 (1952); Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952); Butterfield v. Duquesne Mining Co., 66 Ariz. 29, 182 P.2d 102 (1947); Patterson v. Connolly, 51 Ariz. 443, 77 P.2d 813 (1938); Gila Land & Water Co. v. Brown, 20 Ariz. 400, 181 P. 457 (1919); Camelback Land & Inv. Co. v. Phoenix Entertainment Corp., 2 Ariz. App. 250, 407 P.2d 791 (1965).

[15] In Gila Land & Water Co. v. Brown, 20 Ariz. 400, 406, 181 P. 457, 459 (1919), there is language, though awkward, which bears on the problem. The court said that "the plaintiff corporation had a right to re-enter and take possession of the leased premises for nonpayment of rent for five days, under authority of paragraph 1552, *supra* [§ 33-361 A] whether a clause to that effect was absent from the lease or not." If a termination clause is not absent from the lease, if instead it is present in the lease, and if the court in *Gila Land & Water Co.* is correct, then § 33-361 A applies to all lease terminations despite what the lease might provide to the contrary.

rather than five days. The statute on its face indicates the intention of the legislature to give the tenant a mandatory five day grace period and thereby prevent the increased remedies of the landlord from being oppressive.[16] Whether a provision in the lease *extending* the grace period is operative despite the wording of the statute is not so important, since it certainly would constitute a waiver by the landlord of his statutory right to terminate after five days.[17]

The reach of the second statutory ground for termination — when the "tenant violates any provision of the lease" — is limited by the words "tenant violates." The section is limited to lease provisions which impose upon the tenant a duty or obligation which he can "violate." A provision which purports to terminate the lease upon the occurrence of an event over which the tenant has no control, *e.g.*, the tenant's involuntary bankruptcy or the well's running dry, cannot be enforced by § 33-361 A. But these provisions, in the form of conditions subsequent or special limitations, undoubtedly are still enforceable under the common law.[18]

The "tenant violates" language may make the reach of § 33-361 A depend on the *form* of a lease provision, the section applying to breaches of covenants, but not to special limitations or conditions subsequent. A covenant is worded in terms of a duty or obligation, which the tenant may violate. Conditions subsequent are not *worded* in terms of the tenant's duty, but rather in terms of the landlord's power to terminate the estate upon the occurrence of some event. Special limitations are worded in terms of limitations on the estate. When the event on which the estate is conditioned or limited is, for instance, the tenant's assigning the lease,[19] abandoning the premises, or initiating bankruptcy proceedings, the result in terms of placing a restraint on the tenant is the same as that achieved by a covenant; however, since the construction of the

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[16] It can be argued that a shorter grace period can be imposed by using the second statutory ground, "violates any provision." If the tenant promises in the lease to pay rent at specified times, and fails, then clearly he has violated a provision of the lease. Violating "any provision of the lease" is disjunctively set apart by the word "or" as being something different from "when a tenant neglects or refuses to pay rent when due and in arrears for five days." However, that rent arrearage is dealt with specifically in the first clause, probably should be interpreted to exclude this situation from the operation of the general second clause. Such interpretation supports the probable legislative intent to give all tenants a mandatory five day grace period, when rent is not paid.

[17] Waiver is discussed in detail in Section II C, *infra.*

[18] "[A] statute creating a new remedy or method of enforcing a right which existed before is regarded as cumulative rather than exclusive of the previous remedies." 3 J. SUTHERLAND, STATUTORY CONSTRUCTION § 5305, at 16 (3d ed. 1943).

For examples of events beyond the tenant's control, see 2 R. POWELL, *supra* note 1, ¶ 231[3], at 288-89. For an instance in which a lease was terminated upon sale of the property, see *Middleton Restaurant v. Tovrea Land & Cattle Co.*, 89 Ariz. 316, 361 P.2d 930 (1961).

[19] *Cf.*, Lemons v. Knox, 72 Ariz. 177, 232 P.2d 383 (1951); Note, *Amalgamation Transactions of Corporate Lessees as Breaches of Nonassignment Covenants: Another Plea for Substance over Form*, 69 YALE L.J. 1292 (1960) (assignment of leases with reference to corporate amalgamations).

clause is different, it may not come within § 33-361 A. This construction is supported by the common law background of the statute. Conditions subsequent and special limitations were enforced at common law; therefore, no new remedy was required. On the other hand, there was no termination remedy for breach of a covenant. Therefore, the legislature logically could have intended the statute to apply to covenants but not to conditions subsequent and special limitations.

There are two major limitations on the effectiveness of § 33-361 A to terminate a lease. First, in *Bolon v. Pennington*, the Court of Appeals indicated that courts should ignore "trivial breaches" by a tenant.[20] This attitude might extend to breaches of trivial obligations as well as to slight breaches of important duties.

Second, § 33-361 A's grounds for termination are inoperative if they resulted from "fraud, accident or mistake." This equitable emasculation occurred in *Thomas v. Given*,[21] where the rent was in arrears 11 days and the lessor sought termination under what now is § 33-361 A. Termination was denied because the tenant's failure to pay the rent on time was an accident caused by a new method of posting checks. On the basis of *Thomas v. Given* it is unknown just how far § 33-361 A can be circumscribed by a tenant's equitable argument.[22] "Fraud, accident or mistake," in their ordinary definitions, encompass a large area of possible fact situations.

Although the wisdom and logic of *Thomas v. Given* are certainly questionable on several counts,[23] a lessor's accommodation with the hold-

[20] 432 P.2d 274, 275 (Ariz. Ct. App. 1967). *See generally* 2 R. POWELL, *supra* note 1, § 231[3], at 280, 284; 1 H. TIFFANY, *supra* note 1, § 203, at 335-36.
The courts might take note of a clause to the effect that "any breach shall be considered material and going to the essence of the agreement." However, it is just as likely that a court would disregard this added clause in the same way and for the same reasons that it overlooks the wording of the lease provision itself.

[21] 75 Ariz. 68, 251 P.2d 887 (1952). The court reasoned that § 33-361 A did not work an automatic forfeiture, since the statute requires affirmative action by the landlord, either re-entry or commencement of an action for recovery of the premises. The court then ruled, upon weak authority, that "fraud, accident or mistake" can set aside a termination which is worked automatically by the lessor's taking affirmative action.

[22] Although *Thomas v. Given* permitted a tenant's accident to bar termination for nonpayment of rent, the same would probably be true if "fraud, accident or mistake" caused the violation of "any provision of the lease" under § 33-361 A. The landlord would trigger the "statutory forfeiture" by his "affirmative action," and the equitable excuse for the covenant violation under the *Thomas* theory would relieve against the forfeiture exactly as in a non-payment of rent situation.

[23] The court refused to follow the clear dictates of the legislature. By interjecting equitable defenses into § 33-361 A not placed there by the legislature, the court ignored the established rule against judicial interference with statutory forfeitures. 2 J. POMEROY, EQUITY JURISPRUDENCE § 458 (5th ed. 1941). Furthermore, the case which the court relied upon, *Caine v. Powell*, 185 Ore. 322, 202 P.2d 931 (1949), has been steadily shrinking in its own jurisdiction. Leaving out "accident and mistake," the Oregon Supreme Court has said that *Caine* "stands for the proposition that the landlord cannot terminate a lease for the tenant's breach of covenant resulting from the *fraudulent* conduct of the landlord." (Emphasis supplied). Prins v. Vlugt, 215 Ore. 682, 337 P.2d 787, 796 (1959). *See also* Balser v. Lehrer, 210 Ore. 635, 312 P.2d 1072 (1957).

ing possibly is by means of a condition subsequent or a special limitation in the lease. Terminations based on conditions subsequent or special limitations are subjected to close judicial scrutiny;[24] however, the courts may be more willing to enforce a termination based upon a contractual condition than one based upon § 33-361 A.[25] Consequently, Arizona lessors may be able to avoid the equitable vagaries surrounding *Thomas v. Given* by drafting their own methods for termination in the form of *fair* conditions subsquent or *fair* special limitations.[26]

II. SPECIFIC GROUNDS FOR TERMINATION.

A. *Grounds Implied By Common Law and Uncertain Arizona Statutes.*

In determining grounds for termination, common law implied covenants always should be considered. Arizona specifically has adopted the common law, insofar as it is consistent with the conditions, laws and customs of the state, as the rule of decision in all courts.[27] The common law implied covenants include the tenant's promise not to use the premises in an illegal manner or for an illegal purpose or in a manner constituting a nuisance.[28]

There is also a possibility that terminations could be founded upon or affected by Arizona statutes imposing duties upon the lessee even

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[24] Authorities cited note 7 *supra.*

[25] In *Karam v. Serrano,* 51 Ariz. 397, 407-08, 77 P.2d 447, 451 (1938), the court stated, in dictum, that "if he [the lessee] violates any of the covenants of the lease, and it is provided that such violation shall cause a forfeiture of his lease, the courts will enforce such forfeiture."

Perhaps a special limitation, which provides for *automatic* termination, would have the additional advantage of eliminating the landlord's "affirmative action" which the court seized upon in *Thomas v. Given.*

[26] The overall fairness of the lease is not ignored by the courts when dealing with termination. While stating that conditions would be enforced in leases, the Arizona Supreme Court in *Karam v. Serrano,* 51 Ariz. 397, 77 P.2d 447 (1938), held for the tenant upon an ample showing that the lessor had waived the breach. However, the court went out of its way to note that "the lease involved is evidently one drawn by the lessor. It imposes almost every kind of restriction imaginable upon the lessee." *Id.* at 407, 77 P.2d at 451. In short, a stringent lease will not help a lessor in his termination efforts. Grace clauses, multiple notices and other tenant-oriented characteristics undoubtedly make courts more receptive to the lessor's entreaties.

[27] ARIZ. REV. STAT. ANN. § 1-201 (1956). There are no Arizona decisions considering whether standard common law implied covenants can effect termination. However, since ARIZ. REV. STAT. ANN. § 33-343 (1956) (destruction of premises so as to make them untenantable) probably was passed solely to change common law concerning that situation, the inference is that without statutory modification or obviation the common law rules governing other situations are applicable in Arizona.

[28] R. POWELL, *supra* note 1, ¶ 247[1], at 372-104-.105. Powell states that "[t]here is also some authority allowing a lessor to terminate an estate for years by showing that the accomplishment of the purposes for which the lease was made has become impossible."

though they do not specify termination as a remedy.[29] Although no case law exists on the issue, a lessor could use these vague statutes to justify termination in two possible ways. First, termination logically could be implied as the lessor's remedy for a tenant's violation of a statute meant for the lessor's protection but which provides no sanction for violations.[30] Second, it could be argued that these sections impose implied covenants which, if breached, warrant termination.[31] Further, the lessor could use a tenant's violation to show inequitable conduct, since equities are noticed by courts in termination actions.[32]

B. *Destruction of the Premises; Eminent Domain.*

Section 33-343 was enacted to give the tenant more protection than he had at common law.[33]

> The lessee of a building which, without fault or neglect on the part of the lessee, is destroyed or so injured by the elements or any other cause as to be untenantable or unfit for occupancy, is not liable thereafter to pay rent to the lessor or owner unless expressly provided by written agreement, and the lessee may thereupon quit and surrender possession of the premises.

In short, if the damage is not the tenant's fault and if the damage renders the premises untenantable, the lessee may terminate *unless* his lease provides to the contrary. The practical consequence of § 33-343 is to reverse the parties' positions at common law so the lessor now bears the burden of drafting an exculpatory clause in the lease contract while the tenant is content to remain silent on the point.[34] Any negotiations with

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[29] ARIZ. REV. STAT. ANN. § 33-321 (1956) provides:

> [T]he tenant of a house or apartment, whether it is furnished or unfurnished, shall exercise diligence to maintain the premises in as good condition as when he took possession, ordinary wear and tear excepted.

ARIZ. REV. STAT. ANN. § 33-322 (1956) provides:

> [R]emoval or wilful and material alteration or damage of any part of a building, the furnishings thereof, or any permanent fixture, by or at the instance of the tenant, without written permission of the landlord or his agent, is a misdemeanor.

[30] Section 33-321 probably proscribes waste. Hence, compensatory damages and equitable intervention would be available under the common law. 5 R. POWELL, *supra* note 1, at ¶ 650. However, to obtain multiple damages and forfeiture, a statute must expressly so provide since the Statute of Gloucester (which embodied these remedies) is held not to be part of American common law. RESTATEMENT OF PROPERTY § 198A (1936). *See* 5 R. POWELL, *supra* note 1, at §§ 641, 650.

Section 33-322 does specify a criminal sanction.

[31] This contention could rest on the theory that § 33-361 A permits termination "when tenant violates any provision of the lease," whether express or implied, but such a theory strains the probable intent of the legislature.

[32] *E.g.*, Karam v. Serrano, 51 Ariz. 397, 77 P.2d 447 (1951).

[33] DeMund v. Oro Grande Consol. Mines, 56 Ariz. 458, 463-64, 108 P.2d 770, 772 (1941); *see* 3 H. TIFFANY, *supra* note 1, at § 905; M. FRIEDMAN, *supra* note 1, at 66.

[34] A case in which an Arizona lessor drafted a clause with § 33-343 in mind is *Leonardi v. Furman*, 83 Ariz. 61, 64-65, 316 P.2d 487, 489-90 (1957). No auto-

regard to this issue should utilize fully the possibilities of appropriate rent abatements, insurance for the loss and reasonable time limits for the repair. If the lessor is responsible for repair, then the lease must grant him the specific right of re-entry.[35]

Section 33-343 may also be important in eminent domain proceedings. The general rule at common law is that a taking of the whole parcel in fee simple absolute terminates any leasehold interest, but that if only a part of the land, or a lesser interest therein, is taken, the lease continues.[36] However, if any such partial taking renders the premises "untenantable or unfit for occupancy," there may be a different result in Arizona.

The taking of leased property by eminent domain raises a host of complicated and, in Arizona, unsettled problems. An easy and commonly used method of avoiding all such problems between landlord and tenant is to provide in the lease agreement that the lease will terminate upon the filing of a complaint in eminent domain concerning any part of the property.[37] If any other arrangement is desired, the Arizona constitutional and statutory provisions should be examined carefully,[38] and the rights of the parties spelled out, in detail, in the lease agreement.

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matic termination was worked under § 33-343 since the lease terms controlled by providing that:

> "If . . . the said premises shall be destroyed by fire * * * *or* be so damaged by fire, by the elements, by earthquake, or any other inevitable casualty that the said premises cannot be *repaired* or *restored* within one hundred fifty working days from the date of such damage, this Lease shall, at the option of either party, become terminated and rights hereunder shall cease and terminate and the Tenant shall be entitled to be reimbursed for all rents paid in advance. * * * "

For which party bears the burden of the loss itself, *see* DeMund v. Oro Grande Consol. Mines, 56 Ariz. 458, 108 P.2d 770 (1941); General Accident Fire & Life Assur. Corp. v. Traders Fur Co., 1 Ariz. App. 203, 401 P.2d 157 (1965).

[35] In *Leonardi v. Furman*, 83 Ariz. 61, 64, 316 P.2d 487, 489 (1957), the lease stated that:

> "the Tenant agrees to give the said Landlord access to the leased premises so that the necessary repairs may be resumed without delay, and it is distinctly understood that the above mentioned 150 working days shall not include such time as the premises may be inaccessible for repairs."

Note the importance in such a clause of giving the lessor the right of access to the premises if he has the repair burden. So long as a lessee's possessory interest continues in the leasehold the lessor has no right to enter. Miller v. Condon, 66 Ariz. 34, 39, 182 P.2d 105, 108 (1947) (where the tenant paid rent to the end of the current month and the landlord re-entered prior to the end of the month, the entry was a trespass). Such entry could also constitute a "forcible entry." ARIZ. REV. STAT. ANN. § 12-1172 (1956).

[36] 2 R. POWELL, *supra* note 1, ¶ 247 [2], at 372.119. There is a minority view that a partial taking does result in an eviction of the tenant. *See generally* 2 NICHOLS, EMINENT DOMAIN § 5.23 [3], at 67-71 (3d ed. 1963).

[37] 1 AMERICAN LAW OF PROPERTY § 3.55 (1952); 2 NICHOLS, EMINENT DOMAIN § 5.23 [2], at 65-67 (3d ed. 1963). Nichols indicates that such clauses will be strictly construed by the courts.

[38] *See generally* ARIZ. CONST. art. 2, § 17; ARIZ. REV. STAT. ANN. §§ 12-1111 to -1162 (1956), *as amended*, (Supp. 1967).

C. *Nonpayment of Rent.*

Section 33-361 A expressly provides for the landlord's right to terminate for nonpayment of rent overdue for five days.[39]

A practical obstacle to the enforcement of this right is the Arizona courts' holdings that the landlord's prior acceptance of late rental payments is a waiver of the strict terms of the lease, impliedly extending the payment dates indefinitely.[40] For example, in *Butterfield v. Duquesne Mining Co.*, [41] the lessor attempted to terminate because the lessee had failed to pay the rent due on November 1. But, since the lessor had accepted late rental payments for July, September and October, the court held that there was "an implied extension of time to pay the rentals due."[42]

If a late payment has been accepted, then the lessor must send the lessee notice that the lease terms are reinstated.[43] Another solution is to circumvent the problem in the lease itself, and there are several clauses that might be helpful. First, the lease should state that if the lessor accepts late rental payments it is not tantamount to an implied revision of the lease terms. Second, some reason *other* than the extension of the payment dates might be included (a recognized business necessity, hardship or mutual benefit) as the reason for accepting the late payment. However, such drafting efforts may well prove futile.[44]

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[39] *See* Grizzle v. Runbeck, 74 Ariz. 92, 244 P.2d 1160 (1952).

[40] This reaction is rather extreme. It is reasonable to hold that, by accepting an overdue rental tender, the lessor has waived his right to seek termination for that particular rent being in arrears. *See* 1 AMERICAN LAW OF PROPERTY § 3.95, at 382 (1952); 2 R. POWELL, *supra* note 1, ¶ 250, at 372.128-.130. It is something else to hold such an acceptance is a waiver of the subsequent rental due dates. Perhaps the holding of the Arizona case on this point depends upon there being *several* acceptances of overdue rent and this makes more sense. *See* note 39 *infra.*

It should be noted that this same reasoning is applied to real estate sale contracts. *E.g.*, Tolmachoff v. Eshbaugh, 41 Ariz. 318, 18 P.2d 256 (1933); Stark v. Norton, 24 Ariz. 454, 211 P. 66 (1922). It could be argued that such a construction of an acceptance of late payment is warranted more in a sale than a lease situation because the buyer stands to lose his accrued equity as well as his present possessory interest.

[41] 66 Ariz. 29, 182 P.2d 102 (1947).

[42] *Id.* at 33, 182 P.2d at 104. *See also* Wahlstrom v. Christy, 20 Ariz. 331, 333, 180 P. 528, 529 (1919) ("slight acts" will be construed as waiving forfeitures).

[43] Butterfield v. Duquesne Mining Co., 66 Ariz. 29, 32, 182 P.2d 102, 103 (1947).

If there are any overdue rents outstanding when the reinstatement notice is issued, then the lessee probably must be given a "reasonable time" to bring such amounts current before they can be the basis for a termination action. *Cf.*, Chadwick v. Winn, 101 Ariz. 533, 536, 421 P.2d 890, 893 (1966) (landlord was required to make a demand and afford the tenant a reasonable opportunity to tender the rental payment); Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P.2d 918 (1942) (real estate *sale* contract); Stark v. Norton, 24 Ariz. 454, 211 P. 66 (1922) (real estate *sale* contract).

[44] In *Chadwick v. Winn*, 101 Ariz. 533, 536, 421 P.2d 890, 893 (1966), the Arizona Supreme Court said:

> The law does not favor forfeitures and it cannot condone a lessor's conduct which has put a tenant off guard and has tended to lead him into circumstances in which his interest can be forfeited by the lessor. In such a case, *notwithstanding the provisions of the lease*, reason and justice require that the lessor demand that the rent be paid before exercising a right of forfeiture. (Emphasis supplied).

D. *Tenant's Bankruptcy.*

The Bankruptcy Act expressly permits a lease to be terminable in the event of bankruptcy.[45] Despite this statutory authorization, courts are indisposed to permit such terminations. They are motivated not only by the traditional antipathy toward forfeitures but also by the policy of maximizing the assets of the bankrupt estate.[46] In short, "these forfeiture clauses are to be liberally construed in favor of the bankruptcy lessee."[47]

The central problem in drafting a termination clause which would be operative upon the tenant's bankruptcy is to come within the meaning of "express covenant" under 11 U.S.C. § 110(b). In practice, "express covenant" means that the forfeiture clause must be extremely specific.[48] It is particularly essential that the clause expressly provide for termination upon the bankruptcy of the lessee.[49] However, in drafting an express covenant, the language should not become so specific that the lease terminates automatically upon the lessee's bankruptcy.[50] This would usually work to the detriment of both the lessor and lessee. While the lessor would want termination to be at his option, the lessee would like to preserve that option for the possibility not only of increasing his assets

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Although not directly in point because, even though the lessor had accepted prior late rental payments, the court found an *express* waiver, the language has great import since it manifests the underlying policy against putting "a tenant off guard." A tenant may be put "off guard" as much by prior acceptances of late rent as by express waiver. Consequently, a drafting solution may be doomed to failure if *Chadwick's* strong language is applied to situations of late rental acceptances.

[45] 11 U.S.C. § 110(b) (1964) provides in part:

> A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; *but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforcible* [sic]. (Emphasis supplied).

[46] *See* 4A W. COLLIER, BANKRUPTCY ¶ 70.44 [3], at 542-43 (14th ed. 1967) (ambiguous forfeiture clauses "universally" construed in favor of the lessee).

[47] Smith v. Hoboken R.R., 328 U.S. 123 (1946).

[48] *See id.* at 125-26, where the following lease clause was held sufficient:

> The lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises . . . without the previous consent of the lessor . . . this covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises . . . whether made by the lessee or in any proceeding . . . . whereby any of the rights, duties and obligations of the lessee shall or may be transferred . . . without the consent of the lessor . . . .

[49] *See* 4A W. COLLIER, *supra* note 42, at 544-45:

> It is not enough to say that a lease shall terminate or may be terminated if assigned to anyone — that is too "general." It must be said that the lease shall terminate or may be terminated upon assignment by operation of law, or, still more specifically, that it shall terminate or may be terminated upon the bankruptcy of the lessee (or the lessor or both) — that is "express" enough.

[50] In *Jandrew v. Bouche*, 29 F.2d 346, 347 (5th Cir. 1928), the court held the following clause to be one of conditional limitation ipso facto terminating the lease without action by either party: "This lease shall be personal to the lessees and shall not inure to the benefit of any receiver or trustee in bankruptcy as an asset of the said lessees."

in bankruptcy but also of the lessor's waiving his termination right.[51]

The elements of an effective "express covenant" also include considerations of when the termination right accrues. Usually, a lease is terminated upon the adjudication of lessee's bankruptcy. However, a sufficiently explicit clause may enable the landlord to terminate a lease in the event of the filing of a petition initiating a proceeding under the Bankruptcy Act against the lessee.[52] This is unfair to the lessee because he may never be adjudicated a bankrupt. It would also permit a lessor to file a petition against his own lessee and thereby create his own grounds for terminating the lease.[53] In any event, whether termination rights accrue upon filing, adjudication, or at some other stage in the proceeding, it is vital for the parties to provide for this problem in the lease.

Another critical area which must be covered by the termination clause is the possible bankruptcy of the tenant's assignees in the leasehold estate. The difficulty is that language providing that the lease may be terminated upon the bankruptcy of the lessee or of any "successor" has been held *not* to include an assignee of the lessee.[54] For example, in *In re Murray Realty Co.*,[55] the lease provided that "the insolvency or bankruptcy of the second party [*i.e.*, the lessee] or of any successor, shall at the option of the first party [*i.e.*, lessor] . . . terminate this lease . . . ."[56] The court held that the bankruptcy of an assignee did not permit the lessor to terminate the leasehold estate. Driven by the policy that "the law frowns on forfeitures" and by the fact that the lessor was not prejudiced because the lessee-assignor had sufficient money to pay the lessor, the court took a rigid interpretation of the lease clause and found that "successor" was intended to be distinct from "successors and assigns," thereby exempting "assigns" from the bankruptcy termination clause.[57] With such reluctance to extend bankruptcy termination clauses to the successors and assigns of the original lessee, it is indispensible protection for the lessor that the lease contract proscribe assignment without the lessor's written consent. Furthermore, the termination clause must be absolutely specific as to the lease's terminability upon a subtenant's bankruptcy.

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[51] *See* 4A W. COLLIER, *supra* note 42, at 546.

[52] *Id.* at 545-46 n.12.

[53] *Id.* "[I]f termination can be enforced by virtue of the filing of a petition against a tenant even though the petition may be subsequently dismissed, oppressive misuse of the processes of bankruptcy may result." In view of this problem, there is a movement sponsored by the National Bankruptcy Conference to amend § 110(b), "to suspend the exercise by a lessor of his contract right to terminate on the basis of the filing of a petition under the Act by or against the lessee, unless and until the lessee is adjudged bankrupt."

[54] *Id.* at 545.

[55] 35 F. Supp. 417 (N.D.N.Y. 1940).

[56] *Id.* at 418.

[57] *Id.* at 419; *cf.* *In re* Clerc Chemical Corp., 52 F. Supp. 109 (D.N.J. 1943), *aff'd* 142 F.2d 672 (3d Cir. 1944).

The judicial antipathy toward termination in bankruptcy is manifested not only in attacking a clause's lack of specificity but also in finding the lessor to have waived his termination rights.[58] There are two elements to waiver in this context. First, the lessor must be cognizant of the grounds for termination. For example, in *B.J.M. Realty Corp. v. Ruggieri*,[59] even though the landlord had demanded termination and had accepted rent payments from the lessee in the form of checks bearing the stamp of "debtor in possession," the court held that no waiver of the termination clause had occurred because "the landlord must be fully aware that his right to declare the lease forfeited has become operative before he can be said to have waived that right by acceptance of rent."[60] The second element of waiver is the lessor's failure to indicate promptly and decisively that the lease is terminated. Consequently, where the lessor consented to a Chapter X plan and accepted rental payments without reservation, he waived his termination rights under the lease which gave him the option to terminate upon the filing of the lessee under any insolvency act.[61]

III. PROCEDURE FOR TERMINATION

A. *Demand for Performance and Formal Re-entry.*

At common law a landlord was required to make formal demand for possession before he could maintain an action for termination.[62] In its earliest form, demand was made by re-entry, a symbolic entry upon the land. When the forfeiture was based on a failure to pay rent, the demand requirements were extraordinarily technical.[63] The purpose of demand seems to have been a symbolic act, establishing the termination, which the landlord then enforced in court;[64] it was not meant to give the

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[58] *See* 4A W. COLLIER, *supra* note 46, at 546:
[I]t is not enough simply to be entitled to a forfeiture. *The right must be exercised promptly and unmistakably,* because judicial aversion to forfeitures imposes strict requirements not only upon the existence of the right, but also its exercise, and may readily result in declaring the forfeiture "forfeited" or waived by subsequent acts. (Emphasis supplied)

[59] 326 F.2d 281 (2d Cir. 1964).

[60] *Id.* at 283. The court further stated that:
An intention to waive the forfeiture clause may not be inferred from the payment of rent that had accrued before the filing of the petition or from the payment of rent before the landlord had actual notice of the filing of the petition.

[61] *See* Entin v. Stevens, 323 F.2d 894 (8th Cir. 1963).

[62] 1 AMERICAN LAW OF PROPERTY § 3.94 (1952); 1 H. TIFFANY, *supra* note 1, at § 212.

[63] 1 H. TIFFANY, *supra* note 1, § 200 at 332-33:
A demand must be made on the day on which the rent falls due, and it must be at a convenient hour on such day, before sunset. The demand must . . . be made at the place named for the payment of rent, or if no such place, upon the premises, at the most notorious place thereon, and must be for a sum neither greater nor less than the amount then due.

[64] 1 H. TIFFANY, *supra* note 1, at § 212.

tenant an additional opportunity to perform or remedy the event which entitled the landlord to terminate. The requirement of demand has been removed in most jurisdictions, except where a tenant's duty does not arise until he receives a request from the landlord, in which case the landlord has no right to terminate until he has placed the tenant in default by a demand for performance of the duty.[65]

Section 33-361 A probably dispenses with all requirements for demand or re-entry where a lease is terminated under either provision — rent arrearage or violation of a provision of the lease.[66] A landlord wishing to enforce a termination based on a condition subsequent or special limitation to which § 33-361 A does not apply should not have to make a formal demand either.[67] The legislative policy of § 33-361 A should be recognized in this case as well. The ending of the estate is as effectively symbolized by commencement of a forcible detainer action, with its notice requirement, as by a formalized and archaic re-entry or demand.[68]

B. *Forcible Detainer.*

In Arizona, the forcible detainer statutes[69] implement all termina-

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[65] 1 H. TIFFANY, *supra* note 1, § 200 at 332:
[w]here the performance of a condition *in any way depends on the pleasure of the person entitled to performance*, as regards the manner or time of performance, or as to whether it shall be done at all, he must request performance of the condition in order to be able to claim a forfeiture, *but otherwise no demand for performance is ordinarily regarded as necessary.* (Emphasis supplied).

[66] *See* text of § 33-361 A, *supra* p. .
The statute could be construed to require some sort of demand before the landlord is entitled to "re-enter and take possession," since the language "without formal demand or re-entry" seems to apply only to the right to "commence an action" and not to "re-enter and take possession." *See* Christy v. Wahlstrom, 22 Ariz. 515, 519, 199 P. 122, 124 (1921) (this argument presented but not ruled upon). However, this construction overlooks the common law origin — demand was only required for commencing an action. A landlord could take possession without court action when his tenant voluntarily vacated the premises upon his re-entry. This is undoubtedly what § 33-361 A intends — the landlord may recover possession by self-help (so long as this does not provoke a breach of the peace), or he may recover the property by court action. In neither instance is any formal demand necessary.

[67] *Cf.* Monaghan v. Barnes, 48 Ariz. 213, 225, 61 P.2d 158, 163 (1936) (where apparent express condition effected termination for *rental* default and no formal demand was made, although covenants were broken).

[68] 1 H. TIFFANY, *supra* note 1, at § 212.

[69] ARIZ. REV. STAT. ANN. §§ 12-1171 to -1183 (1956).

tions,[70] those based on § 33-361 A[71] as well as on conditions subsequent and special limitations.[72] Jurisdiction over forcible detainer is shared by superior and justice courts "where the rental value of the property involved does not exceed one hundred dollars per month and where damages are less than five hundred dollars."[73] Otherwise, superior courts have exclusive jurisdiction.[74]

Generally, forcible detainer is intended "to afford a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant."[75] Consequently, the right to actual possession is the only issue to be determined;[76] counterclaims, offsets and cross complaints are not available,[77] and the merits of the title may not be inquired into.[78] The pleadings and proof are therefore restricted almost entirely

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[70] To the uninitiated, § 12-1251 A might look like a termination procedure, as it provides:

> a person having a valid subsisting interest in real property and a right to immediate possession thereof may recover the property by action against any person acting as owner, landlord or *tenant* of the property claimed. (Emphasis supplied).

For three reasons § 12-1251 A is not available for termination purposes. First, § 33-361 B specifically provides that termination under § 33-361 A be carried out "as provided for actions for forcible entry and detainer." Second, § 12-1251 A is used to "determine . . . which party had the paramount legal title to the premises for the purpose of determining who has the right to possession," Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946), not to determine the summary rights of a landlord under a lease provision where no question of title is raised. Third, § 12-1251 A is not adaptable to § 33-361 B's requirement that a termination action "shall be tried not less than five days nor more than 30 days after its commencement" because § 12-1251 A makes no allowance for such immediacy as does § 12-1175 in the forcible detainer procedure.

[71] ARIZ. REV. STAT. ANN. § 33-361 B (1956); *see* ARIZ. REV. STAT. ANN. § 12-1171(3) (1956).

[72] *See* ARIZ. REV. STAT. ANN. § 12-1171(3) (1956):

> A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:
>
> . . . .
>
> (3) wilfully and without force *holds over* any land, tenements or other real property *after termination of the time for which such* lands, tenements or other real property were let to him . . . . (Emphasis supplied).

See also 32 AM. JUR. *Landlord and Tenant* § 918, at 778 (1941) for discussion of holding over, the wrongdoing and trespass aspects of the problem.

[73] ARIZ. REV. STAT. ANN. § 22-201 C (Supp. 1966). The use of "rental value" in § 22-201 C raises a question whether rent in the lease contract or the market rental value is to control. To preserve the summary aspects of forcible detainer and to avoid involvement in questions of market value, it would be best for jurisdiction to depend upon the rent provided in the lease contract.

[74] ARIZ. CONST. art. 6, § 14(5); ARIZ. REV. STAT. ANN. § 22-201 C (Supp. 1966).

[75] Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946).

[76] ARIZ. REV. STAT. ANN. § 12-1177 A (1956).

[77] Hinton v. Hotchkiss, 65 Ariz. 110, 174 P.2d 749 (1946). The Rules of Civil Procedure do *not* control over conflicting provisions of the forcible entry and detainer procedure. Byrd v. Peterson, 66 Ariz. 253, 186 P.2d 955 (1947); Hinton v. Hotchkiss, *supra;* Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 167 P.2d 394 (1946).

[78] Olds Bros. Lumber Co. v. Rushing, 64 Ariz. 199, 204-05, 167 P.2d 394, 396-97 (1946); ARIZ. REV. STAT. ANN. § 12-1177 A (1956).

However, the fact of title in one party may be put in evidence when it is incidental to that party's proof of right to possession by reason of ownership Taylor v. Stanford, 100 Ariz. 346, 349-50, 414 P.2d 727, 730 (1966); Merrifield v. Merrifield, 95 Ariz. 152, 388 P.2d 153 (1963) (dictum).

to the issue of wrongful possession.[79]

Another basic issue involved in forcible detainer deals with which person is empowered to bring the action. Generally, in terminating an estate for years, the "person entitled to such possession" may institute forcible detainer.[80] For example, in *Butterfield v. Duquesne Mining Co.*[81] the court held, under §§ 33-361 and 12-1177, that a lessee who had surrendered possession of the premises lacked capacity to oust the present occupants because "under our forcible entry and detainer law, the plaintiff must have the right to possession before he can maintain his action."

But apparently the lessor always has standing to bring forcible detainer, since the "right to possession" test is not used to his exclusion. The Arizona Supreme Court, in *Cheshire v. Thurston*,[82] held that the plaintiff-landlord was allowed to seek forcible detainer even though he had already alienated his present reversionary interest to another. Although *Cheshire* could be explained on the "right to possession" theory,[83] an inclusion of the lessor among those with the power to bring forcible detainer is consistent with the common law where *only* the lessor could maintain such an action.[84]

There is a common notion that five days' written notice to the lessee of the lessor's intent to institute forcible detainer is required. There is a theory which supports this notion, but the theory is weak.[85] The only express notice requirement for the termination of a lease for

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[79] *Cf.* Gila Land & Water Co. v. Brown, 20 Ariz. 400, 404, 181 P. 457, 458 (1919) (the plaintiff must allege and prove that the defendant is "unlawfully holding the premises after all his rights under the lease have terminated.") *But see* Heywood v. Ziol, 91 Ariz. 309, 311, 372 P.2d 200, 202 (1962) (can show "the facts and attending circumstances upon which the right to possession is claimed.").

Note that in pleading and proving the wrongfulness of the holding over, the lease need not contain a covenant requiring the tenant to deliver up possession upon termination. Such a covenant will be implied. ARIZ. REV. STAT. ANN. § 33-341 D (1956); M. FRIEDMAN, *supra* note 1, at 117.

[80] ARIZ. REV. STAT. ANN. § 12-1171(3) (1956); *see* ARIZ. REV. STAT. ANN. § 33-361 A (1956) ("the landlord or person to whom the rent is due, or his agent").

[81] 66 Ariz. 29, 34, 182 P.2d 102, 105 (1947).

[82] 70 Ariz. 299, 219 P.2d 1043 (1950).

[83] Theoretically, since the lessor's grantee of the reversionary interest takes *through* the lessor, the lessor might well have a right to possession in order to convey the estate to the grantee.

[84] *See* 1 H. TIFFANY, *supra* note 1, § 208, at 348.

[85] The five-day notice rule is supported by the following three-step theory. First, termination occurs upon the action of the landlord before forcible detainer actually is effected. *See* Thomas v. Given, 75 Ariz. 68, 70, 251 P.2d 887, 889 (1952). Second, since the lease already has been terminated, the tenant retains possession after his right thereto has ended and is now a tenant by sufferance. 32 AM. JUR. *Landlord and Tenant* § 75 (1941). Third, § 12-1178 A(1) requires *five days' written notice* for the existence of a forcible detainer action instituted against a tenant "by sufferance."

The weakness in the preceding argument is to be found in § 33-341 E which provides: "A tenant who holds possession of property against the will of the landlord, *except as provided in this section, shall not be considered a tenant at sufferance or at will.*" (Emphasis supplied). Nowhere does § 33-341 mention the estate of a tenant whose lease has been terminated before the expiration of the term.

years comes in § 12-1171 A(3), which provides that forcible detainer arises "after demand made in writing for the possession thereof by the person entitled to such possession." Moreover, no Arizona appellate court has construed either § 12-1171 or § 12-1173 to require five days' notice when instituting a forcible detainer action against a lessee for years. Arizona adopted these sections from Texas, whose courts simply have required written notice, without the five-day condition.[86]

Yet, if there is an implied standard of reasonableness in § 12-1171 A(3)'s written demand provision, then the use of five day notice periods in other forcible detainer sections,[87] as well as the exigencies of the situation, may cause courts to read a five days' notice requirement into the statute. To be safe, lessors should continue the custom of giving at least five days' notice of forcible detainer actions.

C. *Ancillary Problems: Attorneys' Fees and Removal of Trade Fixtures.*

The recovery of attorneys' fees is a common problem which must be solved at the drafting stage. Even though § 12-1178 A grants the lessor "costs" upon winning a forcible detainer action, it is settled in Arizona that attorneys' fees are not recoverable unless provided for by contract or statute.[88] Consequently, the lease contract must include a provision for the reimbursement of attorneys' fees and costs in the enforcement of any terms or provisions of the lease.[89] Specific reference should also be made to fees and costs involved in actually terminating the lease.[90] Although there are cases where attorneys' fees have been granted when the contract allowed generally only for plaintiff's *costs*,[91] good practice

[86] ARIZ. REV. STAT. ANN. §§ 12-1171 and 12-1173 (1956) were adopted from what are now TEX. REV. CIV. STAT. art. 3973 and art. 3975 (1948). The Texas courts have construed an early version of these statutes, TEX. REV. CIV. STAT. arts. 3940, 3942 (1911) in the following manner:

> So we take it our statutes require, when the landlord elects to recover possession of a tenant whom he has placed in possession of the property, that he give notice in writing to the tenant for possession. H. L. Null & Co. v. J. S. Garlington & Co., 242 S.W. 507, 510 (Tex. Ct. Civ. App. 1922) (five day issue was not presented in this case).

[87] ARIZ. REV. STAT. ANN. § 12-1173 A (1956). *See also* ARIZ. REV. STAT. ANN. § 12-1178 C (1956).

[88] Commercial Standard Ins. Co. v. Cleveland, 86 Ariz. 288, 294, 345 P.2d 210, 215 (1959); *see* Colvin v. Superior Equip. Co., 96 Ariz. 113, 122, 392 P.2d 778, 784 (1964); ARIZ. REV. STAT. ANN. § 12-332 (1956) ("taxable costs" in Superior Court are defined to exclude attorneys' fees).

[89] *See* M. FRIEDMAN, *supra* note 1, at 116. *See generally* 2 R. POWELL, *supra* note 1, ¶ 250, at 372.130-31.

[90] It is common for costs and fees to be based on the "enforcement" of the lease contract terms. Unless the contract contains a proper forfeiture clause, the lessor would not be "enforcing" the lease terms, in a strict sense, when seeking termination for the violation of a lease covenant under authority of § 33-361 A. To be safe, the fees and costs should be provided expressly to cover termination and forcible detainer expenditures.

[91] *See* Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964); Commercial Standard Ins. Co. v. Cleveland, 86 Ariz. 288, 345 P.2d 210 (1959).

would require that recovery of both fees and costs be specifically provided for in the lease agreement.[92]

There is a split of authority on the disposition of lessee's trade fixtures when the lease is forfeited before the end of the term. One view holds that the lessee loses his right to remove fixtures upon forfeiture caused by his own act or omission.[93] On the other hand, there are decisions to the effect that the tenant has a reasonable time after the loss of possession by forfeiture in which to remove the fixtures.[94] Although the better, fairer rule is the one permitting the tenant reasonable time to remove his fixtures upon termination,[95] Arizona has not yet had occasion to determine its position. However, it is clear from other contexts that Arizona courts will give great weight to the intention or understanding of the parties in fixtures questions. For example, in *Nigro v. Hatch*,[96] the court, considering whether or not the lessee's building became a fixture, stated that the outcome depended upon the "express or implied understanding of the parties."[97] Since the parties to a sale or lease can determine whether improvements become permanently attached to the land,[98] they also should be able to determine *when* a lessee may remove his trade fixtures upon termination. Hence, the lease contract should set forth not only which property of the tenant may be removed,[99] but also the duration of the right to remove after termination.

IV. The Lessee's Financial Liability Upon Termination.

A. *Accrued Obligations.*

After termination, and as part of a successful forcible detainer

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[92] *E.g.*, Leonardi v. Furman, 83 Ariz. 61, 64, 316 P.2d 487, 489 (1957), which involved a lease contract with a fairly comprehensive clause for the recovery of fees and costs:

> "Should suit be brought by the Landlord to enforce payment or to recover on any of the other terms and conditions contained in this Lease, or should the Landlord engage an attorney because of any default or violation made by the Tenant, then the Tenant agrees to pay for all attorney's fees and all costs caused by the Tenant in connection with such default and/or violation or violations."

While this case dealt with a landlord's provision for recovery of costs, there is no reason why a similar provision could not be inserted for the protection of the tenant.

[93] 2 H. Tiffany, *supra* note 1, at § 622. *See also* Annot., 39 A.L.R. 1099 (1925).

[94] 2 H. Tiffany, *supra* note 1, § 622, at 615.

[95] Tiffany states that this view is "more in accord with the modern application of the law of fixtures as between landlord and tenant." *Id.*

[96] 2 Ariz. 144, 11 P. 177 (1886).

[97] *Id.* at 146, 11 P. at 177. Similarly, in *Gomez v. Dykes*, 89 Ariz. 171, 175, 359 P.2d 760, 763 (1961), the court formulated rules for determining when personal property became affixed to the real estate "in the absence of an agreement between the parties which would otherwise determine the character of the item."

[98] See Hamberlin v. Townsend, 76 Ariz. 191, 194, 261 P.2d 1003, 1005 (1953), for an example of a lease clause covering the disposition of trade fixtures upon the "expiration" of the lease term.

[99] *See generally* M. Friedman, *supra* note 1, at 57-61.

action, the lessor may, at his option, obtain judgment "for all rent found to be due and unpaid at date of judgment."[100] The lessor should also be able to obtain damages for the tenant's past breaches of other covenants,[101] although such recovery probably would not be part of a forcible detainer action.[102] Whether the action is to recover unpaid rent or damages from breached covenants, a merger of the reversion into the lessor's remainder generally does not affect the tenant's liability for accrued obligations.[103]

However, if the lease contract restricts the lessor's scope of ordinary remedies upon termination, then the lease contract will control and the lessee's accrued obligations may well lie beyond the lessor's reach. In *Camelback Land and Investment Co. v. Phoenix Entertainment Corp.*,[104] the court held that where a lease provides exclusive remedies to the lessor in the event of a breach by the lessee, the lessor is bound thereby and cannot go outside the terms of the contract and seek remedies. On this theory, the lessor's claim, which consisted partly of accrued rent unpaid at the time of default, was denied.[105] Although the *Camelback* opinion is unclear[106] it indicates that a lease contract may well limit the normal remedies upon default.[107]

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[100] ARIZ. REV. STAT. ANN. § 12-1178 (1956). *See* Monaghan v. Barnes, 48 Ariz. 213, 61 P.2d 158 (1936) (unpaid rent was recovered on termination accomplished under declaratory judgment action). The amount of unpaid rent granted, as part of the judgment, is not dependent upon the specific sum requested in the prayer. Fenter v. Homestead Dev. & Trust Co., 3 Ariz. App. 248, 413 P.2d 579 (1966). The reasonable rental value will be awarded in an appropriate case. Merrifield v. Merrifield, 95 Ariz. 152, 388 P.2d 153 (1963).

[101] *See* 1 AMERICAN LAW OF PROPERTY § 3.99, at 390 (1952).

[102] Although they do provide for the recovery of unpaid rent, the forcible detainer statutes do not expressly permit the judgment to include damages from general covenant breaches. *See* ARIZ. REV. STAT. ANN. § 12-1178 A (1956). The policy behind such an omission undoubtedly is to preserve forcible detainer as a summary remedy; the inclusion of general covenant breaches would expand the issues and protract the action.

[103] *See* 1 AMERICAN LAW OF PROPERTY §§ 3.99, 3.73 (1952). *See generally* Annots., 58 A.L.R. 906 (1929) (effect of rental due dates on amount of recovery); 51 A.L.R. 1061 (1927); 18 A.L.R. 957 (1922).

[104] 2 Ariz. App. 250, 256, 407 P.2d 791, 797 (1965).

[105] The lease in *Camelback* provided that on tenant's default the lessor could "re-enter the premises and take possession thereof and relet the same for the account of Tenant for the remainder of the YEAR . . . *holding the Tenant liable for any deficiency in rent, FOR SAID YEAR ONLY* . . . ." (Emphasis supplied). *Id.* at 252, 407 P.2d at 793. Instead of suing for the "deficiency" for "said year only," lessor's claim included an accrued rental obligation which arose not in the year of the default.

[106] In denying the lessor's entire claim, which included accrued rent from the lease's first year, the court should have been more explicit as to the nature of lessor's failure to pursue the exclusive remedies provided. Since the lease contract stated that upon default and re-entry the lessor must "relet the same for the account of tenant," lessor's debt action without mitigation seems to be the noncompliance involved. 2 Ariz. App. 250, 252, 407 P.2d 791, 793 (1965).

[107] Unless the intention is actually to the contrary, the lease contract should state that the remedies provided are not exclusive. Also, on the basis of *Camelback*, perhaps the lease contract could state expressly that, upon lessee's default, the lessor may permit the premises to lie idle and sue periodically for rent.

B. *The Disposition of Advanced Sums.*

Instead of relying solely upon post-termination remedies, the lessor commonly will require money to be paid in advance by the tenant. There are various types of these advancements, but the most certain to be enforced is the security deposit, which "represents a fund from which the landlord may obtain payment for damages caused by the tenant during his occupancy."[108] Courts dislike penalties and prefer to give lessors only actual losses; the security deposit is generally acceptable because any amount of the deposit in excess of the loss, by way of rent or damages it expressly secures, must be returned to the tenant.[109] Moreover, where there is a question about the nature of the advanced sum, the court frequently will classify the amount as a security deposit[110] to lessen the harshness of forfeiture.

In assessing the need for a security deposit, the available statutory security devices must be considered.[111] Arizona has two statutes, §§ 33-361 D and 33-362, which specifically relate to a lessor's lien for unpaid rent. But outside the vague contours of § 33-321[112] there is no specific security against waste and no statute which directly bears on security for breach of a general lease covenant. Furthermore, general damages are not recoverable under Arizona's forcible detainer statutes and independent non-summary remedies must be employed for such recoveries.[113] In other words, there *is* a need for security arrangements in Arizona.

As a general rule, the security deposit is payable upon the lessee's entering into possession[114] and may be in the form of cash or securities or both.[115] There are conflicting rules regarding the relationship of landlord and tenant with reference to the security deposit[116] and the deposit's disposition when the reversion is transferred.[117] The Arizona Supreme Court has held that the tenant's right to the return of the security deposit does not arise until he is relieved of all his obligations under the lease.[118]

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[108] Paul v. Kanter, 172 So. 2d 26, 28 (Fla. Ct. App. 1965) (dictum); *see* Note, *Amalgamation Transactions of Corporate Lessees as Breaches of Nonassignment Covenants: Another Plea for Substance over Form*, 69 YALE L. J. 1292, 1307-08 (1960). *See* M. FRIEDMAN, *supra* note 1, at 86.

[109] Bowles v. Westbrook Defense Homes, Inc., 61 F. Supp. 172, 173 (D. Conn. 1945).

[110] Jensen v. Sparkes, 53 F.2d 433 (9th Cir. 1931) (labeled advanced rent by parties but considered security deposit by court). *But see* Loew v. Antonick, 82 Ariz. 204, 310 P.2d 825 (1956).

[111] *See* M. FRIEDMAN, *supra* note 1, at 86.

[112] *See* note 29 *supra*. ARIZ. REV STAT. ANN. § 33-321 (1956) offers no security *per se*, only the possibility of injunctive relief.

[113] *See* note 83 *supra*.

[114] 1 AMERICAN LAW OF PROPERTY § 3.73 (1952).

[115] *Id*; M. FRIEDMAN, *supra* note 1, at 88. Note the problem of income from the deposited amount.

[116] 1 AMERICAN LAW OF PROPERTY § 3.73 (1952).

[117] *Id.*

[118] Cochise Hotel v. Douglas Hotel Operating Co., 83 Ariz. 40, 44, 316 P.2d 290, 293 (1957). *See also In re* Muntz TV, 229 F.2d 228, 231 (7th Cir. 1956).

This means that in some cases the unused balance of the security deposit may not be repaid until after default and re-entry. Consequently, the lease contract should be quite clear as to the time when the security deposit returns to the tenant, if the return is desired at some time prior to the landlord's re-entry.

Another means of obtaining advanced sums from the lessee is through a liquidated damages clause in the lease contract. As a general rule, "liquidated damages," as distinguished from "penalty" clauses are sustained.[119] The difficulty is in defining penalty.[120] California has avoided this problem by largely outlawing liquidated damages clauses in leases.[121]

Arizona has permitted the lessor's retention of advanced money, designated in the lease contract to be liquidated damages, upon default. In *Grizzle v. Runbeck*,[122] the lessors had the right to declare the lease forfeited, demand possession and retain the advanced rent because the sublease expressly provided that the advanced rent should be treated as liquidated damages in the event of a default under the lease. Despite the result in *Grizzle*, there is uncertainty in Arizona about the general acceptability of liquidated damages clauses. First, the statute which refers to liquidated damages clauses in personal property transactions, § 44-2397 A,[123] may well establish a policy of careful scrutiny of liquidated damages provisions in all areas, including landlord-tenant. Second, in *Loew v. Antonick*,[124] decided since *Grizzle*, the Supreme Court was more cautious in its approach to a liquidated damages clause.[125] The tenant defaulted and then sued to recover the advanced sum; the court sustained the lessor's retention of the advancement, not because of the liquidated damages clause, but rather because the advanced sum was

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[119] Liquidated damages clauses are implied where the court regards the sum as reasonable in amount and not disproportionate to the probable loss to the lessor. "More often the lessor has been denied the right to keep the sum upon the ground that the provision was intended as a penalty." 1 AMERICAN LAW OF PROPERTY, *supra* note 4, § 3.73, at 338; M. FRIEDMAN, *supra* note 1, at 87.

[120] Perhaps the newly-enacted UNIFORM COMMERCIAL CODE (effective January, 1968) will provide standards by analogy for this problem in the landlord-tenant context. ARIZ. REV. STAT. ANN. § 44-2397 A (Supp. 1967).

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

[121] Jack v. Sinsheimer, 125 Cal. 563, 566, 58 P. 130, 131 (1899) (damage found extremely difficult to fix or impractical of estimation, as a matter of law). Harvey, *A Study To Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised*, 54 CAL. L. REV. 1141, 1170 (1966).

[122] 74 Ariz. 92, 97, 244 P.2d 1160, 1163 (1952).

[123] *See* note 10 *supra*.

[124] 82 Ariz. 204, 310 P.2d 825 (1956).

[125] The clause provided that upon default "all rentals paid in advance shall be forfeited as liquidated damages." *Id.* at 206, 310 P.2d at 826.

consideration for the lease's execution. Moreover, the court expressly declined comment on the validity of the liquidated damages clause and on the applicability of the California policy against such clauses.[126] In light of *Grizzle*, it is difficult to explain why the Arizona Supreme Court in *Loew* should avoid, both in holding and dictum, the validity of the liquidated damages clause, unless there was a question about the acceptability of such a provision.

Advanced money may also be denominated "consideration for executing the lease." As a general rule, such amount will be forfeited upon default if the lease contract is silent on the point.[127] Usually the advancement doubles as consideration for the lease's execution and for rent,[128] and the basic theory underlying the lessor's retention upon default is that title to the sum passed to the lessor upon execution.[129] Arizona is in harmony with this position; in *Loew v. Antonick*,[130] the lessor was able, upon tenant's default, to retain $10,000 advanced rent which also was consideration for the execution of the lease.[131]

Usually the lease must be quite clear that the advanced sum is indeed a bonus or consideration for the execution of the lease. To distinguish the sum given from a security deposit, interest should not be given to the lessee on the amount advanced,[132] and the disposition of the advanced money upon destruction or condemnation must be handled carefully.[133] Also, the default clause should not provide that the advancement will be forfeited at the time of "tenant's default" for this might indicate that the payment was not absolute, that title to the sum

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[126] 82 Ariz. 204, 210, 310 P.2d 825, 829 (1956).

[127] 1 AMERICAN LAW OF PROPERTY § 3.73, at 337 (1952).

[128] *E.g.*, Warming v. Shapiro, 118 Cal. App. 2d 72, 257 P.2d 74 (1953).

[129] *See generally* Annot., 27 A.L.R.2d 656, 658 (1953). A further reason given is that, by defaulting, the lessee prevented the application of the advanced sum to the last month of the rental period. However, this is more of a justification for the basic rule than a theory in itself.

[130] 82 Ariz. 204, 310 P.2d 825 (1956).

[131] The lease contract stated, as a preamble, that the lessee "in consideration of the leasing of said premises," would do various things, one of which was to give the lessor $10,000 advanced rent. *Id.* at 205, 310 P.2d at 826. An additional reason for the result was that the advanced rent could not be apportioned over a definite time period, since options were granted to the lessess. *Id.* at 209, 310 P.2d at 829.

[132] *See generally* Annot., 27 A.L.R.2d 656, 659 (1953); *cf.* Jensen v .Sparkes, 53 F.2d 433, 435 (9th Cir. 1931) (10% interest given by the lessor on the advanced rent found indicative of the parties' intent "that the title of the money should remain in the tenant instead of the landlord").

[133] Frequently a clause returning the advancement to the tenant upon destruction will lead to the conclusion that the amount is a security deposit. *See generally* Annot., 27 A.L.R.2d 656, 660 (1953). However, this was not the case in *Loew v. Antonick*, 82 Ariz. 204, 208-09, 310 P.2d 825, 828 (1956), where such a clause was held not to preclude forfeiture of the consideration since the disaster clause was "an independent covenant" without "relation to any possible breach by either the lessor or the lessee," and did not "manifest an intention that the 'payment' should be metamorphosed into a 'security.'"

did not pass on the lease's execution, and that therefore the forfeited amount is a penalty and not consideration.[134]

A most common and also troublesome provision is the one which states that the forwarded amount is simply rent paid in advance. Numerous cases have permitted the lessor to keep the advanced rent upon the tenant's default.[135] In a leading decision, *Schoen v. New Britain Trust Co.*,[136] $15,000, paid in advance for the last year of the term, remained with the lessor when the tenant defaulted. Although the court mentioned that the $15,000 "became and was part of the consideration of the lease,"[137] the basic justification for the result was founded upon a fictional analysis. The court acknowledged that rent "becomes the property of the lessor as soon as the period to which the rent is applicable arrives," but held that "when the default of the lessee makes impossible his performance of the contract of lease, the law accelerates the time when the advance rental becomes the property of the lessor to the time of termination of the lease."[138]

Today, the *Schoen* approach does not seem to be widely accepted.[139] An advanced sum becomes the property of the lessor only because the designated period for its application has arrived, or because it was consideration which passed to the lessor upon execution, or because it represents a valid liquidated damages provision. Arizona is probably in accord with this analysis, as *Grizzle* and *Loew* permitted the forfeiture of advanced rent on the theories that the forwarded monies were liquidated damages and consideration for execution. If *Schoen* were the law in Arizona, the Arizona Supreme Court would have had no cause to rest its decisions on these further grounds. Because there are good reasons for obtaining "advanced rent" upon the execution of a lease,[140] the contract must describe the amount as something more than advanced rent if the lessor is to retain the sum upon default.

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[134] *See generally* Annot., 27 A.L.R.2d 656, 664 (1953). Perhaps a way to draft a forfeiture provision without indicating that title has been with the lessee until default is to state that upon lessee's default there is no claim upon the lessor for amounts given by the lessee. A-1 Garage v. Lange Inv. Co., 6 Cal. App. 2d 593, 44 P.2d 681 (1935), *cert. denied*, 296 U.S. 642 (1935).

[135] *See* 1 AMERICAN LAW OF PROPERTY § 3.73, at 338 (1952); M. FRIEDMAN, *supra* note 1, at 86.

[136] 111 Conn. 466, 150 A. 696 (1930).

[137] *Id.* at 472, 150 A. at 699.

[138] *Id.* at 473, 150 A. at 699.

[139] *E.g.*, Garfinkle v. Montgomery, 113 Cal. App. 2d 149, 248 P.2d 52 (1952) ($1,350 was paid as advanced rent and when tenant defaulted the lessor was forced to return the money to tenant).

[140] One is security. Another is to help indicate that the rent accrues on a day-by-day basis rather than entirely at the end of a rental period. Unless there is a particular agreement in the lease contract covering the method of rent accrual, rent payable in advance is probative of a day-to-day accrual and insures that the lessor has a claim to the rent accrued in the period when the tenant defaults. *See generally* Annot., 18 A.L.R. 957, 967-68 (1922).

As the foregoing discussion should suggest, the ability of a landlord to retain prepaid amounts upon default and termination depends more on form than on substance. The prepayment in each case is basically the same; only the labels are different.[141] Considering the Arizona courts' sensitivity to forfeitures,[142] the influence of a statute which will scrutinize the reality of liquidated damages clauses in personal property transactions,[143] and well-founded predictions that California may change its rules regarding the retention of advanced sums,[144] it is likely that the Arizona court will look beneath the label in deciding the disposition of prepaid amounts.[145] Consequently, since the possible judicial compulsion to ascertain and follow actual intention probably would be manifested in construing *ambiguous* lease provisions to correlate with the "real" intention of the parties, precise draftmanship is indispensible.

C. *The Effect and Validity of Acceleration Clauses.*

Sometimes a lease contract will provide that upon lessee's default the entire rent for the remainder of the term shall immediately become due and payable.[146] Such an acceleration clause has been upheld.[147] However, assessing the arguments involved, this type of provision probably should not be valid in Arizona.

One argument favoring such a clause is that since advanced rent may be retained upon default, when designated to be consideration for executing the lease, remaining rent for that same period should be capable of acceleration upon default.[148] In short, the failure of consideration is no different in one case than it is in the other. However, in the lease realm, where labels are so all-important, accelerated amounts not clearly designated consideration or liquidated damages can only be unenforceable penalties.[149] Another argument is that the permissibility of acceleration in the context of promissory notes[150] justifies acceleration of rent in leases. This argument ignores the "difference between the acceleration of an ordinary debt and the acceleration of rent. In the case of an ordinary debt, the debtor has already received the entire consideration, either in money or in property, while in the case of rent

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[141] *See* Harvey, *supra* note 102, at 1172.
[142] *See* Thomas v. Given, 75 Ariz. 68, 251 P.2d 887 (1952).
[143] ARIZ. REV. STAT. ANN. § 44-2397 A (Supp. 1967).
[144] Harvey, *supra* note 102, at 1170.
[145] For a discussion of the "objective" and "subjective" theories regarding contracts, see 1 A. CORBIN, CONTRACTS § 106 (1963).
[146] 1 AMERICAN LAW OF PROPERTY § 3.74, at 339 (1952).
[147] *Id.*
[148] *Id.*; *see* Note, 43 CAL. L. REV. 344, 349 (1955).
[149] United States Leasing Corp. v. duPont, 59 Cal. Rptr. 43, 58 n.11 (Dist. Ct. App. 1967); Ricker v. Rombough, 120 Cal. App. 2d 912, 261 P.2d 328 (1953).
[150] Small v. Ellis, 90 Ariz. 194, 367 P.2d 234 (1961).

an acceleration would require him to pay for that which he has not yet received."[151]

V. SURVIVAL OF THE LESSEE'S LIABILITY BEYOND DEFAULT OR RE-ENTRY.

A. *The Historical Background and Present Development of the Modern Lease.*

Any discussion of the lessee's post-termination liabilities must necessarily include a reference to the modern lease's tortuous history. Properly speaking, the word "lease" comprehends not only the lease instrument but also the relationship established by the conveyance of the premises.[152] Thus, "lease" is at once a mixture of contract and property principles, but the relative proportions are uncertain. The reasons for this hybrid state are historical.

Prior to 1200, the lease had primarily a contractual, rather than a property, significance.[153] Later, as a reaction to the enclosure movement in England and as a result of the development of the writ *ejectione firmae*,[154] "[T]he swing of the pendulum was so great that not only did the interest of the lessee come to be regarded as an estate in land, but the lease was asserted to be essentially a conveyance, rather than a contract."[155] However, the lease did not become entirely a conveyance of land because, as a "chattel real," the leased premises were alienable *inter vivos* and could pass to the lessee's personal representative upon death.[156]

With the ascendancy of the "business lease" during the past 150 years, the lease has tended again toward contract. By handling most of the landlord-tenant problems by specific clauses, there has been a reintroduction of a predominately contractual ingredient.[157] However, which aspects of the lease are contract and which are property is relatively unknown. Consequently, whether traditional property or modern contract remedies are available to a lessor upon termination is an unanswered question. However, one authority has stated that:

> the task of modern courts has been to divorce the law of leases from its medieval setting of real property law, and adapt it to present day conditions and necessities by means of

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[151] Ricker v. Rombough, 120 Cal. App. 2d 912, 920, 261 P.2d 328, 332 (1953).
[152] 1 H. TIFFANY, *supra* note 1, at § 74.
[153] 1 AMERICAN LAW OF PROPERTY § 3.11 (1952); 2 R. POWELL *supra* note 1, ¶ 221, at 177.
[154] *See* 1 H. TIFFANY, *supra* note 1, at § 73.
[155] 2 R. POWELL, *supra* note 1, ¶ 221, at 178.
[156] 1 H. TIFFANY, *supra* note 1, at § 73.
[157] 2 R. POWELL, *supra* note 1, ¶ 221, at 179.

contract principles, which were only emerging when the law of landlord and tenant first developed.[158]

One fairly minor effect of the lease's dual personality is to create a Statute of Frauds issue upon termination.[159]

A more major problem is to properly handle the lease's contractual and property personalities upon default if the lessor desires both re-entry and the continuation of the lessee's liability. In such a case, the parties should understand that property is the lease's predominant characteristic, and liability for rent depends upon the lessee's possession of the leasehold estate.[160] Consequently, whether re-entry is effected in a consensual or nonconsensual manner,[161] the result is the same: the present interest becomes re-vested in the grantor and merges with the reversionary interest, the lessee no longer has possession, and the lessee's liability for rent based on property principles is extinguished.

If there is no provision in the lease contract extending lessee's liability beyond re-entry, then the extinguishment of the lessee's possessory estate works a complete termination, and, aside from accrued obligations and the disposition of advanced monies, the lessee is exonerated from further liability under the lease. On the other hand, if the lease contract contains a specific provision which retains the lessee's liability upon the lessor's re-entry, then a complete termination does

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[158] Bennett, *The Modern Lease—An Estate in Land or Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEX. L. REV. 47, 48 (1938). There is a contrary view, holding that to fix the exact proportions of contract and conveyance in lease law would "destroy the elasticity of the law" which is at once the "glory" and "uncertainty" of the law. 2 R. POWELL, *supra* note 1, ¶ 221, at 184.

[159] Since leased premises are considered an interest in property, the transfer of the remainder may be void as a violation of the Statute of Frauds when there is no written instrument involved. ARIZ. REV. STAT. ANN. § 33-401 A (1956). However, even if there is no writing, a surrender by operation of law, which is considered outside the Statute of Frauds, probably would be inferred from the lessor's exercise of control over the re-acquired premises. *See* 4. H. TIFFANY, *supra* note 1, at § 962. If judicial action dictated the lessor's reacquisition there probably is no Statute of Frauds problem. § 33-456 (1956).

[160] Because a covenant by the tenant to pay the rent was merely a covenant to render the feudal service that was based on the tenant's estate and land, termination of the tenant's estate, whether by surrender or forfeiture, terminated not only the tenurial obligation to pay rent, but also liability on the covenant to pay rent.

Harvey, *supra* note 102, at 1145. *See also* 1 AMERICAN LAW OF PROPERTY § 3.99 (1952); 3 H. TIFFANY, *supra* note 1, at §§ 903-04. *See generally* Annots., 58 A.L.R. 906 (1929); 18 A.L.R. 957 (1922).

[161] Ouster of a lessee before expiration of the term may be done by express or implied consent of the parties and in the absence of a particular contract clause, this type of termination is properly known as "surrender." Cochise Hotels v. Douglas Hotel Operating Co., 83 Ariz. 40, 316 P.2d 290 (1957) (implied surrender); 4 H. TIFFANY, *supra* note 1, § 960, at 16 (definitional and semantical problems); *see* Smith v. Neely, 93 Ariz. 291, 294, 380 P.2d 148, 150 (1963) (surrender is a matter of intent). *See also* Byrd v. Peterson, 66 Ariz. 253, 186 P.2d 955 (1947) (surrender of the primary lease held to have no effect upon a sublease without an agency clause in the sublease).

not occur, the landlord-tenant relationship is partially preserved on a contract basis, and the tenant remains liable for damages.[162]

Unless the lease contract provides otherwise, the lessor may choose not to re-enter upon a default or an abandonment[163] and to hold the lessee liable under the lease instrument. In the case of abandonment, even though the lessee does not occupy the leased premises he is still responsible for his lease obligations.[164] The lessee's possessory interest in the leasehold estate continues until a surrender occurs or the lease term expires.[165]

In a minority of jurisdictions, however, the landlord is under a duty to procure a new tenant upon abandonment in order to minimize damages.[166] It is hard to predict how Arizona would decide this issue. The doctrine of mitigation of damages usually applies to breach of *contract* and the *resulting damages.*[167] When the lessor chooses not to re-enter upon his tenant's abandonment, there is an affirmation of the lease, as the recovery is not for *damages* but rather for *rent.* So long as leases retain their basic property characteristics it would seem best not to impose a duty to mitigate upon abandonment. However this may have been done already by some ambiguous dictum in *Camelback Land and Investment Co. v. Phoenix Entertainment Corp.*[168]

B. *Lease Contract Clauses For Lessee's Continued Liability After Lessor's Re-entry.*

The lease may provide for the lessee's continued liability for the stated rent notwithstanding the lessor's re-entry, and such a clause generally seems to be upheld.[169] However, because the lessee's obligation for rent per se depends upon his possession of the premises, this clause

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[162] 3 H. TIFFANY, *supra* note 1, § 903, at 564.

[163] Abandonment may be made a default if the lease contract contains a covenant against abandonment.

[164] M. FRIEDMAN, *supra* note 1, at 46.

[165] 3 H. TIFFANY, *supra* note 1, at § 902. 1 AMERICAN LAW OF PROPERTY § 3.99 (1952).

[166] 3 H. TIFFANY, *supra* note 1, at § 902.

[167] Rio Grande Oil Co. v. Pankey, 50 Ariz. 529, 538, 73 P.2d 707, 710 (1937) (dictum); RESTATEMENT OF CONTRACTS § 336 (1932).

[168] 2 Ariz. App. 250, 254, 407 P.2d 791, 795 (1965). The Court of Appeals stated that:

> ordinarily, the lessor would have the right to hold the lessee liable for rents due for the balance of the term of the lease, subject to the lessor's duty to attempt to mitigate damages to the credit of the lessee.

Not a great deal of stock should be placed in this language. First, it is not clear that the lessor left the premises vacant when the tenant abandoned and defaulted in rent. Second, the lease involved required the landlord, upon re-entry, to "relet the same for the account of tenant," thus imposing a contractural duty to mitigate. *Id.* at 252, 407 P.2d at 794. Third, since the lease was held the exclusive source of remedies upon default and since no provision enabled the lessor to let the premises lie vacant, there probably was a re-entry, and the court probably was commenting on the ordinary lease clause requiring a re-letting when there is a re-entry.

[169] 3 H. TIFFANY, *supra* note 1, at § 903; Annot., 99 A.L.R. 42, 43 (1935).

is effective only in giving the lessor an action for damages.[170] Being a contractual remedy, the landlord must mitigate these damages as best he can,[171] and seek recovery only at the date of expiration of the term when damages can be ascertained fully.[172] Consequently, such a clause usually is in conjunction with an authorization in the lease permitting the lessor to relet the premises on behalf of the tenant.[173]

This commonly used clause provides "that upon abandonment by the lessee, or after default by the lessee and eviction by the lessor, the lessor may re-enter the property, relet it as 'agent' for the defaulting lessee and hold the lessee responsible for any deficiencies resulting from the reletting."[174] In order for the reletting to be within the permission granted, the clause should state that the new term's duration can be either greater or lesser than the term remaining under the defaulted lease, and that the character of the leased property can be changed in the subsequent lease.[175] Moreover, the formula for computing damages should make clear that rent from the new tenancy will be credited not only against the sums owing under the previously defaulted lease but also against "attorneys' fees and other costs of repossession, brokerage, and cost of renovation for the new occupancy."[176] Although there is a contrary view,[177] the liability for damages resulting from a reletting is generally held to be single and entire, not multiple and several."[178] and the lessor, therefore, must wait until the end of the defaulted terms to press for damages.[179] Consequently, the reletting clause should provide for payment by the tenant of any deficiency then existing on the days when rent would have been payable under the defaulted lease.[180] Finally, any security deposit made upon the execution of the lease may be retained, under a proper provision, until the final damages are ascertained.[181]

When construing a reletting clause, courts should make clear that the underlying theory is contract not property. Otherwise, confusion is inevitable. In jurisdictions which treat a lease mainly as a conveyance, it is held that "damages for the loss of future rentals cannot be recovered

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[170] 3 H. TIFFANY, *supra* note 1, at § 903.
[171] *Id.* at 563-64.
[172] *Id.* § 903; Harvey, *supra* note 102, at 1157.
[173] *See generally* M. FRIEDMAN, *supra* note 1, at 48.
[174] Harvey, *supra* note 102, at 1176.
[175] M. FRIEDMAN, *supra* note 1, at 47.
[176] *Id.* at 48.
[177] 3 H. TIFFANY, *supra* note 1, § 903, at 565.
[178] Hermitage Co. v. Levine, 248 N.Y. 333, 338, 162 N.E. 97, 98 (1928).
[179] *Id.*; Phillips-Hollman v. Peerless Stages, 210 Cal. 253, 258, 291 P. 178, 180 (1930) (dictum).
[180] *See* Phillips-Hollman v. Peerless Stages, 210 Cal. 253, 261, 291 P. 178, 181 (1930) (lessor was permitted to re-enter and to seek damages at each rental due date because there was an intent in the lease "to keep the liability to pay *rent* alive, (as distinguished from the ordinary liability to pay damages.)").
[181] *See* 1 AMERICAN LAW OF PROPERTY § 3.73, at 339 (1952).

unless the lease somehow continues in existence."[182] But how can the lessee continue to have an interest in the land when he has no right to direct or control the activities of the lessor, when the lessee cannot obtain the profits made by the lessor from the new lease, and when the lessor must attempt to re-let or lose all right to damages from the lessee? Cardozo was right in pointing out that a reletting clause "does not mean that he [the landlord] is an agent in a strict sense. Plainly, he is not, for, after the termination of the lease, what he relets is his own."[183]

For continuing contractual liability under such a reletting clause to be enforceable, the lessor must "use reasonable celerity and diligence in attempting to re-let."[184] In the *Cochise Hotels* case the landlord re-entered the leased premises and after almost five years had still not relet the property.[185] The Arizona Supreme Court agreed with the trial court "that the option to relet was extinguished or abandoned."[186] The basic rationale for the *Cochise Hotels* decision was surrender; the five-year failure to relet was "inconsistent with the rights of the tenant under the lease"[187] and consequently the court felt that the hotel was being run on the lessor's behalf, not the tenant's.

C. *The Availability of Anticipatory Breach Actions.*

Under contract law an unequivocal repudiation of a contract prior to the performance date is considered a breach and permits an action for damages to be maintained before performance is due.[188] Although courts often permit such recovery "where the lessee has breached his *executory agreement* to execute a lease or has refused to take possession of the leased premises,"[189] the same is generally not true where the lease has been in operation.[190] The reason for not permitting actions for anticipatory breach in the lease context again relates to the lease's heritage in property law "that the lessee's obligation to pay the rent is dependent upon the continuance of the lessee's estate and its corollary rule that rent is recoverable only as it accrues over the life of the lease."[191]

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[182] Harvey, *supra* note 102, at 1177.
[183] Hermitage Co. v. Levine, 248 N.Y. 333, 337, 162 N.E. 97, 98 (1928).
[184] Cochise Hotels v. Douglas Hotel Operating Co., 83 Ariz. 40, 46, 316 P.2d 290, 294 (1957); *see* Camelback Land & Inv. Co. v. Phoenix Entertainment Corp., 2 Ariz. App. 250, 254, 407 P.2d 791, 795 (1965).
[185] 83 Ariz. 40, 46, 316 P.2d 290, 294 (1957).
[186] *Id.*
[187] *Id.*
[188] Hochester v. De la Tour, 2 Ell. & Bl. 678 (Q.B. 1853): 4 A. CORBIN, CONTRACTS § 959 (1952); RESTATEMENT OF CONTRACTS § 318 (1932).
[189] Bennett, *supra* note 139, at 48.
[190] *See* Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 YALE L.J. 85, 120 (1954). *See generally* Bennett, *supra* note 139, at 49-51.
[191] Harvey, *supra* note 102, at 1163; *see* Comment, *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, 64 YALE L.J. 85, 120 (1954) (the promise to pay rent is thought "contingent upon possession").

Although an anticipatory breach action in the lease context would not be for rent but rather for damages[192] and although the considerations in favor of such action usually outweigh the speculative nature of the damages,[193] probably the general rule will survive for a considerable time. It can only be hoped that the Arizona courts will take passing recognition of the twentieth century and permit anticipatory breach actions in appropriate lease cases.

In the meantime, until more Arizona case law has developed, lessors, to be assured of operative damage remedies before the term's end, must rely upon the most effective and the most important principle of all — the lease instrument should set forth the remedies in clear and concise language.

[192] Therefore, lessee's possession is unnecessary.

[193] *See* Bennett, *supra* note 139, at 51. The author points out that even though there is some speculation involved in setting damages prior to the end of the term, "to require the lessor to wait five or ten years for his damages, during which time his mortgage may be foreclosed or the property sold for taxes which cannot be paid with the premises lying vacant, can hardly be "justified."