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Landlord and Tenant—Mitigation of Damages—Landlord Must Plead and Prove Actual Efforts to Relet in Order to Recover Rent for the Balance of the Term of a Wrongfully Abandoning Tenant.—*Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968)

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LANDLORD AND TENANT—MITIGATION OF DAMAGES—LANDLORD MUST PLEAD AND PROVE ACTUAL EFFORTS TO RELET IN ORDER TO RECOVER RENT FOR THE BALANCE OF THE TERM OF A WRONGFULLY ABANDONING TENANT.—*Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968).

Defendant-tenant notified plaintiff-landlord that he intended to vacate the space leased for his drugstore prior to the expiration of the lease term. He then removed most of his equipment and merchandise and surrendered the key. After the lease had expired, the landlord sued for the rent for the balance of the term. The landlord's sole apparent endeavor to relet after abandonment—placement of a window "for rent" sign—was revealed only on cross examination. *Held*: Unless a landlord pleads and proves efforts to relet wrongfully abandoned premises, he is not entitled to recover from a tenant the balance of rent due under their lease. *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968).

When a tenant wrongfully abandons leased property, the majority of jurisdictions permits the landlord to let his property remain idle and to collect full rent for the entire remaining term of the lease.¹ A minority follows a rule which is referred to, somewhat inaccurately, as a duty to mitigate damages.² By this rule, if the landlord fails to exert reasonable diligence to relet an abandoned leasehold, the tenant's liability for rent after abandonment is reduced by the amount which the lessor could have earned by reasonable efforts to relet.³

Vawter, an extension of the minority position, requires a landlord plaintiff to plead and prove a good faith effort to relet, as a condition precedent to the right to *any* recovery of rent from an abandoning

¹ 3 H. TIFFANY, LAW OF REAL PROPERTY § 902 (3d ed. 1939); Annot., 21 A.L.R.3d 541 (1968).

² The "duty" referred to in mitigation of damages is not a duty in the sense that breach of its performance is actionable. Rather "duty" is employed as a shorthand way of conveying the thought that failure to make an effort to mitigate damages will result in a reduction of recoverable damages by a sum which would reasonably have been expected to be produced by the effort, had it been made.

See Annot., 21 A.L.R.3d 541, 565-570 (1968) for cases demonstrating that Arizona, Iowa, Kansas, New Hampshire, North Carolina, Oregon, South Carolina, Utah and Wisconsin require the landlord to mitigate damages.

³ *Campbell v. McLaurin Inv. Co.*, 74 Fla. 501, 77 So. 277 (1917); *Gordon v. Consolidated Sun Ray, Inc.*, 195 Kan. 341, 404 P.2d 949 (1965); *Wright v. Baumann*, 239 Ore. 410, 398 P.2d 119, 21 A.L.R.3d 527 (1965); *Anderson v. Andy Darling Pontiac*, 257 Wis. 371, 43 N.W.2d 362 (1950).

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tenant. The minority rule would allow the landlord who fails to mitigate to recover some rent if the rental market fell and a court found that he could not have earned the original lease rent had he successfully relet. The *Vawter* holding would preclude any recovery by the landlord absent proof of actual efforts to relet, even if such efforts could not have gained him rent equal to that provided for in the lease.⁴

I. THE WASHINGTON POSITION

The Washington position on mitigation after abandonment of leaseholds is unclear. If the landlord accepts surrender without qualification, the tenant's obligation to pay rent thereafter is terminated.⁵ However, re-entry by the landlord after abandonment does not of itself constitute an unqualified acceptance of surrender.⁶ When a tenant wrongfully abandons, the landlord may elect either to treat the term as subsisting and sue for rent reserved as it comes due, or treat the lease as terminated, re-enter, and sue for damages.⁷

If the landlord chooses to sue for damages, they are measured by the difference between the rent reserved in the lease and the fair rental value for the balance of the term⁸—a measure similar to that normally exacted when a duty to mitigate exists.

However, if the landlord elects to wait and sue for rent, the Washington law concerning the amount of the recovery is more complex

⁴ The reasonable diligence standard probably would not deny recovery for failure to look for a tenant if it were clear under the circumstances that none could be found. *Vawter* probably applies only to situations in which there was reason to believe that the premises could have been rented. Proof that attempts to relet would be fruitless should, arguably, satisfy the requirements of reasonableness. The state of the rental market was not discussed in *Vawter*.

⁵ *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916) (dictum); *Martin v. Siegley*, 123 Wash. 683, 212 P. 89 (1923) (dictum); *Pollock v. Ives Theatre, Inc.*, 174 Wash. 65, 24 P.2d 396 (1933) (dictum); *Anderson v. Ferguson*, 17 Wn. 2d 262, 135 P.2d 302 (1943) (dictum).

⁶ *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916); *Pollock v. Ives Theatre, Inc.*, 174 Wash. 65, 24 P.2d 396 (1933). These cases further establish that if a tenant moves out in response to notice to pay overdue rent or surrender under the unlawful detainer statute (now, WASH. REV. CODE § 59.12.030(3) (1953)), the landlord may recover damages just as he could if the tenant's abandonment were not so compelled.

⁷ *Brown v. Hayes*, 92 Wash. 300, 302-03, 159 P. 89, 91 (1916).

⁸ *Brown v. Hayes*, 92 Wash. 300, 159 P. 89 (1916); *Pollock v. Ives Theatre, Inc.*, 174 Wash. 65, 24 P.2d 396 (1933). See also, *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 P. 603 (1911), a case setting forth the same measure of damages on refusal of a prospective tenant to take possession under a contract to lease upon completion of a building. The *Brown* case cites *Oldfield* as authority for the damages rule applied in *Brown*, but the factual settings of the two cases are markedly different.

and less certain. Rerenting the leased premises, post-abandonment, does not constitute acceptance of surrender by operation of law, and if the landlord does re-rent, his recovery in a suit for rent under the original lease is limited to the difference between the rent there reserved and the rent actually received from the substitute tenant.⁹ When the lease expressly gives the landlord the right to re-enter and expel the tenant for failure to pay rent, but without extinguishing the tenant's liability for rent during the remainder of the term, the landlord is entitled in the event of abandonment to recover the rent agreed to for the lease term "less the amount actually received from subsequent tenants, provided [the lessor] makes an honest and reasonable effort to relet."¹⁰ This language could be read as implying, under certain leases, a rule similar to that of *Vawter*, denying recovery in the absence of sufficient efforts to relet.¹¹

The most difficult result to predict is that of the case in which the landlord does not sue for damages after re-entry, does not re-rent, and does not have a right under the lease to re-enter and expel the tenant while preserving rent liabilities. In 1918 in *California Building Co. v. Drury*,¹² the Washington court held that a landlord who, after abandonment, elected to consider the lease still in existence and to bring an action for rent subsequently accrued was under no obligation to accept any other tenant during the term of the lease. Full recovery for the rent reserved in the lease was allowed. This apparent acceptance of the majority rule, rejecting mitigation, has never been overruled, but

⁹ *Martin v. Siegley*, 123 Wash. 683, 212 P. 1057 (1923).

¹⁰ *Exeter Co. v. Martin, Ltd.*, 5 Wn. 2d 244, 249, 105 P.2d 83, 85 (1940). See also, *Metropolitan National Bank v. Hutchinson Realty Co.*, 157 Wash. 522, 289 P. 56 (1930).

A more recent Washington decision discussing mitigation cites *Exeter* for the proposition that an honest and reasonable but unsuccessful effort to relet is required for full recovery of rent reserved, but the opinion sheds no light on the measure of damages in the absence of such an effort. *Myers v. Western Farmers Assoc.*, 75 Wash. Dec. 2d 151, 449 P.2d 104 (1969). Interestingly, *Myers* apparently did not involve a lease with provisions similar to those which purportedly dictated the result in *Exeter*. But, it is difficult to read *Myers* as extending the *Exeter* rule to cases of abandonment in general because the court did not need to decide and did not decide whether mitigation was required under the circumstances. The court merely stated that if the landlord was required to mitigate damages, then there was substantial evidence to show that he made an honest and reasonable attempt to do so.

¹¹ The justification for such a reading is strengthened by the court's conclusion that it was prejudicial error to instruct the jury that the measure of damages was the difference between the rent reserved in the lease and the reasonable rental value for the unexpired term. *Exeter Co. v. Martin, Ltd.*, 5 Wn. 2d 244, 249-50, 105 P.2d 83, 85 (1940).

¹² 103 Wash. 577, 175 P. 302 (1918).

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a contrary conclusion is suggested by dictum in the subsequent case of *Anderson v. Ferguson*.¹³

The *Anderson* suit, an action for rent, was remanded by the Washington Supreme Court because evidence was insufficient on the issue of abandonment. However, in remanding, the court said:¹⁴

If the respondents have abandoned the premises, repudiating the lease, then the appellant will be entitled to recover the full amount of unpaid rent for the entire term, less any rental which appellant reasonably could have obtained for the premises during the remainder of the term after the date of such abandonment.

No lease provision concerning the landlord's rights on abandonment was discussed by the court and the premises had not been rerented after the asserted abandonment. The *Anderson* formulation of the measure of damages comports with the usual minority position, yet this dictum may arguably be attributable, and thus limited, to the controversy's peculiar facts. The major focus of the case was the question of whether the obligation for rent continues after fire destruction of buildings on the leasehold. The court concluded that a tenant remains liable for rent so long as any part of the demised premises is capable of being occupied.¹⁵ Perhaps the measure of damages set forth represented an attempt to temper the severity of this rule and would not be applied in a suit lacking such strong practical justification for abandonment.

The 1918 *California Building Co.* case presents facts closer to those

¹³ 17 Wn. 2d 262, 135 P.2d 302 (1943).

¹⁴ *Id.* at 277, 135 P.2d at 308. This language is clearly dictum, for the issue of whether a landlord has a duty to mitigate damages by an attempt to relet was raised neither at trial nor on appeal. In the lower court both parties had agreed that "... the property had no rental value after the fire, and that [lessor] could not lease the premises for any sum." *Anderson*, 17 Wn. 2d at 265, 135 P.2d at 304; and Brief for Appellant at 5, Brief for Respondent at 14. The lessor's allegation was possibly designed to guard against assertion by the lessee of a duty to mitigate and a claim for corresponding reduction of rental liability. See note 4 *supra*. The lessee's admission was dictated by his reliance on the contention that under a rule of "apportioning the rents" a tenant is relieved from further rental liability when leased premises are totally destroyed (the lack of rental value was asserted to indicate the totality of destruction). Brief for Respondent at 10-16. Whether the supreme court overlooked this point when writing the language quoted in the text (the court did allude to it at the outset of its opinion) or did not believe that the property was without rental value is unclear. Nevertheless, the language quoted, framed as a guide to the trial court on remand and favoring the duty to mitigate, still stands as an indication of possible disapproval of the *California Building Co.* rule.

¹⁵ *Id.* at 274-76, 135 P.2d at 307-08.

of *Vawter* than any other case that has come before the Washington Supreme Court. But, the dictum in the more recent *Anderson* decision can be interpreted as an indication of the supreme court's disapproval of the majority rule approach of *California Building Co.*¹⁶ The divergence in approach demonstrated by these two opinions leaves the Washington position uncertain for the present.

It is likely that in the future the Washington Supreme Court will squarely face the mitigation issue, particularly in view of the current pressure for reform in landlord-tenant law.¹⁷ The choice between the views of *California Building Co.* and *Anderson* will then be presented. *Vawter* provides a useful vehicle for discussion of the appropriate legal response to the issue. Is the duty to mitigate damages desirable as an approach to solution of the social problems presented by abandonment of leaseholds? What policies are served by a rule that conditions the amount of recovery for rent on the landlord's efforts to secure a substitute tenant? Is the more stringent *Vawter* rule necessary or desirable to effectuate these policies? This Note explores possible answers to these questions.

II. THE ANATOMY OF A CONTEMPORARY APPROACH

A. *The Merits of a Duty to Mitigate*

The minority rule, making efforts to mitigate a factor in the measure of damages, reflects the infusion of contract and tort principles into

¹⁶ Strong language in *Martin v. Siegley*, 123 Wash. 683, 212 P. 89 (1923), also lends weight to the argument that Washington no longer adheres to the majority position. The facts of that case involved the measure of damages when a landlord actually secures a substitute tenant rather than, as in *California Building Co.*, simply waits out the term and sues for rent. But the court in *Martin* spoke more broadly than necessary to decide the case in commenting: "We believe it is the *duty* of the landlord, upon abandonment of the premises by the tenant, to take possession of the leased property and re-rent it . . ." *Id.* at 687, 212 P. at 1058 (emphasis added). Use of the term "duty" would seem to suggest that failure to make any effort to re-rent would result in less than full recovery for rent reserved for the lease term after abandonment. However, even if *Martin* were read as conditioning damages on efforts to mitigate, it could still be interpreted as adopting this measure only for cases involving the trustee in bankruptcy of the abandoning tenant—for such was its own particular factual setting.

¹⁷ LeBlanc, *Landlord-Tenant Problems*, in U.S. DEP'T OF H.E.W., CONFERENCE PROCEEDINGS, THE EXTENSIONS OF LEGAL SERVICES TO THE POOR 51 (1964); Blum and Dunham, *Shumlordism As A Tort—A Dissenting View*, 66 MICH. L. REV. 451 (1968); Lesar, *Landlord and Tenant Reform*, 35 N.Y.U.L. REV. 1279 (1960); Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CALIF. L. REV. 670 (1966); Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); AMERICAN BAR FOUNDATION, MODEL LANDLORD-TENANT CODE (Tent. Draft 1969).

landlord-tenant law, an area for the most part still controlled by real property conveyancing doctrines.¹⁸ When a contract is breached, the recovery of the party asserting the breach is limited by the rule of avoidable consequences.¹⁹ Tort law follows a comparable rule requiring the injured party to make reasonable efforts to prevent aggravated injury.²⁰ By contrast, the concept of a lease as the conveyance of a property interest has carried with it the doctrine of the independence of covenants.²¹ The resulting view of the promise to pay rent as independent of the landlord's responsibilities provides a rationale for the majority position that the abandoning tenant may be held for the entire rent he covenanted to pay, even though the landlord allows the property to remain idle for the rest of the lease term or arbitrarily refuses to accept a new tenant who presents himself or is obtained by the abandoning tenant.²²

In the contemporary urban context, however, the lease of an apartment or place of business has become predominantly an exchange of contractual promises to which the conveyance of an estate in land is only incidental,²³ and for which the traditional conveyancing approach is inappropriate. Moreover, the placing of a burden of mitigation on the landlord, when limited by the proviso that his efforts to relet need only be reasonably diligent,²⁴ does not impose a requirement so onerous

¹⁸ 2 R. POWELL, REAL PROPERTY § 221(1) (1967).

¹⁹ P. CONWAY, OUTLINE OF THE LAW OF CONTRACTS at 570-72 (3d ed. 1968); C. MCCORMICK, LAW OF DAMAGES § 33 (1935); S. WILLISTON, ON CONTRACTS § 1353 (3d ed. 1968); RESTATEMENT OF CONTRACTS § 336(1) (1932).

²⁰ RESTATEMENT OF TORTS § 918 (1939).

²¹ As applied, the concept that covenants of landlord and tenant are independent of one another means that, unless a statute or prior agreement is controlling, a lease is not forfeited for failure to pay rent. Further, the obligation to pay rent continues even though the building on a leasehold is substantially destroyed. See *Anderson v. Ferguson*, 17 Wn. 2d 262, 135 P.2d 302 (1943); *Arbenz v. Exley, Watkins & Co.*, 57 W. Va. 580, 50 S.E. 813 (1905); H. LESAR, LANDLORD AND TENANT § 3.11 (1957).

²² 3 H. TIFFANY, LAW OF REAL PROPERTY § 902 (3d ed. 1939); *California Building Co. v. Drury*, 103 Wash. 577, 175 P. 302 (1918).

²³ *Wright v. Baumann*, 239 Ore. 410, 398 P.2d 119, 21 A.L.R.3d 527 (1965), 2 R. POWELL, REAL PROPERTY (1967) § 221 at 179, S. WILLISTON, ON CONTRACTS § 946 (3d ed. 1968), McCormick, *The Rights of the Landlord upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211, 222 (1925), Note, *Landlord and Tenant—Right of Lessor to Refuse Any Subtenant When Lease Prohibits Transfer Without Consent*, 41 MINN. L. REV. 355 (1957).

²⁴ The standards of diligence in mitigation of damages vary with the circumstances. See *Myers v. Western Farmers Ass'n*, 75 Wash. Dec. 2d 151, 449 P.2d 104 (1969) (honest and reasonable effort made, although unsuccessful); *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964) (jury should decide if offering property at a rent greatly in excess of lease amount was a good faith effort to relet on lessee's behalf); *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945) (when landlord

as to deprive him of the benefit of his bargain in the event of abandonment. Conversely, given the modern commercial context of leasing, the majority rule that the landlord need not make any effort to mitigate involves social costs that are both unnecessary and unjustifiable.

The welfare and prosperity of the community as a whole is advanced by encouraging the productive use of the property within the community.²⁵ In *Vawter* the landlord allowed his property to stand idle for five months. Under the majority rule, which promotes such inaction, the tenant not only loses the benefit of offsetting rentals but may be charged as well with ruinous losses incurred by vandalism and accelerated deterioration. Owners are encouraged to neglect their property after abandonment by the lessee, thus increasing the likelihood of accidental fire, deterioration in appearance, and decline in value. The surrounding neighborhood may suffer a loss in desirability and a consequent fall in property values. On the other hand, tenant occupancy yields property protection, productive business, and the tax monies thereby generated—all benefits to the whole of society. To the extent the majority rule causes the loss of such benefits, it is both anachronistic and socially detrimental. Particularly in slum areas, where the landlord may not be aware of the loss of values and may feel that he has a captive tenancy,²⁶ the resulting contribution to progressive deterioration of a neighborhood manifests a vicious irresponsibility to society.

Further, assuming that modern commercial realities make it reasonable to treat leasing arrangements like other contracts, the majority rule runs counter to the traditional policy of contract law against awarding punitive damages.²⁷ A landlord's arbitrary refusal to use

confined to hospital and daughter made unsuccessful attempts to relet by correspondence, the court held that no specific method was required in an effort to relet); *In re Garment Center Capital*, 93 F.2d 667 (2d Cir. 1938) (though landlord advertised to relet at a higher rental, the asking price was only the basis of negotiation and failure to rent was attributable to extensive vacancy in the building and poor rental conditions).

²⁵ See *Martin v. Siegley*, 123 Wash. 683, 687-88, 212 P. 1057, 1059 (1923):

It is not in accordance with public policy to lay down a rule whereby the landlord would be required to permit the premises to remain idle over a long term and thereafter recover damages for the full amount of the rentals stipulated for the term, because it is better for the parties to the agreement as well as to the public to have property put to some beneficial use.

²⁶ See Schier, *Protecting the Interests of the Indigent Tenant: Two Approaches*, 54 CAL. L. REV. 670 (1966).

²⁷ 5 A. CORBIN, ON CONTRACTS § 1077 (1964); RESTATEMENT OF CONTRACTS § 342 (1932). See also *Long v. Pierce County*, 22 Wash. 330, 351, 61 P. 142, 148 (1900)

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reasonable efforts to relet or to accept a proffered tenant has a strong punitive connotation. In at least one court, a provision for forfeiture of rents to be paid for the remainder of the lease, without a requirement for reasonable diligence by the landlord to relet, was held to be an agreement for liquidated damages disproportionate to actual damages and thus void.²⁸

A landlord should be encouraged to maintain his property in productive use by reasonable efforts, and a tenant ought not to be penalized beyond the damages that his abandonment makes difficult to avoid. A duty to mitigate damages by efforts to relet is desirable as a legal device to promote these social interests.

The difficulties sometimes attributed to imposition on the landlord of a duty to mitigate are not sufficiently counter-persuasive. The landlord's duty to relet ought not, of itself, to increase the frequency with which tenants abandon leaseholds. In any jurisdiction, the tenant will be liable for the difference between the rent he had contracted to pay and other rentals obtained by the landlord. The landlord may also expect to recover costs which he suffers in order to secure new occupants, whether he is successful or not.²⁹ Also, holdings in various jurisdictions belie the contention that a duty to mitigate might require the lessor to enter into an undesirable business relationship. The landlord has not been required to accept tenants who were financial risks,³⁰ or who conducted a type of business precluded by the original lease.³¹ Neither have landlords been required to shift present tenants into new quarters,³² nor to alter their premises.³³

(liquidated damages for failure to meet building completion date set aside as a forfeiture).

²⁸ *Anderson v. Andy Darling Pontiac*, 257 Wis. 371, 43 N.W.2d 362 (1950).

²⁹ RESTATEMENT OF CONTRACTS § 336(2) (1932).

³⁰ *Reget v. Dempsey-Tegler & Co.*, 70 Ill. App. 2d 32, 216 N.E.2d 500 (1966) (landlord not required to accept proffered subtenant who had unsatisfactory credit rating and operated a business markedly dissimilar to that of tenant in order to mitigate damages); *Edmands v. Rust & Richardson Drug Co.*, 191 Mass. 123, 77 N.E. 713 (1906) (in mitigating damages, lessor was not bound by the determination of the lessee that a prospective tenant was satisfactory financially and was justified in evicting the subtenant).

³¹ *Carpenter v. Wisniewski*, — Ind. App. —, 215 N.E.2d 882 (1966) (when lease provided only for use as a drugstore, landlord was not required to let for a different use or for a use which would increase his insurance rates).

³² *Reich v. McCrea*, 59 Hun. 625, 13 N.Y.S. 650 (1891) (landlord not obliged to allow a tenant to exchange rooms to fill the room abandoned by another tenant.)

³³ *Woodbury v. Sparrell Print*, 198 Mass. 1, 84 N.E. 441 (1908) (landlord not required to make alterations or additions out of own funds, increase length of lease or include other premises in order to attract a new tenant).

B. *The Problem of Implied Surrender*

When a requirement to mitigate damages is imposed, the landlord ought not to be penalized for his efforts to relet. The landlord's attempt to find a new tenant has sometimes been held to constitute an implied acceptance of a surrender, thus cutting off his claim for recovery under the original lease.³⁴ A few jurisdictions have ruled that any rental to someone other than the lessee operates as a surrender, unless the new rental was made at the specific request of the abandoning lessee.³⁵ In other jurisdictions it is advisable for the landlord to indicate to the lessee that the lessee will be held for those damages which cannot be avoided, and that his relationship to the lessee in attempting to reduce the rent owed is similar to that of an agent.³⁶

The problem of implied surrender could be solved if courts would require a landlord to mitigate damages by reletting, but with the presumption that reletting after abandonment is an act on behalf of the lessee. The landlord should not be obligated to make extraordinary efforts to locate and notify his tenant. The Washington court has been consistently reluctant to imply a surrender from a landlord's efforts to relet.³⁷ Still, an explicit presumption that a landlord's attempt to relet is made to benefit the tenant rather than to excuse him from all responsibility for rent would complement the mitigation requirement, allowing the social benefit derived from it while alleviating the landlord's fears of implied acceptance of surrender.³⁸

³⁴ The surrender of a lease is a mutual release of further obligations by either party. To effect a surrender, it is necessary that there be a common intent, signified by words or acts tantamount to words, to relinquish the relation of landlord and tenant. *Abrahamson v. Brett*, 143 Ore. 14, 21 P.2d 229 (1933); *Yakima Valley Motors v. Webb Tractor and Equipment Co.*, 14 Wn. 2d 468, 128 P.2d 507 (1942), H. LESAR, LANDLORD AND TENANT § 3.99 (1957).

³⁵ *Welcome v. Hess*, 90 Cal. 507, 27 P. 369 (1891); *M.L. Improvement Corp. v. State*, 118 Misc. 605, 194 N.Y.S. 165, 167 (1922). The policy of implying surrender when a landlord mitigates is criticized by Groll, *Landlord-Tenant: The Duty to Mitigate Damages*, 17 DEPAUL L. REV. 311 (1968).

³⁶ It is a question of fact in each case whether the lessor has accepted a surrender. Behavior of the parties may supplement or substitute for a statement by the lessor of his intent to relet for the lessee's account. *See, e.g., Liberty Plan Co. v. Adwan*, 370 P.2d 928 (Okla. 1962) (placing of tile on floor and making doorway after abandonment were not such substantial changes in premises as to constitute breach of the lease); *Heuss v. Olson*, 43 Wn. 2d 901, 264 P.2d 875 (1953) (a notice that failure to pay rent after destruction of premises would terminate lease operated as an unqualified surrender of the lease by the lessor); H. LESAR, LANDLORD AND TENANT § 3.99 at 393-94 (1957).

³⁷ *See* notes 6 & 9 and accompanying text *supra*.

³⁸ Landlords may also protect themselves by writing into leases liens to attach to property if rent is unpaid. In *Vawter*, the parties contractually provided for a lien

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C. Vawter's Rule of "Plead and Prove"

The social value of a requirement to mitigate the damages caused by the abandonment of property is as great in the landlord-tenant relationship as it is in contract and tort cases. However, the stringent *Vawter* rule requiring a showing of a good faith effort to relet as a condition precedent to recovery of post-abandonment rents³⁹ is not necessary to effectuate the policy to encourage reletting. The landlord will be sufficiently encouraged to exert reasonable efforts to find a new tenant if he knows that his recovery will be reduced if he fails to act. The additional requirements of pleading and proof may needlessly penalize the landlord. In a falling market, even when a landlord does in fact try to rerent his premises, a rule of pleading could deny him damages he could not avoid. More seriously, *Vawter* transforms a rule for the measurement of damages into a rule completely denying relief for prior breach of a promise on the basis of subsequent behavior of the injured party.

Vawter represents an overkill approach which might bring the desir-

on trade fixtures which the court allowed the landlord to keep. Some states also have statutory provisions for liens on personal property, sometimes including crops, which a landlord may enforce for rents due him. *See, e.g., IOWA CODE ANN. § 570.1 (1946); WASH. REV. CODE § 60.72.010 (1961)*. But, when rents due have been reduced by the reletting of the leasehold, the amount recoverable by enforcing liens for rent ought also to be reduced. Failure to show mitigation of damages should be a defense against a lien to the same extent that it is a defense against a claim for rents and expenses. The existence of a lien as a secondary method of recovering rent should not be allowed to subvert the policy to encourage the landlord to relet. In *Vawter*, the issue of enforcing the lien was not properly tried because the items covered by the lien were valueless.

If the landlord is not able to show specific instances of reasonable diligence in attempting to relet, the inference should be that an attempt to relet was not made. Analogously, an inference arises that a witness available to a party would have testified adversely when he is not called in circumstances when it would be natural for the witness to be produced. *See, e.g., State v. Davis, 73 Wn. 2d 271, 438 P.2d 185 (1968); Secondino v. New Haven Gas Co., 147 Conn. 672, 165 A.2d 598 (1960)*.

³⁹ *Vawter* held that the landlord must bear the burden of pleading and proving what he did toward mitigation. But this holding does not in fact change the responsibilities of the parties. Even in the *Vawter* case, the tenant had the responsibility to argue non-mitigation in his defense. 159 N.W.2d 538-41 (1968). No matter to whom the burden of proof is technically given, proof will in fact rest with the landlord because he is the party having access to the relevant information. *See, e.g., U.S. v. New York, N.H. & H. R.R., 355 U.S. 253 (1957)* (Plaintiff carrier had burden of showing that short freight cars were not available during wartime to sustain its claim for full payment, because that information was within its peculiar knowledge); *U.S. v. Hayes, 369 F.2d 671-76 (9th Cir. 1966)* (plaintiff creditor had burden to show amounts paid in reduction of debt, as fact within the peculiar knowledge of the creditor); *Morris v. Williams, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967)* (defendant had burden of proving nonfeasibility of proportionate reduction in welfare medical assistance, as a fact within his knowledge and competence); *C. McCORMICK, LAW OF DAMAGES § 33 (1935); 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940)*.

able mitigation rule into disrepute and slow its adoption in a great number of jurisdictions. *Vawter's* focus on the landlord does not sufficiently take into account the obligations of the tenant. The policy to keep property in productive use is ill-served by a rule that might encourage abandonment. To deprive the landlord of all the benefits of his bargain, if he does not minimize his damages, is to run the risk that renters might take leases less seriously, eroding the commercial utility of such agreements.

CONCLUSION

The minority rule conditioning recovery for rent after abandonment of leaseholds on mitigation of damages is a desirable legal approach to promote the important policy of encouraging the continuous, productive use of property. Given the present commercial context in which leases are made, the tenant ought not to bear damages higher than ordinary contract damages just because his tenancy contract relates to real property. When the landlord can keep his property socially productive by exerting reasonable efforts which do not entail risk or undue expense to him, he should be expected to do so. However, the objective of preventing deterioration of improved property is not advanced by rules, such as that in *Vawter*, which present the possibility that abandonment of leaseholds may prove to be without financial consequences to breaching tenants.

Old authority in Washington clearly supports the majority rule of no duty to mitigate damages after wrongful abandonment of leased premises. However, dictum in a more recent decision indicates approval of the minority rule, which predicates the measure of damages in all actions for rent after abandonment on reasonable efforts of the landlord to mitigate by reletting the premises.⁴⁰ Since the older decision has been undermined by subsequent dictum and also by changing social conditions, it is submitted that Washington courts are free to abandon the majority rule and to follow the sounder minority position. Given the positive social consequence derivable from the minority rule, its adoption in Washington would be a step forward in

⁴⁰ See notes 12-17 and accompanying text *supra* for a discussion of these Washington authorities.

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sound social policy—as well as a welcome clarification of present law. As a correlative proposition, reletting by the landlord should be explicitly presumed to be an act on behalf of the tenant so that surrender will not be implied and the landlord penalized for his good faith efforts. However, the strict “plead and prove” rule of *Vawter* does not enhance the social benefits obtainable from adoption of a mitigation requirement and should be rejected as an unnecessary burden on the landlord.