#50 7/28/66

Memorandum 66-54

Subject: Study 50 - Lessor-lessee

You will recall that we distributed a tentative recommendation on this subject last year, considered the comments on that tentative recommendation, revised the tentative recommendation (June 17, 1966), and again distributed it for comments.

We attach two copies of the June 17 tentative recommendation (green pages from galley proofs of the California Law Review, which designates the material as a "tentative recommendation"). There are a few typographical errors which we will correct before we send this recommendation to the printer. Also, please mark any suggested revisions on one copy and return it to us at or before the September meeting. This recommendation is scheduled for approval for printing at the September meeting.

You will recall that the previous tentative recommendation met with general approval and we made a number of changes in response to the comments we received. The additional comments we received as a result of the second distribution to approximately 300 persons are attached as Exhibits I-IX. (The Legislative Counsel has suggested a number of technical changes that will be incorporated into the bill before it is printed in our pamphlet).

Except for Mr. Agay (Exhibit I), the revised tentative recommendation met with approval. Please read Exhibits IV, V, VI, VII, VIII, and IX (which we will not otherwise refer to herein). It is apparent that Mr. Agay does not understand the effect of the recommendation. He takes the view that it benefits only the lessee.

The following is a section by section analysis of the comments that suggested changes in the recommendation. Mr. Agay (Exhibit I) makes a great many suggestions and generally objects to the entire scheme of the

proposed legislation. We have not attempted to list all suggestions he makes in the following analysis of the comments. We suggest you read his entire letter which is attached as Exhibit I.

Section 1951 (Recommendation - Page 4)

See Exhibit II for Mr. Swafford's suggested revision of Section 1951

Section 1951.5 (Recommendation - Pages 4-5)

See Exhibit II for Mr. Swafford's suggested revision of Section 1951.5.

Mr. Agay makes a number of comments concerning this section. See page 3 (last paragraph) and first four paragraphs on page 4 of Exhibit I. Among his suggestions are the following:

(a) That the notice referred to in Section 1951.5(b) be a signed written notice to preclude bad faith claims by tenants.

(b) That the statute should indicate which provisions are subject to modification by contract.

Section 1952 (Recommendation - Page 5)

See Exhibit II for Mr. Swafford's suggested revision of Section 1952.

Section 1953 (Recommendation - Page 6)

Mr. Swafford (Exhibit II) states:

> With respect to proposed sections 1953 and 1954, I find it a bit difficult to associate the concept of rescission with a lease, the term of which has commenced. In other words, rescission involves the placing of the parties in the same position they would have been had the contract or lease not been entered into, and if the term is partially over, it is difficult to envision how a lessee can return possession for the unexpired portion of the term.

Mr. Swafford is not completely correct in his analysis of rescission relief. See, for example, Pendell v. Warren, 101 Cal. App. 407, 281 Pac. 658 (1929)(rescinding vendee liable for the value of the use of the truck

he purchased for the time, beyond period necessary to test it, during which he had the possession and use of it). We do not believe that it would be desirable to attempt to spell out how the relief of rescission will be used in lease cases. This is a general problem that sometimes arises where a contract requires continuing performance and is rescinded after part performance. The matter is covered by Civil Code Section 1692 (last paragraph) which provides:

> If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.

Hence, we suggest that no revision of the proposed legislation on leases is needed.

Section 1953.5 (Recommendation - Pages 6-7)

See Exhibit II for Mr. Swafford's suggested revision of Section 1953.5.

Section 1954 (Recommendation - Pages 7-8)

See the Comment to Section 1953.

Section 3320 (Recommendation - pages 8-9)

See Exhibit II for Mr. Swafford's suggested revision of Section 3320.

Mr. Agay suggests that subdivision (b) be made "far more explicit to include by way of example and not limitation exactly that type of damage [rental for period it takes to find a new tenant and to prepare the property for a new tenant]". He also would like to see explicit mention in the statute of the type of damage indicated in the comment--the damage from the loss of rentals during the period that a landlord gives a tenant an opportunity to retract his repudiation or cure his breach. He would

like to see the statute provide that the landlord would be entitled to attorney's fees in connection with the reviewing of new proposed leases. At one time, the Commission did attempt to spell out damages in the text of the statute. It was concluded, after considerable discussion, that it was better to state the general rule in the statute and to give examples in the comment. We suggest that no change be made in the statute. We could mention that attorney's fees in connection with the reviewing of new proposed leases on the premises would be recoverable if the Commission wishes that to be added to the comment.

Section 3321 (Recommendation - Page 9)

See Exhibit II for Mr. Swafford's suggested revision of Section 3321.

Section 3322 (Recommendation - Page 10)

See Exhibit II for Mr. Swafford's suggested revision of Section 3322.

Section 3323 (Recommendation - Pages 10-11)

See Exhibit II for Mr. Swafford's suggested revision of Section 3323.

Section 3324 (Recommendation - Page 11)

See Exhibit II for Mr. Swafford's suggested revision of Section 3324.

See the comment of Mr. Agay on Exhibit I, pages 6 (last paragraph) and 7 (first half of page).

Section 3325 (Recommendation - Pages 11-12)

See Exhibit II for Mr. Swafford's suggested revision of Section 3325.

See Mr. Agay's comment concerning this section on Exhibit I, page seven (longest paragraph on page).

Section 3326 (Recommendation - Page 12)

No comments concerning this section.

Section 3308 (Recommendation - Pages 12-13)

Both Commissioner Stanton and Mr. Nicholson (Exhibit III) suggest that this section should be retained (instead of repealed) and made applicable only to leases of personal property.

Section 3387.5 (Recommendation - Page 13)

See Exhibit II for Mr. Swafford's suggested revision of Section 3325.

Mr. Agay (Exhibit I, page 5) presents the following problem:

> Assume that a person with no available resources for paying any newly created debts is the owner of a piece of property. He is requested by a tenant to construct an improvement and to mortgage the property to obtain the funds to pay for the cost thereof. The proposed mortgage payments would be easily covered by the rentals reserved under a proposed lease. The landlord is fully satisfied with the financial responsibility of the proposed tenant. The transaction is basically a risk free transaction to the landlord and should remain so. Yet, even though the tenant were financially responsible, the effect of Section 3320 and the other provisions of the tentative recommendation would put the landlord in jeopardy. He would be put at his peril to finding a new tenant. I do not think that the mortgagee would be satisfied with the fact that there is a "reasonable rental value" in lieu of cold, hard cash for the mortgage payment.

Mr. Agay makes the same point on pages 7 and 8 of Exhibit I:

> In connection with Section 3387.5, I recognize the propriety of the provisions of subdivision (a). What I do not understand, however, is why it is any more just that there be specified enforcement where there is a change of transfer of title to improvements than it is where the landlord takes the risk of making an improvement without any contemplation of being compensated therefor by way of purchase. Should not that landlord also be entitled to specific relief?

Section 1174 (Recommendation - Pages 13-14)

Mr. Agay (Exhibit I, page 8) states: "I, of course, disagree with the deletions you have proposed from Section 1174 of the Code of Civil Procedure in that I disagree that Sections 1953 and 1954 give adequate remedy to the landlord."

Section 11 (Recommendation - Page 14)

See Exhibit II for Mr. Swafford's suggested revision of Section 3325.

Mr. Agay objects to the retroactive application of the statute. (See Exhibit I, page 8).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 66-52

EXHIBIT I

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SANFORD M. GAGE
OF COUNSEL

TELEPHONE
OLIVE 1-3380

IN REPLY PLEASE REFER TO:

August 15, 1966

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California 94305

RE: Tentative Recommendation relating to Rights and Duties Upon Abandonment or Termination of a Lease of Real Property--Revised June 17, 1966

Gentlemen:

I offer some suggestions, comments and questions with respect to the above Tentative Recommendation.

I think that your conclusion in the background portion of the Recommendation to the effect that existing law is inadequate for the protection of the landlord and the tenant is sound. With the exception of landlord rights by reason of repudiation of a lease, it appears to me, however, that your recommended legislation does nothing to improve the position of a landlord who uses either competent counsel or the most prevalent lease forms. Rather, the proposed legislation would take away rights which the landlord now has.

On pages 2 and 3, you point up the fact that the third listed remedy presently available, to relet the property on behalf of the tenant, "is unsatisfactory from the lessor's standpoint because the courts have held the cause of action for damages does not accrue until the end of the original lease term." It appears to me that the most logical approach to cure this inadequacy is to statutorily grant the right for damages before the end of the original lease term rather than taking away the right in total, which is what the proposed legislation would do. I cannot understand how the proposition that a present landlord remedy is partially inadequate leads to the conclusion that the remedy itself should be eliminated rather than cured of its defect.

I think that every effort should be made in new legislation to attempt to protect the innocent party. I personally find it much easier to advise a defaulting party that by his default he has a great exposure of risk and loss, than it is to advise an innocent party that his remedies are insufficient and very costly to pursue.

I would propose that in the event of default by the tenant, the landlord be permitted to accelerate the rental obligation under the lease (now prohibited by law). Certainly there is no historical or constitutional objection to permitting the landlord to require the purchase of the term interest by payment in cash. Such an acceleration provision could be tempered by a provision that the money be deposited into court to be drawn upon as time passes, so as to secure the tenant will receive the possession to which he is entitled (subject to being dispossesed for reason of breaches other than the payment of rental) and to secure the repayment to the tenant upon termination of the lease at landlord's election.

The point made in the Recommendation that the present remedy of landlords to take over the premises on behalf of tenants and collect the rent as it comes due permits the landlord to proceed without attempting to "mitigate his damages". I have personally experienced this in representing a tenant. Whenever a tenant leaves premises early, if the lease prohibits an assignment or subletting, then the tenant no doubt with some justification, feels that the landlord is taking advantage by not attempting to mitigate his damages. Rather than eliminating the right of the landlord to relet the premises on behalf of the tenant, however, it would seem more proper to condition such remedy on the granting of the right to the tenant (assuming the tenant has waived such right under the lease) to assign or sublet to such person as to whom the landlord can have no reasonable objection.

I would therefore recommend that your comment No. 4, appearing on page 5, should be changed such that the landlord could treat a repudiated or terminated lease as being still in existence so that he could receive the rentals as they become due and that this right be provided by law without the necessity of special provision within the lease itself. Indeed, I would recommend that these rights be available even if the lease is "forfeited". In that connection, however, I should point out that relief is available to the tenant under Code of Civil Procedure Section 1179. Perhaps that section itself could be broadened to protect the tenant against forfeitures of not only the lease but also of payments under the lease.

Your comment No. 6, appearing on pages 5 and 6, indicates that as a general matter, it is your opinion that the normal contractual remedy of the difference between the value and the contract price will be sufficient. I feel that this fails to take into account the general differences between leasing real estate, where a monthly consideration or regularly paid consideration is contemplated and bargained for under a lease as opposed to a sale of chattel where it is contemplated that the seller may well have to sit with the property for some period of time until his consideration is received. Moreover, I feel it is far simpler to determine the value of personal property than it is the fair rental value for a long period of time of a piece of property. In addition, I think that the market for the sale of chattels is generally greater than the market for finding a particular tenant. I do not think that the remedy of rentals contracted for less fair rental value of the property truly takes into consideration the losses to the landlord for the period of time it takes to find a tenant.

Your concluding comment in that paragraph numbered 6, that it is unfair to permit the property to remain idle, fails, I believe, to take into account that in the sale of chattels it is a one-shot transaction in most occasions. The seller receives his consideration and no longer has any concern over the use of the chattel he is transferring. That is not true in the case of a lease. There is a continuous relationship and the landlord, for good cause, may be choosy in his selection of tenants. Thus, the property may, in fact, remain idle until the landlord has found someone he considers satisfactory.

I was unable to understand the meaning of your comment No. 7, appearing on page 6. If, in fact, the measure of damages relates to fair market rental and not to what the landlord ultimately receives from a new tenant, how could the reletting in any way affect the damages or reduce the damages to which the landlord is entitled?

I move now to the specific language proposed, but, for the most part, I shall refrain from repeating the comments above, which might be applicable to other specific sections.

In connection with Section 1951.5, it would seem to me that where the tenant is vacating the property, the option of whether or not to terminate should be left up to the landlord. Why should a tenant be permitted to terminate his obligation and, mitigate his losses if he has no use for the property by merely vacating?

Next, in connection with the same subsection (b) of Section 1951.5, I was not certain whether or not such a provision was modifiable by the contract of the parties. Indeed, many of the provisions left that same question in my mind and I would suggest that since some of the provisions specifically state they are not modifiable by contract, that a separate section be added to state which provisions are and which provisions are not modifiable by contract.

Lastly, in connection with the same subsection, I would certainly suggest that the notice referred to therein be a signed written notice so that there could be no bad faith claims by a tenant that his lessor had requested him to leave.

I would make the same comments with respect to the option to terminate being with the innocent party and the clarification of the right to modify by contract in connection with subsection (c) of Section 1951.5.

Since it is so significant to me, I again make note of the fact that I disapprove of the effect of subdivision (c) to the extent that it eliminates the landlord's right to collect rent as it comes due (see page 11 of Recommendation).

I refer to your comment on page 18 concerning subdivision (b) of Section 1954. You state, in the last sentence thereof, that "an aggrieved lessor may terminate the lease and immediately sue for damages resulting from the loss of the rental that would have accrued under the lease." As I read subdivision (b), it refers to Section 3320, which in turn, as I read it, states the basic measure of damages to be the excess of the rent reserved under the lease over the reasonable rental value. This to me seems far different than the loss of the"rentals that would have accrued under the lease" as stated in your comment on page 18.

Some of the objections I have raised above are recognized in the third paragraph of your comments appearing on page 21. You seem to indicate that your Section 3320 will give the landlord his rental for the period it takes to find a new tenant and to prepare the property for a new tenant. If that be your intention, I would suggest that subdivision (b) of Section 3320 be made far more explicit to include by way of example and not limitation, exactly that type of damage. Likewise, I feel that an explicit mention should

be made of the type of damage indicated in the final paragraph on page 21, to wit: the damage from the loss of rentals during the period that a landlord gives a tenant an opportunity to retract his repudiation or cure his breach.

Let me point out, however, that I personally do not feel that even if Section 3320 were cured to specifically include these items as recoverable damages, that the remedy provided is sufficient. Unless and until the landlord's bargained for rentals for the entire term are secured to him, the measure of damages provided under Section 3320 will be insufficient.

Perhaps by way of example, I can better show the problem which I believe to exist. Assume that a person with no available resources for paying any newly created debts is the owner of a piece of property. He is requested by a tenant to construct an improvement and to mortgage the property to obtain the funds to pay for the cost thereof. The proposed mortgage payments would be easily covered by the rentals reserved under a proposed lease. The landlord is fully satisfied with the financial responsibility of the proposed tenant. The transaction is basically a risk free transaction to the landlord and should remain so. Yet, even though the tenant were financially responsible, the effect of Section 3320 and the other provisions in the Tentative Recommendation would put the landlord in jeopardy. He would be put at his peril to the finding of a new tenant. I do not think that the mortgagee would be satisfied with the fact that there is "a reasonable rental value" in lieu of cold, hard cash for the mortgage payment.

Moreover, where in Section 3320, or otherwise, is the time and effort and perhaps even worry, of the landlord compensated. I even have some question under the present language whether the landlord would be entitled to attorney's fees in connection with the reviewing of new proposed leases.

In connection with Section 3322(a), while the section itself may in part be proper, I would suggest that language be added so that there is a presumption that no avoidance was possible and so that there is a strong presumption that the non-defaulting party acted with reasonable diligence. It is my understanding that in some areas of the law of

damages, the non-breaching party may not assert his financial inability as an excuse for failure to avoid damages or mitigate damages. If my understanding is correct, then I certainly would suggest that in this area it be made specifically clear that the financial resources and financial requirements necessary to avoid damages take into specific account the financial abilities of the non-breaching party.

More basically in connection with this Section 3322, I am somewhat confused as to how it could be applicable. I have been unable to detect where the landlord, under the proposed recommendations, can use as a measure of his damages, the rental under the lease without deduction for fair rental value, or where, except for the brief period of time mentioned in your comment on page 21, the fact that there is a loss of time and rentals during such period of time, is ever taken into account.

Assuming, however, an area for application of Section 3322, it appeared to me that the section left some uncertainty as to whether or not a landlord was supposed to lease to a new tenant for a term shorter than the original lease and, if so, how his damages would then be measured. Would he have to wait until the end of the shorter term or the end of the original term to measure his damages?

Again under Section 3322, does a landlord turn down a lease for a rental less than that set forth in the lease breached at his peril? Does he wait for a new tenant to pay the same rental as reserved under the old lease at his risk that by such waiting he will lose a portion of his remedy against the breaching tenant?

In connection with Section 3323, I would suggest that specific examples be included to show when the requirements of Section 1670 and 1671 would be met. One of such examples is indicated in your comment following Section 3323. Actually it would seem reasonable to permit a liquidated damage clause in almost any lease except those of apartments or offices where there was a clearly ascertainable rental and a near 100% occupancy.

In connection with Section 3324, you have attempted to obtain for tenants a remedy which is generally afforded to landlords under forms now prevalent. Unfortunately, however, it appears that subdivision (b) of that section may go too

far in certain circumstances. There are many leases which permit the landlord to recover attorney's fees only if action is brought to remove the tenant or if the tenant is delinquent in the payment of rentals. Thus, the landlord would have no right to attorney's fees for breach of any other provision of the lease by the tenant. Yet, according to subdivision (b), the tenant would be given a universal right against the landlord for whatever breach occurred.

On the other hand, the provision seems not to go far enough for the tenant. As I read the subdivision (b), if the landlord sues the tenant and the tenant does not cross-complain or counterclaim, then he would not be "obtaining relief for the breach of the lease". Rather, he would be merely defending a claim by his landlord. Thus, even though he prevailed, he would not receive attorney's fees. To the extent that your suggestion is valid, certainly the reciprocity of attorney's fees should be in connection with any matter for which one or the other of the parties is entitled to attorney's fees, rather than in terms of who is the complaining party.

Do I correctly understand Section 3325 and your comment in connection therewith appearing in the final paragraph on page 29, that no longer can a term for a period of years be sold for present consideration? That would be my understanding since if the tenant at any time after paying the consideration for the term, desired to terminate the lease, he could do so either by abandonment or repudiation and thereby force the landlord to return the consideration. I would disagree with such a result. Moreover, I disagree with your conclusion that it is inconceivable that a landlord might insist upon a bona fide bonus for entering into a lease or in other words, a lump sum payment not to be amortized over the term of the lease. Apparently the recommendations indicate a feeling that such bonus is only extracted as a guise for attempting to secure a forfeiture. I feel that in attempting to prevent forfeitures, the proposed language of Section 3325 goes too far. It prevents legitimate transactions. It appears to establish as a rule for all time that landlords must accept as consideration for the granting of a term an equal payment month by month.

In connection with Section 3387.5, I recognize the propriety of the provisions on subdivision (a). What I do not understand, however, is why it is any more just that there be

specific enforcement where there is a chance of transfer of title to improvements than it is where the landlord takes the risk of making an improvement without any contemplation of being compensated therefor by way of purchase. Should not that landlord also be entitled to specific relief?

I, of course, disagree with the deletions you have proposed from Section 1174 of the Code of Civil Procedure in that I disagree that Sections 1953 and 1954 give adequate remedy to the landlord.

Lastly, I object to Section 11. I would propose instead that the act be made prospective only. Your own comment in connection therewith recognizes that there are strong doubts as to the extent that such legislation could be retroactive. Obviously, there are going to be parties attempting to take advantage of the new language and others who would attempt to insist upon the enforcement of the rights and remedies pre-existing this revision or as stated under a lease which pre-existed this revision. I think it unwise, if not unfair, to create situations where there clearly will be litigation, not only at the trial, but at the appellate levels.

I apologize for the length of this letter, but I felt it necessary in order to express my deep concern over the presently existing Recommendation, which I feel to be far too tenant-oriented and far too guilty-party oriented.

Thank you for the privilege of submitting the foregoing.

Yours very truly,

RICHARD D. AGAY

RDA/jj

Memo 66-54

EXHIBIT II

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August 3, 1966

California Law Revision Commission
Law School
Stanford University
Stanford, California 94305

Re: Tentative Recommendations of California Law Revision Commission relating to Rights and Duties upon Termination of a Lease

Gentlemen:

I have received and reviewed the information which you have sent to me on the subject matter. Enclosed herewith are my suggested revisions to the proposed sections. I believe they are self-explanatory. Although some are in the nature of nit picking, many are somewhat more substantive. In any event, I have included all proposed changes because I believe that as much clarity as possible is necessary in connection with legislation.

With respect to proposed sections 1953 and 1954, I find it a bit difficult to associate the concept of rescission with a lease, the term of which has commenced. In other words, rescission involves the placing of the parties in the same position they would have been had the contract or lease not been entered into, and if the term is partially over, it is difficult to envision how a lessee can return possession for the expired portion of the term.

Very truly yours,

Jack T. Swafford

Jack T. Swafford
of BURRIS & LAGERLOF

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JTS:js
Encl.

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

SECTION 1. Section 1951 is added to Chapter 2 of Title 5 of Part 4 of Division 3 of the Civil Code to read:

1951. A lease of real property is [deemed to be] repudiated when, without justification:

(a) ~~One~~ [Either] party [to the lease] communicates to the other party by word, ~~or~~ act [or conduct] that he ~~either~~ will not or cannot perform ~~his-remaining-obligations~~ [a material obligation remaining] under the lease; [or]

(b) Either party ~~does-any~~ [by a] voluntary act or [by voluntarily engaging] engages in [a] ~~voluntary~~ course of conduct, ~~which~~ renders substantial performance of his [remaining] obligations under the lease impossible or apparently impossible; or

(c) The lessor actually evicts the lessee from the leased property.

SEC. 2. Section 1951.5 is added to said chapter, to read: 1951 A lease of real property is terminated prior to the expiration of the term when:

(a) The lessor, with justification, evicts the lessee from the [leased] property;

(b) The lessee vacates [quits] the [leased] property pursuant t a notice served pursuant to Sections 1161 and 1162 of the Code of Civ Procedure or pursuant to any other [written] notice or [written] requ by the lessor to vacate [quit] the [leased] property; or

(c) The lease is repudiated by either party thereto, and [(1)] t aggrieved party [either] is not entitled to [seek] or does not seek specific or preventive relief to enforce the provisions of the lease provided in subdivision (c) of Section 1953, [or (2) the aggrieved party gives the other party written notice of his election not to see such relief.]

SEC. 3. Section 1952 is added to said chapter, to read:

1952. [Except in the case of an unjustified eviction] The effec of a repudiation of a lease of real property is nullified if, before the other party has brought an action for damages caused by the repudiation, the repudiator becomes ready, willing, and able to perform his remaining obligations under the lease and the other party is so informed. [by written notice.]

SEC. 5. Section 1953.5 is added to said chapter, to read:

1953.5. The time for the commencement of an action based on the repudiation of a lease of real property begins to run:

(a) If the repudiation occurs before [there is a] any failure [on the part] of the repudiator to perform [a material] his obligations under the lease, at the time of the repudiator's first [such] failure ~~to perform the obligations of the lease~~.

(b) If the repudiation occurs at the same time as, or after, [there is] a failure [on the part] of the repudiator to perform his [a material] obligations under the lease, at the time of the repudiation.

§ 3320. Lessor's damages upon termination of lease for breach

3320. Subject to Section 3322, if a lease of real property is terminated because of the lessee's breach thereof, the measure of the lessor's damages for such breach is the sum of the following:

(a) The worth of the excess, if any, of the [worth of the] rent and charges equivalent to rent reserved in the lease for the portion of the term following such termination over the reasonable rental value of the [leased] property for the same period.

(b) Subject to Section 3324, any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

§ 3321. Lessee's damages upon termination of lease for breach

3321. Subject to Section 3322, if a lease of real property is terminated because of the lessor's breach thereof, the measure of the lessee's damages for such breach is the sum of the following:

(a) The [worth of the] excess, if any, of the reasonable rental value of the [leased] property for the portion of the term following such termination over the worth of the rent and charges equivalent to rent reserved in the lease for the same period.

(b) Subject to Section 3324, any other damages necessary to compensate the lessee for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

§ 3322. Avoidable consequences; lessor's profits on reletting

3322. (a) A party to a lease of real property that has been breached by the other party may not recover for any detriment caused by such breach that could have been avoided through the exercise of reasonable diligence without undue risk of other substantial detriment.

(b) When a lease of real prperty is terminated because of the lessee's breach thereof and the lessor relets the property, the lessor is not accountable to the lessee for any [gross or net] profits made on the reletting, but any such [net] profit shall be set off against the damages to which the lessor is otherwise entitled.

§ 3323. Liquidated damages

3323. Notwithstanding Sections 3320 and 3321, upon any breach of the [a] provisions of a lease of real property, liquidated damages may be recovered if they are [so] provided in the lease and [they] meet the requirements of Sections 1670 and 1671.

§ 3324. Attorney's fees

3324. (a) In addition to any other relief to which a lessor or lessee is entitled by reason of the breach of a lease of real property by the other party to the lease, ~~the lessor or lessee~~ [he] may recover reasonable attorney's fees incurred in obtaining such relief if [and to the extent that] the lease provides for the recovery of such fees.

(b) If a lease provides that one party to ~~the~~ [a] lease [of real property] may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the lease [is also entitled to and may to the same extent as the other party] ~~may also~~ recover attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

§3325. Lessee's relief from forfeiture

3325. Subject to the lessor's right to obtain specific enforcement of the lease, if a lease of real property is terminated because of the breach thereof by the lessee or if the lessee abandons the [property covered by 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 [the sum of] (a) the portion of the total amount required to be paid to [or for the benefit of] the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the termination or abandonment of the lease and (b) any damages, including liquidated damages as provided in Section 3323, to which the lessor is entitled by reason of such breach or abandonment. The right of a lessee to recover under this section may not be waived prior to the accrual of such right.

SEC. 9. Section 3387.5 is added to the Civil Code, to read:

3387.5. (a) A lease of real property may be specifically enforced by any party, or assignee of a party, to the lease when:

(1) The lease provides for the transfer to the lessee at the termination [expiration] of the term of the lease of title to buildings or other improvements affixed by the lessor to the leased property; or

(2) The lease contains an option which the lessee may exercise at the termination [expiration of the term] of the lease to acquire title to buildings or other improvements affixed by the lessor to the leased property.

(b) Nothing in this section affects the right to obtain specific or preventive relief in any other case where such relief is appropriate.

SEC. 11. [To the full extent that it constitutionally can be so applied,] this act applies to all leases [of real property] whether executed, renewed, or entered into before or after the effective date of this act. ~~to the full extent that it constitutionally can be so applied.~~

Memo 66-54 EXHIBIT III

UNITED STATES LEASING CORPORATION
633 BATTERY ST. • SAN FRANCISCO, CALIF. 94111 • 415/397-1787

July 11, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Gentlemen:

Thank you for your copy of the revised recommendation dated June 17, 1966, concerning lease remedies. As General Counsel for a California headquartered financial leasing corporation I was interested in the applicability of your recommendation to leases of personal property and therefore previously wrote to you making several suggestions. I was interested to note in reading through the present revision that you have avoided the questions raised by myself, and I am sure others, by attempting to make the revisions apply expressly to real property. On page 31 of the proposal, however, you recommend the repeal of Civil Code Section 3308 which applies to personal as well as to real property. Should not this Section be left in, limiting its application, however, solely to personal property.

Very truly yours,

Brandt Nicholson
General Counsel

BN:jj

Memo 66-54

EXHIBIT IV

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REPLY
ATTENTION
M. R. Raftery

July 21, 1966

California Law Revision Commission
30 Crothers Hall, Stanford University
Stanford, California 94305

Attention: John H. DeMoully

Gentlemen:

Thank you for the Tentative Recommendations relating to Rights and Duties Upon Termination of a Lease of real property which was forwarded to me by your office this past week.

I have had an opportunity to review same and I feel that this is an excellent recommendation that should be made to the 1966 legislative session.

I thank you once again for having forwarded this matter to me, and I wish your commission success in its presentation to the legislature.

Sincerely,

Michael R. Raftery

MICHAEL R. RAFTERY of
THOMPSON & COLEGATE

MRR:fs

Memo 66-54

EXHIBIT V

ALBERT J. FORN
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July 22, 1966

John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for the copy of the Revised Recommendations of the Commission relating to Rights and Duties Upon Termination of a Lease.

I heartily endorse the proposals, and believe that they will be a welcome improvement in the present California Law on Landlord and Tenants.

Very truly yours,

ALBERT J. FORN

AJF:DD

Memo 66-54

EXHIBIT VI

#52-50

JOHN W. HUTTON
EDWARD J. FOLEY

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509 BROADWAY
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July 13, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Recommendations of California Law Revision Commission relating to Rights and Duties Upon Termination of a Lease

Gentlemen:

Thank you for the material you recently sent us in the above-entitled matter. We have looked it over and do not have any recommendations thereon, but we would like to let you know that we feel you are doing a splendid job.

Kindly keep us on your mailing list for future publications.

Sincerely yours,

HUTTON and FOLEY

By: Edward J. Foley

EJF:acj

Memo 66-54 EXHIBIT VII

#50-58

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John H. DeMoully
California Law Revision Commission
Law School
Stanford University
Stanford, California 94305

Re: Tentative Recommendation relating to Rights and Duties Upon Abandonment or Termination of Lease

Dear Mr. DeMoully:

Thank you for forwarding a copy of the above recommendation.

I have read the analysis and recommendation with interest and feel that it presents a much more workable and practical approach to the problems of abandonment and termination of leases than presently exists.

Please keep me on your mailing list in these matters. Thank you.

Very truly yours,

WILLIAM G. COSKRAN

WGC/sc

Memo 66-54

EXHIBIT VIII

Stanford Law Review
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

June 9, 1966

Mr. John H. DeMoully
California Law Revision Commission
Crothers Hall
Stanford, California

Dear Mr. DeMoully:

Thank you very much for the material on lease abandonment. I found them quite helpful in my research. My Note on the duty of maintenance or residential leaseholds will be in issue six of the Review. Mrs. Birch will see that you get a copy.

I am in complete accord with the tentative recommendation of the commission as modified by Memorandum 66-7. I find, however, Mr. Herrington's fears unmerited. To begin with, I disagree with Justice Carter's opinion in Dean v. Kuchel and would not be disturbed if the state and local government lost the benefit of this means of financing improvements. Under the tentative recommendations, however, the builder would not lose his security, but would have an even better position. Since the ground lease is subject to early determination on termination of the building lease, the measure of damages available on anticipatory breach of the building lease is the present discounted value of the rent reserved. The repudiation of the building lease has destroyed the builder's property, and the reasonable rental value of nothing is nothing. Other than this, I found no problems and hope you can get the legislature to enact this reform.

Thank you again for your assistance.

Sincerely,

John Bartlett
Board of Editors

JB/vb
enc.

Memo 66-54

EXHIBIT IX

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IN REPLY PLEASE REFER TO:

July 12, 1966

680.1

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Tentative Recommendations Relating to Rights and Duties Upon Abandonment or Termination of a Lease of Real Property, Revised June 17, 1966.

Gentlemen:

At your request, I reviewed the above tentative recommendation, but only superficially at this time. Such superficial review has not disclosed any changes which we would suggest.

If, upon a more thorough review, any changes occur to me, I will forward the suggestion to you.

Sincerely,

Martin Perlberger

MP:jp

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

RELATING TO

RIGHTS AND DUTIES UPON ABANDONMENT OR TERMINATION OF A LEASE OF REAL PROPERTY

This tentative recommendation is published here so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

BACKGROUND

Section 1925 of the Civil Code provides that a lease is a contract. Historically, however, a lease of real property has been regarded as a conveyance of an interest in land. Although the trend of the law within recent years has been to divorce the law of leases from its medieval setting of real property law and adapt it to modern conditions by means of contract principles, the influence of the common law of real property remains strong. The California courts state that a lease is both a contract and a conveyance and apply a blend of contract and conveyance law to lease cases. This blend, however, is frequently unsatisfactory and harsh, whether viewed from the standpoint of the lessor or the lessee.

Under existing law, when a lessee abandons the leased property and repudiates his remaining obligations under the lease, his conduct does not—in the absence of a provision in the lease—give rise to an immediate action for damages as it would in the case of an ordinary contract. Such conduct merely amounts to an offer to surrender the remainder of the term. Confronted with such an offer, the lessor has three alternative courses of action.

First, he may refuse to accept the offered surrender and sue for the accruing rent as it becomes due for the remainder of the term. From the lessor's standpoint, this remedy is seldom satisfactory because he must rely on the continued availability and solvency of a lessee who has already demonstrated his unreliability. Moreover, he must let his property remain vacant, for it still belongs to the lessee for the duration of the lease. In addition, repeated actions may be necessary to recover all of the rental becoming due under the lease. This remedy is also unsatisfactory, from the lessee's standpoint, for it permits the lessor to refuse to make any effort to mitigate or minimize the injury caused by the lessee's default.

Second, he may accept the lessee's abandonment as a surrender of the remainder of the term and regard the lease as terminated. This amounts to a cancellation of the lease or a rescission of the unexecuted portion of the lease. Because in common law theory the lessee's rental obligation is dependent on the continuation of his estate in the land, the termination of the lease in this manner has the effect of terminating the remaining rental obligation. The lessor can recover neither the unpaid rent nor damages for its loss. Moreover, the courts construe any conduct by the lessor that is inconsistent with the lessee's continued ownership of an estate in the leased property as an acceptance of the lessee's offer of surrender, whether or not such acceptance is intended. Hence, efforts by a lessor to minimize his damages frequently result in the loss of all right to the unpaid future rentals as well as all right to any damages for the loss of the future rentals.

Third, he may notify the lessee that the leased property will be relet for the benefit of the lessee, relet the property, and sue for damages caused by the lessee's default. This remedy, too, is unsatisfactory because the courts have held that the cause of action for damages does not accrue until the *end* of the original lease term. Hence, an action to recover any portion of the damages will be dismissed as premature if brought before the end of the original term.

Where the lessee breaches the lease in a material respect so that eviction would be warranted, the lessor has a similar choice of remedies. He may decline to terminate the lease and sue for damages. He may cancel or rescind the lease, evict the lessee, and give up any right to damages for the loss of future rentals. He may also evict the lessee without terminating the lease, relet for the benefit of the lessee, and then sue for damages at the end of the term.

To provide some protection against the possibility of a lessee's breach or repudiation of a lease, lessors sometimes require lessees to make an advance payment to the lessor at the time of the execution of the lease. The courts have held that, if a lessor has sufficient foresight to label this payment as an advance payment of rent or as consideration for the execution of the lease, he may retain the entire amount of the payment when the lease is terminated because of the lessee's breach regardless of the actual damage caused by the breach. If the payment is labeled security for the lessee's performance, however, the lessor is entitled to keep only the amount of his actual damages. And if the payment is labeled as liquidated damages, the courts hold that a provision for its retention is a forfeiture and therefore void.

RECOMMENDATION

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 is terminated by reason of the lessee's breach. Accordingly, the Commission recommends the enactment of legislation designed to effectuate the following principles:

1. Repudiation of a lease, whether by word or by act, should be regarded as a total breach of the lease, giving rise immediately to remedial rights on the part of the aggrieved party, just as repudiation of any other contract gives rise immediately to such remedial rights.

2. When a lease has been repudiated, the aggrieved party should have the right to resort to the usual contract remedies that are available upon repudiation of any other contract. The aggrieved party should have the right to rescind the lease, treat the lease as ended for purposes of his own performance and sue immediately for all damages caused by the repudiation and termination of the lease, or sue for specific or preventive relief if he has no adequate remedy at law.

3. When a lease has been breached in a sufficiently material respect to justify the termination of the lease by the aggrieved party but there has been no repudiation of the lease, the aggrieved party should have the right to resort to the usual contract remedies that are available upon a material breach of any other contract: (1) He should be entitled to treat the breach as a partial breach, regard the lease as continuing in force, recover damages for the detriment caused by the breach, and resort to a subsequent action in case a further breach occurs; (2) in appropriate cases, he should be entitled to specific or preventive relief to assure the continued performance of the lease; (3) he should be entitled to rescind the lease; and (4) he should be entitled to treat the lease as ended for purposes of performance and sue immediately for all damages, both past and prospective, caused by the breach and termination of the lease.

4. Except where a lessor is entitled to specific enforcement of the lease, he should not be able to treat a repudiated lease as still in existence and enforce the payment of the rents as they accrue. Moreover, the eviction of the lessee from the leased property following the lessee's breach should terminate the lease. In each of these cases the lessor should have a right to recover damages that is independent of the continuance of the lease, and the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property should be abandoned.

5. The party repudiating his obligations under a lease should have the right, as he generally does under other contracts, to retract his repudiation and thus nullify its effect at any time before the aggrieved party has brought action upon the repudiation or otherwise changed his position in reliance thereon.

6. The basic measure of the damages when a lease has been repudiated or terminated because of a material breach should be the loss of the bargain represented by the lease. The aggrieved party should be entitled to recover the difference between the value of the remaining rentals provided in the lease and the fair rental value of the property for the remainder of the term. He should also be entitled to recover any incidental damages resulting from the breach, such as moving or renovation expenses necessarily incurred or lost profits. But, as under contract law generally, there should be no right to recover for any loss that is reasonably avoidable. Thus, if the lessor chooses to let the property remain idle, he should not be permitted—as he is under existing law—to recover from the lessee the entire remaining rental obligation.

7. When a lessor relets property after the original lease has been terminated, the reletting should be 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 and not to the defaulting lessee.

8. A liquidated damages provision in a lease should be treated like such a provision in any other contract. When the amount of the prospective damage that may be caused when a lease is terminated because of a material breach cannot be readily ascertained, a fair liquidated damages provision should be enforceable.

9. A defaulting lessee should be entitled to relief from the forfeiture of an advance payment that exceeds the damages caused by his default regardless of the label attached to the payment by the provisions of the lease: A lessor should not have the right to exact forfeitures by the artful use of language in a lease.

10. A lessor's right to recover damages should be independent of his right to bring an action for unlawful detainer to recover the possession of the property, and the damages recommended herein should be 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.

11. Section 3308 of the Civil Code should be repealed. Section 3308 provides, in effect, that a lessor may recover the measure of damages recommended above *if* the lease so provides and the lessor chooses to pursue that remedy. Enactment of legislation effectuating the other recommendations of the Commission would make section 3308 superfluous.

12. Code of Civil Procedure section 1174 should be amended to provide that the eviction of a lessee for breach of the lease terminates the lessee's interest in the property. Section 1174 now permits the eviction of a lessee without the termination of his interest in order to permit the lessor to preserve his right to damages. Under the statute recommended by the Commission, the lessor's right to damages does not depend upon the continuance of the lessee's estate so the provisions of Section 1174 that provide for such continuance are no longer necessary.

13. If a lease is part of a lease-purchase agreement, it should be clear that the lessee's obligation under the lease is specifically enforceable and that he may not, by abandoning the lease, leave the lessor with only the right to recover damages measured by the difference between the consideration specified in the lease and the fair rental value of the property. It is frequently intended that the rental specified in lease-purchase agreements will also compensate the lessor for the improvement that he has agreed to transfer to the lessee at the end of the term. It is necessary, therefore, that the parties understand that the lessee's obligation to pay the full amount of the consideration specified in the

lease may not be defeated by his own act of abandoning the leased property.

PROPOSED LEGISLATION

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

An act to add Sections 1951, 1951.5, 1952, 1953, 1953.5, and 1954 to Chapter 2 of Title 5 of Part 4 of Division 3 of, to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 of, to add Section 3387.5 to, and to repeal Section 3308 of, the Civil Code, and to amend Section 1174 of the Code of Civil Procedure, relating to leases.

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

SECTION 1. Section 1951 is added to Chapter 2 of Title 5 of Part 4 of Division 3 of the Civil Code, to read:

1951. A lease of real property is repudiated when, without justification:

(a) One party communicates to the other party by word or act that he either will not or cannot perform his remaining obligations under the lease;

(b) Either party does any voluntary act or engages in any voluntary course of conduct which renders substantial performance of his obligations under the lease impossible or apparently impossible; or

(c) The lessor actually evicts the lessee from the leased property.

Comment. Section 1951 is definitional. The substantive effect of a repudiation as defined in Section 1951 is described in the following sections.

Subdivisions (a) and (b) follow the definition of an anticipatory repudiation that appears in Section 318 of the *Restatement of Contracts*.

Under the preliminary language of Section 1951, subdivision (c) applies only when the eviction is "without justification." Such an eviction is one that the lessor did not have a right to make under the terms of the lease or under the substantive law governing the rights of lessors and lessees generally. If the lessor had the right to evict the lessee, the lease would be terminated by the eviction under the provisions of Section 1951.5(a). But if the lessor did not have the right to evict, the eviction would not terminate the lease if the lessee sought and obtained specific enforcement of the lease. See Section 1951.5(c). The word "actually" is intended to make clear that subdivision (c) refers to actual eviction, not "constructive eviction." Under Section 1951.5, a lessee must treat an actual eviction as a termination of the lease unless he can obtain a decree for specific or preventive relief. For wrongful conduct not amounting to an actual eviction (sometimes referred to in the past as "constructive eviction"), the lessee may elect to treat the lease as continuing and recover damages for the detriment caused by the wrongful conduct. See Section 1954.

SECTION 2. Section 1951.5 is added to said chapter, to read:

1951.5. A lease of real property is terminated prior to the expiration of the term when:

(a) The lessor, with justification, evicts the lessee from the property;

(b) The lessee vacates the property pursuant to a notice served pursuant to Sections 1161 and 1162 of the Code of Civil Procedure or pursuant to any other notice or request by the lessor to vacate the property; or

(c) The lease is repudiated by either party thereto and the aggrieved party is not entitled to or does not seek specific or preventive relief to enforce the provisions of the lease as provided in subdivision (c) of Section 1953.

Comment. Section 1951.5 prescribes certain conditions under which a lease is terminated prior to the end of the term. The list is not exclusive. Section 1933 also sets forth certain conditions under which a lease is terminated. And, of course, if a lease is rescinded pursuant to Sections 1688-1693, the interests of the respective parties come to an end prior to the expiration of the term of the lease.

Subdivisions (a) and (b) refer both to the situation where a condition has occurred warranting a termination of the lease and to the situation where a breach of the lessee's obligations warrants a termination of the lease. Under Sections 1953 and 1954, however, the lessor would be entitled to damages following the eviction of the lessee only in the case of an eviction following a breach.

To the extent that subdivisions (a) and (b) provide that an eviction following a breach of the lease by the lessee is a termination of the lease, they change the California law. Under Code of Civil Procedure Section 1174 (as amended in 1931), a lessee could be evicted from the leased property following a material breach without terminating the lease. Presumably that provision was designed to overcome such cases as *Costello v. Martin Bros.*, 74 Cal. App. 782, 241 Pac. 588 (1925), which held that the eviction of the lessee terminated the lease and ended the lessor's right to recover either the remaining rentals due under the lease or damages for the loss of such rentals. Because Sections 1953 and 1954 provide for the recovery of damages despite the termination of the lease and the eviction of the lessee, there is no further need to continue the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property.

Subdivision (c) changes the California law in part. Under prior California law, a repudiation of the lease by the lessee and his abandonment of the property did not terminate the lease. The courts stated that the lessor could regard the lease as continuing in existence and recover the rents as they came due. See *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944); *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891). Subdivision (c) makes it clear that a lessor may no longer utilize this remedy. Upon a repudiation of the lease by the lessee, the lessor cannot regard the lease as continuing and enforce the payment of rental as it falls due unless he is entitled to and obtains a decree requiring specific performance of the lease as provided in Sections 1952 and 1953. Instead, Section 1953 grants the lessor the right to recover all of the damages caused by the lessee's repudiation.

Subdivision (c) is consistent with the California law relating to a lessee's remedies. Under subdivision (c) as under the prior California law, a lessee may regard the lease as terminated by the lessor's repudiation and eithe sue for his damages under Section 1953 or rescind the lease. Under some circumstances the lessee may also seek specific performance of the lease under subdivision (c) of Section 1953. *Cf.* 30 CAL. JUR. 2d *Landlord and Tenant* § 314 (1956).

SECTION 3. Section 1952 is added to said chapter, to read:

> 1952. The effect of a repudiation of a lease of real property is nullified if, before the other party has brought an action for damages caused by the repudiation or otherwise changed his position in reliance on the repudiation, the repudiator becomes ready, willing, and able to perform his remaining obligations under the lease and the other party is so informed.

Comment. Section 1952 codifies the rule applicable to contracts generally that a party who repudiates a contract may retract his repudiation, and thus nullify its effect, if he does so before the other party to the contract has materially changed his position in reliance on the repudiation. RESTATEMENT, CONTRACTS §§ 280, 319 (1932); 4 CORBIN, CONTRACTS § 980 (1951).

SECTION 4. Section 1953 is added to said chapter, to read:

1953. When a party repudiates a lease of real property, the other party may do any one of the following:

(a) Rescind the lease in accordance with Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3.

(b) Recover damages in accordance with Article 1.5 (commencing with Section 3320) of Chapter 2 of Title 2 of Part 1 of Division 4.

(c) Obtain specific or preventive relief in accordance with Title 3 (commencing with Section 3366) of Part 1 of Division 4 to enforce the provisions of the lease if such relief is appropriate.

Comment. Except where a mining lease is involved (see *Gold Mining & Water Co. v. Swinerton*, 23 Cal. 2d 19, 142 P.2d 22 (1943)), the California courts have not applied the contractual doctrine of anticipatory repudiation to a lessee's abandonment of the leasehold or repudiation of the lease. See *Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731 (1912); *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891). Section 1953 is designed to overcome the holdings in these cases and to make the contractual doctrines of anticipatory breach and repudiation applicable to leases generally. *Cf.* 4 CORBIN, CONTRACTS §§ 954, 959-989 (1951).

Under the prior California law, when a lessee abandoned the leased property and repudiated the lease, the lessor had three alternative remedies: (1) to consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to consider the lease as terminated and retake possession for his own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee at the end of the lease term for the difference between the lease rentals and what the lessor could in good faith procure by reletting. *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 671, 155 P.2d 24, 28 (1944); *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932).

Under Section 1953, a lessor may still terminate the lease and retake possession for his own account by rescinding the lease under subdivision (a). But a lessor will not be able to let the property remain vacant and recover the rent as it becomes due, for Section 1951.5 provides that the lessee's repudiation terminates the lease and, hence, there is no more rent due. Under Section 1953, if a lessor wishes to nullify the effect of the lessee's repudiation and retain his right to the accruing rental installments, the lessor is required to seek specific enforcement of the lease under subdivision (c). Under subdivision (b), the lessor may recover damages for the loss of the bargain represented by the original lease—*i.e.*, the difference between the rent reserved in the lease and the fair rental value of the property together with all other detriment proximately caused by the repudiation. Under the prior law, too, the lessor could recover such damages; but under subdivision (b) the lessor's cause of action accrues upon the repudiation while under the prior law the lessor's cause of action did not accrue until the end of the original lease term. See *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932).

The remedies specified in Section 1953 may also be used by a lessee when the lessor breaches the lease, but in this respect Section 1953 merely continues the preexisting law without significant change. See 30 CAL. JUR. 2d *Landlord and Tenant* § 314 (1956).

SECTION 5. Section 1953.5 is added to said chapter, to read:

1953.5. The time for the commencement of an action based on the repudiation of a lease of real property begins to run:

(a) If the repudiation occurs before any failure of the repudiator to perform his obligations under the lease, at the time of the repudiator's first failure to perform the obligations of the lease.

(b) If the repudiation occurs at the same time as, or after, a failure of the repudiator to perform his obligations under the lease, at the time of the repudiation.

Comment. Section 1953.5 clarifies the time the statute of limitations begins to run on a cause of action for repudiation of a lease. The rule stated is based on Section 322 of the Restatement of Contracts. Under the preexisting California law, the statute of limitations did not begin to run until the end of the lease term. See *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945).

Section 1953.5 merely sets forth the time the statute of limitations begins to run. It does not purport to prescribe the earliest date for the commencement of an action based on repudiation. Nothing here forbids the commencement of such an action prior to the date the statute of limitations commences to run.

SECTION 6. Section 1954 is added to said chapter, to read:

1954. When a party breaches a lease of real property in a material respect without repudiating the lease, the other party may do any one of the following:

(a) Rescind the lease in accordance with Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3.

(b) Terminate the lease and recover damages in accordance with Article 1.5 (commencing with Section 3320) of Chapter 2 of Title 2 of Part 1 of Division 4.

(c) Without terminating the lease, recover damages for the detriment caused by the breach in accordance with Article 1 (commencing with Section 3300) of Chapter 2 of Title 2 of Part 1 of Division 4.

(d) Obtain specific or preventive relief in accordance with Title 3 (commencing with Section 3366) of Part 1 of Division 4 to enforce the provisions of the lease if such relief is appropriate.

Comment. If a party to a lease repudiates the lease, whether or not he commits any other breach of the lease, the remedies of the aggrieved party are governed by Section 1953. Section 1954 prescribes the remedies available to the aggrieved party when a lease is breached in a material respect but there is no repudiation of the lease. The remedies prescribed are those that are usually available to an aggrieved party to any contract when that contract is breached in a material respect without an accompanying repudiation. See *Coughlin v. Blair*, 41 Cal. 2d 587, 262 P.2d 305 (1953); 4 CORBIN CONTRACTS § 946 (1951).

Under Section 1954, the aggrieved party may simply rescind or cancel the lease without seeking affirmative relief. He may regard the lease as ended for purposes of performance and seek recovery of all damages resulting from such termination, including damages for both past and prospective detriment. He may regard the lease as continuing in force and seek damages for the detriment caused by the breach, resorting to a subsequent action in case a further breach occurs. And, finally, in appropriate cases the aggrieved party may seek specific performance of the other party's obligations under the lease, or he may seek injunctive relief to prevent the other party from interfering with his rights under the lease.

Section 1954 makes little, if any, change in the law insofar as it prescribes a lessee's remedies upon breach by the lessor. See 30 CAL. JUR. 2d *Landlord and Tenant* §§ 313-320 (1956). Subdivisions (a), (c), and (d) make little change in the remedies available to a lessor upon breach of the lease by the lessee. See 30 CAL. JUR. 2d *Landlord and Tenant* § 344 (1956).

Subdivision (b), however, probably changes the law relating to the remedies of an aggrieved lessor. Although the prior law is not altogether clear, it seems likely that if a lessor terminated a lease because of a lessee's breach and evicted the lessee, his cause of action for the damages resulting from the loss of the rentals due under the lease did not accrue until the end of the original lease term. See *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945);

Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932). Under subdivision (b), an aggrieved lessor may terminate the lease and immediately sue for the damages resulting from the loss of the rentals that would have accrued under the lease.

SECTION 7. 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 Breach and Termination of Lease of Real Property

Comment. This article sets forth in some detail the damages that may be recovered when a lease of real property is terminated by reason of the lessee's or lessor's breach. The article also sets forth the lessee's right 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 termination of lease for breach*

3320. Subject to Section 3322, if a lease of real property is terminated because of the lessee's breach thereof, the measure of the lessor's damages for such breach is the sum of the following:

(a) The worth of the excess, if any, of the rent and charges equivalent to rent reserved in the lease for the portion of the term following such termination over the reasonable rental value of the property for the same period.

(b) Subject to Section 3324, any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

Comment. Section 3320 prescribes the measure of the damages a lessor is entitled to recover when the lease is terminated because of the lessee's breach.

Under subdivision (a), the basic measure of the lessor's damages is the excess of the unpaid "rent and charges equivalent to rent" under the lease over the rental the lessor can reasonably expect to obtain by reletting the property. In this context, "rent and charges equivalent to rent" refers to all obligations the lessee undertakes in exchange for the use of the leased property. For example, if the defaulting lessee had promised to pay the taxes on the leased property and the lessor could not relet the property under a lease either containing such a provision or providing sufficient additional rental to cover the accruing taxes, the loss of the defaulting lessee's assumption of the tax obligation would be included in the damages the lessor is entitled to recover under Section 3320.

The measure of damages described in subdivision (a) is essentially that described in Civil Code Section 3308 (superseded by this article) as enacted in 1937. The measure of damages described in Section 3308 is applicable, however, only when the lease so provides and the lessor chooses to invoke that remedy. The measure of damages described in Section 3320 is applicable in all cases.

Subdivision (b) is included in this section in order to make it clear that the basic measure of damages described in Section 3320 is not the limit of a lessor's recoverable damages when the lease is terminated by reason of the lessee's breach.

When a lease is terminated, it will usually be necessary for the lessor to take possession for a time in order to prepare the property for reletting and to secure a new tenant. A lessor should 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 lessee an opportunity to retract his repudiation or cure his breach and resume his obligations under the lease. If the lessor does so and the lessee does not accept the opportunity to cure his default, 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, the lessor should be entitled to 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 should be entitled to recover them also. Subdivision (b), which is based on Civil Code Section 3300, provides that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. This would include, of course, damages for the lessee's breach of specific covenants of the lease.

Subdivision (b) is "subject to Section 3324" in order to make clear that the lessor's attorney's fees are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or lessee.

Section 3320 has been made subject to Section 3322 in order to make it clear that, under Section 3320 as under the law relating to contracts generally the defaulting lessee is not liable for any consequences that the lessor can reasonably avoid. Moreover, if the lessor relets the property for a rental in excess of the rental provided in the original lease, the damages the lessor is entitled to recover under Section 3320 must be reduced accordingly.

§ 3321. Lessee's damages upon termination of lease for breach

3321. Subject to Section 3322, if a lease of real property is terminated because of the lessor's breach thereof, the measure of the lessee's damages for such breach is the sum of the following:

(a) The excess, if any, of the reasonable rental value of the property for the portion of the term following such termination over the worth of the rent and charges equivalent to rent reserved in the lease for the same period.

(b) Subject to Section 3324, any other damages necessary to compensate the lessee for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

Comment. Section 3321 prescribes the basic measure of the damages a lessee is entitled to recover when the lease is terminated because of the lessor's breach. It is consistent with the existing California law. *Stillwell Hotel Co. v. Anderson*, 4 Cal. 2d 463, 469, 50 P.2d 441, 443 (1935) ("The general rule of damages is that the lessee may recover the value of his unexpired term and any other damage which is the natural and proximate result of the eviction.") Where appropriate, a lessee may recover damages for loss of good will, loss of prospective profits, and expenses of removal from the leased property. See, *e.g.*, *Beckett v. City of Paris Dry Goods Co.*, 14 Cal. 2d 633, 96 P.2d 122 (1939); *Johnson v. Snyder*, 99 Cal. App. 2d 86, 221 P.2d 164 (1950); *Riechhold v. Sommarstrom Invest. Co.*, 83 Cal. App. 173, 256 Pac. 592 (1927).

Section 3321 is subject to Section 3322 to make clear that the defaulting lessor is not liable for any consequences that the lessee can reasonably avoid. Subdivision (b) is subject to Section 3324 in order to make clear that the lessee's attorney's fees are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or lessee.

§ 3322. Avoidable detriment; lessor's profits on reletting

3322. (a) A party to a lease of real property that has been breached by the other party may not recover for any detriment caused by such breach that could have been avoided through the exercise of reasonable diligence without undue risk of other substantial detriment.

(b) When a lease of real property is terminated because of the lessee's breach thereof and the lessor relets the property, the lessor is not accountable to the lessee for any profits made on the reletting, but any such profit shall be set off against the damages to which the lessor is otherwise entitled.

Comment. Under prior California law, a lessor could decline to retake possession of leased property after it had been abandoned by the lessee and could recover the full rental as it came due from time to time under the lease. See *De Hart v. Allen*, 26 Cal. 2d 829, 832, 161 P.2d 453, 455 (1945). Subdivision (a) of Section 3322 substitutes for this rule the rule applicable to contracts generally that a party to a lease that has been breached by the other party may not recover for any detriment caused by such breach that could have been avoided through the exercise of reasonable diligence. See RESTATEMENT, CONTRACTS § 336 (1932).

Under prior law, a lessor could relet property after the original lessee has abandoned the lease if he did so either on his own account (in which case the lessee's rental obligation was 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 received a higher rental when reletting for the account of the lessee than was provided in the original lease, the lessee was entitled to the profit.

Under Section 3322, a lessor who relets property after the original lessee has abandoned it does so for his own account; and under subdivision (b) any profit received belongs to the lessor rather than 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 subdivision (b) 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).

§ 3323. Liquidated damages

3323. Notwithstanding Sections 3320 and 3321, upon any breach of the provisions of a lease of real property, liquidated damages may be recovered 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. Provisions in leases for liquidated damages upon repudiation of the lease by the lessee have been held to be void. *Redmon v. Graham*, 211 Cal. 491, 295 Pac. 1031 (1931); *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130 (1899). Such holdings were proper so long as the lessor's cause of action upon repudiation 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 Section 1953 and this article, however, the lessor's right to damages accrues at the time of the repudiation; 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 percentage lease. It may be the case if the property is unique and its fair rental value cannot be determined. Accordingly, Section 3323 is included as a reminder that the cases holding liquidated damages provisions in leases to be void are no longer authoritative, and that in some cases such provisions may be valid.

So far as provisions for liquidated damages upon a lessor's breach are concerned, Section 3323 is declarative of the preexisting law under which such provisions were upheld if reasonable. See *Scid Pak Sing v. Barker*, 197 Cal. 321, 240 Pac. 765 (1925).

§ 3324. Attorney's fees

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

(b) If a lease provides that one party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the lease may also recover attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

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 makes it clear that the remaining sections in the article do not impair a party's rights under such a provision.

Subdivision (b) is included in the section to equalize the operation of leases that provide for the recovery of an attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other seldom has sufficient bargaining power to require the inclusion of a provision for attorney's fees that works in his favor. Under Section 3324, if either party is entitled by a provision in the lease to recover attorney's fees, the other may recover such fees when he is forced to resort to the courts to enforce his rights under the lease. To prevent the provisions of subdivision (b) from being nullified by standard waiver provisions in leases, the second sentence of subdivision (b) prohibits the waiver of a party's right to recover attorney's fees under the subdivision until the right actually accrues.

§ 3325. Lessee's relief from forfeiture

3325. Subject to the lessor's right to obtain specific enforcement of the lease, if a lease of real property is terminated because of the breach thereof by the lessee or if the lessee abandons 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 or abandonment of the lease and (b) any damages, including liquidated damages as provided in Section 3323, to which the lessor is entitled by reason of such breach 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.

Section 3325 changes the prior California law. Under the prior California law the right of a lessee to recover an advance payment depended on whether the advance payment was designated a security deposit (lessee may recover), liquidated damages (lessee may recover), an advance payment of rental (lessee may not recover), *Compare Warning v. Shapiro*, 118 Cal. App. 2d 72, 257 P.2d may not recover, or a bonus or consideration for the executor of the lease (lessee 74 (1953) ($12,000 forfeited because designated as both a bonus and an advance payment of rental) *with Thompson v. Swirym*, 95 Cal. App. 2d 619, 213 P.2d 740 (1950) (advance payment of $2,800 held recoverable as a security deposit). See discussion in Joffe, *Remedies of California Landlord upon Abandonment by Lessee*, 35 So. Cal. L. Rev. 34, 44 (1961) and Note, 26 Calif. L. Rev. 385 (1938). See also Section 3323 and the comment to that section.

§ *3326. Unlawful detainer actions*

3326. (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 a claim for damages was made and determined on the merits in the previous action.

Comment. Section 3326 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 3326 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 3326, such damages may be recovered in either action; but the lessor is entitled to but one determination of the merits of a damages claim for any particular detriment.

Section 8. 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 it is 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.

SECTION 9. Section 3387.5 is added to the Civil Code, to read:

3387.5. (a) A lease of real property may be specifically enforced by any party, or assignee of a party, to the lease when:

(1) The lease provides for the transfer to the lessee at the termination of the term of the lease of title to buildings or other improvements affixed by the lessor to the leased property; or

(2) The lease contains an option which the lessee may exercise at the termination of the lease to acquire title to buildings or other improvements affixed by the lessor to the leased property.

(b) Nothing in this section affects the right to obtain specific or preventive relief in any other case where such relief is appropriate.

Comment. Under the prior California law, if a lessee defaulted in the payment of rent, abandoned the property, or otherwise breached the lease, the lessor could refuse to terminate the lease and sue to collect the rental installments as they accrued. Because the lessee's obligation under a lease was, in effect, specifically enforceable through a series of actions, leases have been utilized by public entities to finance the construction of public improvements. The lessor constructs the improvement to the specifications of the public entity-lessee, leases the property as improved to the public entity, and at the end of the term of the lease all interest in the property and the improvement vests in the public entity. See, *e.g.*, *Dean v. Kuchel*, 35 Cal. 2d 444, 218 P.2d 521 (1950); *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P.2d 14 (1942). Sometimes the public entity's right to acquire the property or the improvement is absolute under the terms of the agreement; sometimes it depends on the exercise of an option. In either event, this system of financing public improvements would be seriously jeopardized if upon repudiation of the lease by the lessee the lessor's only right were the right to recover damages measured by the difference between the worth of the remaining rentals due under the lease and the rental value of the property. See Section 3320.

Section 3387.5 has been added to the Civil Code, therefore, to make it abundantly clear that a lease is specifically enforceable if it provides for the transfer of improvements constructed on the leased property to the lessee at the termination of the lease. Under Section 3387.5, it will be clear that a lessee may not avoid his obligation to pay the lessor the full amount due under the lease by abandoning the leased property and repudiating the lease.

Although Section 3387.5 may not be necessary inasmuch as agreements for the transfer of interests in real property are generally specifically enforceable, Section 3387.5 will avoid any uncertainty concerning the nature of the obligations that are assumed by the parties when entering into lease-purchase agreements.

SECTION 10. Section 1174 of the Code of Civil Procedure is amended to read:

1174. If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement [if the notice required by Section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited.] [Material in brackets deleted by amendment.]

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. Judgment against the defendant guilty of the forcible entry, or the forcible or unlawful detainer, may be entered in the discretion of the court either for the amount of the damages and the rent found due, or for three times the amount so found.

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

Comment. The language deleted from Section 1174 was added to permit a lessor to evict a defaulting lessee and relet the premises without forfeiting his right to look to the lessee for any resulting deficiencies in the accruing rentals. Under the pre-existing law, a lessor whose lessee defaulted in the payment of rent had to choose between suing the lessee from time to time to collect the accruing rentals and completely terminating the lease and the lessee's obligation to pay any more rent. *Costello v. Martin Bros.*, 74 Cal. App. 782, 786, 241 Pac. 588 (1925).

Inasmuch as Civil Code Sections 1953 and 1954 permit a lessor to recover his damages for the loss of the future rentals due under the lease despite the termination of the lease, the deleted language is no longer necessary.

SEC. 11. This act applies to all leases, whether executed, renewed, or entered into before or after the effective date of this act, to the full extent that it constitutionally can be so applied.

Comment. Section 11 provides that this act is to be applied to leases executed before as well as after its effective date. The purpose of Section 11 is to permit, insofar as it is possible to do so, the courts to develop and apply a uniform body of law applicable to all cases involving a repudiation or material breach of a lease that arise after the effective date of the act. The section recognizes that the constitutional prohibition against the impairment of the obligation of contracts may limit the extent to which this act can be applied to leases executed before its effective date. But whether there is such a constitutional limitation on the retroactive application of this act, and if so what the extent of such limitation is, must be determined by the courts.