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Memorandum 65-26

Subject: Study No. 50 - Lessor's Rights Upon Abandonment by Lessee

Attached to this memorandum is a tentative recommendation and statute designed to carry out the Commission's decisions at the May meeting.

Because there was some indication at the May meeting that all of the statutes should be in the same place, we have placed the entire statute in the portion of the Civil Code relating to damages. It appears as Article 1.5 of a chapter entitled "Measure of Damages". The first article in the chapter is entitled "Damages for Breach of Contract". This seems to us to be the most logical place for the statute.

Because of the statute's location, we have been able to avoid any use of the word "hiring" which appears in Sections 1925 et seq. of the Civil Code.

Note particularly Section 3322, relating to a lessor's incidental damages. This section is designed to clarify several matters that are not entirely clear from the statements of the general rules in Sections 3320 and 3321. Section 3322 clarifies the lessor's rights during any necessary vacancy period while a new lessee is being obtained. The idea of including a section defining incidental damages comes from Section 2710 of the Commercial Code, which defines a seller's incidental damages after a buyer's breach of a sales contract.

The Commission disapproved a proposed section providing that abandonment of leased property is a breach of the lease contract and an anticipatory repudiation of the remainder of its obligation. The Commission's decision was made on the ground that such a section is unnecessary. Accordingly, there is no section in this article stating explicitly when the lessor's cause of action for the damages specified accrues. It seems implicit,

however, that it accrues at the time of breach. The ordinary rule applicable is that a contract is effectively repudiated when the repudiation is communicated to the promisee. It seems likely that the courts would apply the ordinary anticipatory breach and repudiation rules in the light of this statute and the Commission's recommendation.

Respectfully submitted,

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Assistant Executive Secretary

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE RIGHTS AND DUTIES ATTENDANT UPON

ABANDONMENT OR TERMINATION OF A LEASE

Section 1925 of the Civil Code provides, in effect, that a lease is a contract. The cases involving leases, however, have repeatedly pointed out that a lease is also a conveyance, for it transfers to the lessee an estate in property. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457 (1942); Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122 (1939). And, although principles of contract law are frequently applied in determining cases involving leases (see, e.g., Medico-Dental Bldg. Co. v. Horton & Converse, supra), the courts have been guided principally by common law property concepts in determining the rights of the parties upon a total breach of a lease by the lessee. See Welcome v. Hess, 90 Cal. 507, 513, 27 Pac. 369 (1891).

As a result of this development, the present law does not afford adequate relief to either lessors or lessees when the leasehold is abandoned or the lease is otherwise terminated because of the lessee's breach. Under existing law, a lessor frequently is precluded from recovering damages for all of the detriment caused by the defaulting lessee, and a defaulting lessee may be subjected to forfeitures that are not countenanced under the law relating to contracts generally.

Under existing law, when a lessee abandons the leased property and repudiates the remaining obligations of the lease, his actions constitute merely an offer to surrender the remainder of the term. Welcome v. Hess,

90 Cal. 507, 513, 27 Pac. 369 (1891). Confronted with such an offer, the lessor has three courses of action among which he may choose, Kulawitz v. Pacific etc. Paper Co., 25 Cal.2d 664, 671, 155 P.2d 24 (1944). First, he may decline the lessee's offer to surrender and sue for the unpaid rent as it becomes due for the remainder of the term. If the lessor selects this course of action, he has no duty to mitigate damages by reletting the property; he can recover the full amount of the rent while permitting the property to remain vacant. See De Hart v. Allen, 26 Cal.2d 829, 832, 161 P.2d 453 (1945). Second, he may accept the lessee's offer to surrender and thus extinguish the lease. This course of action not only terminates the lessee's interest in the property, it also terminates the lessee's obligation to pay any further rent, and the lessor is not entitled to any damages for the loss of his bargain represented by the original lease. Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891). The cases make clear, too, that any action taken by the lessor that is inconsistent with the lessee's continued ownership of the property will be deemed an acceptance of the lessee's offer to surrender, whether the lessor intended such an acceptance or not. Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 230 P.2d 10 (1951). Finally, if the lessor notifies the lessee of his intention to do so, the lessor may relet the property for the benefit of the lessee and recover damages in the amount of the excess of the rentals called for in the original lease over the rentals obtained by reletting. The lessor cannot sue immediately to recover these damages; the cause of action does not accrue until the end of the term, and the lessor must wait until that time and then sue for all of the rental deficiencies. Truff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932). The courts have held that prior notification

to the lessee is essential to this course of action and that without such notification the lessor's reletting of the property will terminate the original lease and the lessee's rental obligation. Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 230 P.2d 10 (1951). Apparently, then, this third course of action is unavailable to a lessor who is unable to give proper notice to the defaulting lessee. Such a lessor must choose between permitting the property to remain vacant (thus preserving the lessee's rental obligation) and terminating the lessee's remaining obligation by resuming possession or by reletting the property.

In contrast, under the law applicable to most contracts, repudiation constitutes a total breach for which an action can be maintained even though the time for full performance has not yet elapsed. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22 (1943); Remy v. Olds, 88 Cal. 537, 26 Pac. 255 (1891). And, under the law applicable to most contracts, repudiation by the promisor gives rise to a duty on the part of the promisee to mitigate damages, i.e., the promisee cannot recover damages for any detriment that is reasonably avoidable. See discussion in Bomberger v. McKelvey, 35 Cal.2d 607, 613-615 (1950).

Except where a mining lease is involved (see Gold Mining & Water Co. v. Swinerton, supra), however, the doctrine of anticipatory breach has not been applied to leases. Oliver v. Toydon, 163 Cal. 124, 124 Pac. 731 (1912); Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891); In re Bell, 85 Cal. 119, 24 Pac. 633 (1890). Bound by the concept that the lease is a conveyance of the entire term from the lessor to the lessee, the courts have considered the lessor's obligation performed by the delivery of the lease, leaving merely the lessee's unilateral obligation to pay the rental; hence, the doctrine of anticipatory breach is not applied to leases because it is

inapplicable to unilateral obligations for the payment of money in installments. Cf. Cobb v. Pacific Mutual L. Ins. Co., 4 Cal.2d 565, 573, 51 P.2d 84 (1935).

In addition, the courts by adhering to these property concepts have permitted lessees to be subjected to forfeitures that would not be permitted under any other kind of contract. The courts have been quick to hold that provisions in leases for liquidated damages are void. Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899). Similarly, provisions for the acceleration of the unpaid rental installments have been held invalid. Ricker v. Rombough, 120 Cal. App.2d Supp. 912, 261 P.2d 328 (1953). But, if the lessee makes an advance payment to the lessor as an advance payment of rental or "in consideration for the execution of the lease," the lessor is entitled to keep the payment regardless of his actual damages when the lease is terminated by reason of the lessee's breach. A-1 Garage v. Lange Investment Co., 6 Cal. App. 2d 593, 44 P.2d 681 (1935); Curtis v. Arnold, 43 Cal.App. 97, 184 Pac. 510 (1919); Ramish v. Workman, 33 Cal. App. 19, 164 Pac. 26 (1917).

In contrast, where the buyer repudiates a contract for the sale of real property, any advance payments made to the seller in excess of his actual damages are recoverable by the buyer. Freedman v. The Rector, 37 Cal.2d 16, 230 P.2d 629 (1951). Moreover, even though a contract for the sale of property recites that an initial payment is in "consideration for entering into the agreement," the courts permit the buyer to recover so much of the payment as exceeds the seller's damages if, in the light of the entire transaction, there was in fact no separate consideration supporting the payment. Caplan v. Schroeder, 56 Cal.2d 515, 15 Cal. Rptr. 145, 364 P.2d 321 (1961).

In 1937, Civil Code Section 3308 was enacted in an effort to ameliorate

the deficiencies in the law relating to leases. The effort, however, was only partially successful. Under Section 3308, if a lease so provides, the lessor may bring an action for damages immediately upon termination of the lease by reason of the lessee's abandonment or breach of the lease. The lessor's damages in such an action amount to the excess of the value of the remainder of the term over the then reasonable rental value of the remainder of the term. Section 3308, however, does not apply unless it is made applicable by a provision in the lease, it does not require the lessor to resort to the remedy provided (and thus require mitigation of damages), and it does not relieve a lessee from forfeiture.

The Law Revision Commission has concluded that the rules applicable to contracts generally would be fairer to both lessors and lessees than are the rules now applied when a lease is abandoned or otherwise terminated by reason of the lessee's breach. Accordingly, Commission recommends the enactment of legislation designed to effectuate the following principles:

1. When a lease is abandoned or otherwise terminated by reason of the lessee's breach or repudiation of the lease, the lessor should have an immediate right to damages. He should not be required to defer action until the end of the term and run the risk of the defaulting lessee's continued solvency and availability.

2. If a lessor relets property after termination of a lease by reason of the lessee's abandonment or breach of the lease, the lessor should not forfeit his right to damages. On the contrary, he should be entitled to recover all reasonable expenses incurred in reletting the property and the excess, if any, of the then value of the remaining rentals called for in the original lease over the then value of the rentals called for in the new lease for the

same period. But, if the lessor does not act reasonably in attempting to secure as high a rental as possible upon the reletting, he should not be entitled to recover, in addition to his expenses, any more than the amount by which the value of the remainder of the original lease exceeds the fair rental value of the property for the same period.

3. If a lessor fails or refuses to relet the property, he should not be permitted to recover from the lessee the entire remaining rental obligation. On the contrary, the lessor's damages should be limited to the amount by which the value of the remainder of the original lease exceeds the fair rental value of the property for the same period.

4. The validity of a reasonable liquidated damages provision in a lease should be recognized. The amount of the lessor's damage at the time of the abandonment or repudiation by the lessee may not be readily ascertainable; and in such a case, a fair liquidated damages provision should be as enforceable as it would be if contained in any other contract.

5. A defaulting lessee should be entitled to relief from a forfeiture regardless of the label attached to it by the provisions of the lease. A contract for the use of property should not be able to exact forfeitures to any greater extent than a contract for the sale of property.

6. When a lessor relets property after the original lease has been terminated, it should be clear that the reletting is for the lessor's own account, not for the lessee's. Of course, such a reletting should reduce the damages to which the lessor is entitled; but if any profit is made upon the reletting, that profit should belong to the lessor, not the defaulting lessee.

7. It should be clear that a lessor's right to damages for the loss of the remainder of the lease term does not impair his right to specific or preventive relief under the lease in any case where such a form of relief is

otherwise appropriate. It should be clear also that a lessor's right to recover such damages is independent of his right to bring an action for unlawful detainer to recover the possession of the property, and that such damages are recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action. Of course, the lessor should not be entitled to recover twice for the same items of damage.

8. Section 3308 of the Civil Code should be repealed. Enactment of legislation effectuating the other recommendations of the Commission would make Section 3308 superfluous.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 of, and to repeal Section 3308 of, the Civil Code, relating to leases.

The people of the State of California do enact as follows:

SECTION 1. Article 1.5 (commencing with Section 3320) is added to Chapter 2 of Title 2 of Part 1 of Division 4 of the Civil Code, to read:

Article 1.5. Damages Upon Termination or Repudiation of Lease

Comment. This article sets forth in some detail the damages a lessor is entitled to recover when the lessee abandons the leased property or the lease is otherwise terminated by reason of the lessee's breach. The article also sets forth the lessee's rights to relief from any forfeiture of advance payments made to the lessor. The remainder of the article is designed to clarify the relationship between the right to damages arising under this article and the right to obtain other forms of relief under other provisions of California law.

§ 3320. Lessor's damages upon reletting

3320. (a) Subject to subdivision (b), if leased real or personal property is relet following the termination of the original lease by the lessor because of the lessee's breach thereof, or following the abandonment of the leased property or other repudiation of the lease by the lessee, the measure of the lessor's damages for such breach, abandonment, or repudiation is the sum of the following:

(1) The excess, if any, of the then value of the amount which would have been due to the lessor under the original lease for so much of its term as is also covered by the new lease over the then value of the amount due to the lessor under the new lease for the same period.

(2) The excess, if any, of the then value of the amount which would have been due to the lessor under the original lease for so much of its term as is not covered by the new lease over the then reasonable rental value of the property for the same period.

(3) Any incidental damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach, abandonment, or repudiation, or which in the ordinary course of things would be likely to result therefrom.

(b) If the reletting of the property is not made in good faith and in a reasonable manner, the measure of the lessor's damages under this section may not exceed that provided in Section 3321.

Comment. Section 3320 sets forth the measure of the lessor's damages when the lessee abandons the leased property, or the lease is otherwise terminated by reason of the lessee's breach, and the lessor relets the property.

Under Section 3320, the basic measure of the lessor's damages is the excess of the present value of the remaining rental due under the original lease over the present value of the rentals due under the new lease for the same period. If the new lease does not cover the entire period covered by the original lease, the lessor's damages for the period not covered by the new lease are measured by subtracting the reasonable rental value of the property for the period not covered by the new lease from the rental value of the property for that period as set by the original lease. Under Section 3320, the value of these rental obligations should be computed as of the time of judgment. If some installments are then due or overdue, they should be taken at full value plus interest. Those that are not then due should be appropriately discounted.

In order to provide protection to the defaulting lessee against the possibility of the lessor's reletting the property for a nominal rental, subdivision (b) permits the lessee to show that the new lease was not made in good faith and in a reasonable manner. If the lessee is able to make such a showing, the lessor's damages are limited to the amount he could recover if there had been no reletting.

In addition to the basic measure of damages, the lessor is entitled to recover from the lessee certain incidental damages. These are described in Section 3322. See the Comment to that section. And, if the lease so provides, the lessor may be entitled to recover his attorney's fees in addition. See Section 3324.

§ 3321. Lessor's damages where property is not relet.

3321. Unless the measure of damages provided in Section 3320 is applicable, if a lease of real or personal property is terminated by the lessor because of the lessee's breach thereof, or if the lessee abandons the leased property or otherwise repudiates the lease, the measure of the lessor's damages for such breach, abandonment, or repudiation is the sum of the following:

(a) The excess, if any, of the then value of the amount which would have been due to the lessor under the lease for the remainder of the term over the then reasonable rental value of the property for the same period.

(b) Any incidental damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach, abandonment, or repudiation, or which in the ordinary course of things would be likely to result therefrom.

Comment. Section 3321 sets forth the measure of the lessor's damages when the lessee abandons the leased property, or the lease is otherwise terminated by reason of the lessee's breach, and the lessor does not relet the property.

Under Section 3321, the basic measure of the lessor's damages is the excess of the present value of the remaining rental due under the lease over the then reasonable rental value of the property for the same period. As under Section 3320, these values should be computed as of the time of judgment. If some rental installments are then due or overdue, they should be taken at full value plus interest. Those that are not then due should be appropriately discounted.

In addition to this basic measure of damages, the lessor is entitled to recover from the lessee certain incidental damages described in Section 3322. See the Comment to that section. And, if the lease so provides, the lessor may be entitled to recover his attorney's fees in addition. See Section 3324.

The measure of damages described in Section 3321 is essentially that described in Civil Code Section 3308 (superseded by this article) as enacted in 1937. Section 3308's measure of damages was applicable, however, only when the lease so provided and the lessor chose to invoke that remedy. The measure of damages described in Sections 3320 and 3321 is applicable in all cases. Hence, under these sections, a lessor may not decline to relet the property and hold the original lessee for the entire remaining rental obligation as he is entitled to do under existing law. Under these sections, as under the law relating to contracts generally, the defaulting lessee is not liable for any consequences that the lessor can reasonably avoid.

§ 3322. Lessor's incidental damages

3322. Incidental damages to a lessor under this article include but are not limited to:

(a) The amount due to the lessor under the lease for such time as is reasonably necessary to relet the property, together with any reasonable expenses incurred in caring for the property during such time.

(b) If the lessee has abandoned or otherwise repudiated the lease, the amount due to the lessor under the lease for any reasonable time granted by the lessor to the lessee to retract the repudiation, together with any reasonable expenses incurred in caring for the property during such time.

(c) Any reasonable expenses incurred in retaking possession of the property.

(d) Any reasonable expenses incurred in making repairs required to be made by the lessee under the lease or required to remedy damage to the property caused by the lessee in violation of the lease.

(e) Any reasonable expenses incurred in reletting the property.

Comment. Section 3322 is included in this article in order to make it clear that the basic measure of damages described in Sections 3320 and 3321 is not the limit of a lessor's recoverable damages when the lessee abandons the leased property or the lease is otherwise terminated by reason of the lessee's breach.

When leased property is abandoned or the lease is otherwise terminated, it will usually be necessary for the lessor to take possession for a short time in order to prepare the property for reletting and to secure a new tenant.

A lessor must be entitled to recover the rentals due under the lease for this period if the damages awarded are to put him in as good a position as would performance by the lessee of his contractual obligations. The lessor should also be entitled to recover for his expenses in caring for the property during this time, for these are expenses that he would not have had to bear if the lessee had not abandoned the property or breached the lease.

In some cases, too, a lessor may wish to give a repudiating lessee an opportunity to retract his repudiation and resume his obligations under the lease. If the lessor does so and the lessee persists in his repudiation, the lessor should be entitled to recover the full amount of the rentals due under the lease for this period of negotiation as well as his expenses in caring for the property during this period.

In addition, Section 3322 provides that the lessor may recover for his expenses in retaking possession of the property, repairing damage caused by the lessee, and in reletting the property. There may be other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee, and if so, the lessor may recover them also. Section 3322 does not purport to set forth an exclusive list of the items of incidental damage; it merely lists the incidental damages that will usually accrue when a lease is abandoned or otherwise terminated by reason of the lessee's breach.

§ 3323. Liquidated damages

3323. Notwithstanding Sections 3320, 3321, and 3322, upon any breach of the provisions of a lease of real or personal property, the lessor is entitled to recover liquidated damages if they are provided in the lease and meet the requirements of Sections 1670 and 1671.

Comment. Section 3323 does not create a right to recover liquidated damages, it merely recognizes that such a right may exist if the conditions specified in Civil Code Sections 1670 and 1671 are met. Liquidated damages provisions in leases have been held to be void. Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899). Such holdings were proper so long as the lessor's cause of action upon abandonment of a lease was either for the rent as it came due or for the rental deficiencies as of the end of the lease term. Under such circumstances, there could be little prospective uncertainty over the amount of the lessor's damages. Under this article, however, the lessor's right to damages accrues at the time of the abandonment; and because they must be fixed before the end of the term, they may be difficult to calculate in some cases. This will frequently be the case if the property is leased under a gross receipts lease. It may be the case if the property is unique and its fair rental value cannot be ascertained with certainty. Accordingly, Section 3323 is included as a reminder that the authorities holding that liquidated damages provisions in leases are void and no longer control, and in some cases such provisions may be valid.

§ 3324. Attorney's fees

3324. In addition to any other relief to which the lessor is entitled by reason of the lessee's breach, abandonment, or repudiation of a lease of real or personal property, the lessor may recover reasonable attorney's fees incurred in obtaining such relief if the lease provides for the recovery of such fees.

Comment. Leases, like other contracts, sometimes provide that a party forced to resort to the courts for enforcement is entitled to a reasonable attorney's fee. Section 3324 is included in this article in order to make it clear that the remaining sections in the article do not impair the lessor's rights under such a provision.

§ 3325. Lessee's relief from forfeiture

3325. If a lease of real or personal property is terminated by the lessor because of the breach thereof by the lessee, or if the lessee abandons the leased property or otherwise repudiates the lease, the lessee may recover from the lessor any amount paid to the lessor in consideration for the lease (whether designated rental, bonus, consideration for execution thereof, or by any other term) that is in excess of (a) the portion of the total amount required to be paid to the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the termination, repudiation, or abandonment of the lease and (b) any damages to which the lessor is entitled by reason of such breach, repudiation, or abandonment. The right of a lessee to recover under this section may not be waived prior to the accrual of such right.

Comment. Section 3325 is designed to make the rules stated in Freedman v. The Rector, 37 Cal.2d 16, 230 P.2d 629 (1951), and Caplan v. Schroeder, 56 Cal.2d 515, 15 Cal. Rptr. 145, 364 P.2d 321 (1961), applicable to cases arising out of the breach of a lease. The Freedman case held that a wilfully defaulting vendee under a contract for the sale of real property may recover the excess of his part payments over the damages caused by his breach. The Caplan case held that a wilfully defaulting vendee could recover such an advance payment even though the contract recited that the advance payment was in consideration for the execution of the contract. The court looked beyond the recital and found that there was in fact no separate consideration for the advance payment aside from the sale of the property itself.

Similarly, Section 3325 will permit a lessee to recover advance payments, regardless of how they are designated in the lease, if the court finds that such payments are in fact in consideration for the lease and are in excess of the damages suffered by the lessor as a result of the lessee's breach.

The last sentence of Section 3325 is probably unnecessary. The Freedman and Caplan cases are based on the provisions of the code prohibiting forfeitures. These rules are applied despite contrary provisions in contracts. Nonetheless, the sentence is included to make it clear that the provisions of this section may not be avoided by the addition to leases of provisions waiving rights under this section.

§ 3326. Lessor's benefits on reletting

3326. When a lease of real or personal property is terminated by the lessor by reason of the lessee's breach thereof, or when the lessee abandons the leased property or otherwise repudiates the lease, and the lessor relets the property, the lessor is not accountable to the lessee for any profit made on the reletting, but any such profit shall be set off against the damages to which the lessor is otherwise entitled.

Comment. Under existing law, a lessor may relet property after the original lessee has abandoned the lease if he does so either on his own account (in which case the lessee's rental obligation is terminated) or for the account of the lessee. See discussion in Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 685, 230 P.2d 10 (1951). Although no case has yet arisen so holding, the rationale of the California cases indicates that if the lessor receives a higher rental upon the reletting than was required by the original lease, the lessee is entitled to the profit.

Under Section 3326, a lessor who relets property after the original lessee has abandoned it does so for his own account. Any profit received is the lessor's, it does not belong to the defaulting lessee. Profit received on the reletting, however, reduces the damages suffered by the lessor for which the lessee is liable.

The rule stated in Section 3326 is similar to the rule applicable when the buyer under a sales contract repudiates the sale and the seller resells the goods to mitigate damages. See COMM. CODE § 2706(6).

§ 3327. Specific or preventive relief

3327. Nothing in this article affects the right to obtain specific or preventive relief if the damages specified in this article are inadequate and specific or preventive relief is otherwise appropriate.

Comment. This article sets forth the damages to which a lessor is entitled when his lessee abandons the leased property or the lease is otherwise terminated by reason of the lessee's breach. Section 3327 is designed to indicate merely that the lessor's right to damages is not his exclusive remedy. In appropriate cases, specific or preventive relief may be granted where the remedy in damages is inadequate.

§ 3328. Unlawful detainer actions

3328. (a) Nothing in this article affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

(b) The bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure does not affect the right to bring a separate action to recover the damages specified in this article; but there shall be no recovery of damages in the subsequent action for any detriment for which damages were awarded in the previous action.

Comment. Section 3328 is designed to clarify the relationship between this article and the chapter of the Code of Civil Procedure relating to actions for unlawful detainer, forcible entry, and forcible detainer. The actions provided for in the Code of Civil Procedure are designed to provide a summary method of recovering possession of property. Those actions may be used by a lessor whose defaulting lessee refuses to vacate the property after termination of the lease.

Section 3328 provides that the fact that a lessor has recovered possession of the property by an unlawful detainer action does not preclude the bringing of a later action to recover the damages to which he is entitled under this article. Some of the incidental damages to which the lessor is entitled may be recovered in either the unlawful detainer action or in an action to recover the damages specified here. Under Section 3328, such damages may be recovered in either action; but the lessor is entitled to recover but once for any particular detriment.

SEC. 2. Section 3308 of the Civil Code is repealed.

~~3308.--The parties to any lease of real or personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease-- for the balance of the stated term or any shorter period of time over the then reasonable rental value of the premises for the same period.~~

~~The rights of the lessor under such agreement shall be cumulative to all other rights or remedies-- now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination.--The parties to such lease may further agree therein that unless the remedy provided by this section is exercised by the lessor within a specified time the right thereto shall be barred.~~

Comment. Section 3308 is repealed because the remainder of the statute makes it unnecessary. The remedy that Section 3308 states may be provided in a lease is made the general rule, whether or not provided in the lease, under the provisions of the remainder of the statute.