

#50

1/6/67

Memorandum 67-11

Subject: Study 50 - Abandonment or Termination of a Lease

Attached to this memorandum on pink paper is an advance private copy of a portion of CAJ's report to the Board of Governors. Generally, CAJ approves the lease recommendation. There are several criticisms and objections, however, but some of these have already been met by revisions the Commission has made that CAJ has not had an opportunity to consider.

Retrospective Application of the Act

A majority of CAJ objects to Section 13 of the proposed act which provides:

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.

A minority suggests that the proposed act provides a fairer measure of damages and fairer rights and duties between lessor and lessee and that these may be made applicable to preexisting leases without constitutional objection, citing Feckenscher v. Gamble, 12 Cal.2d 482 (1938). The essence of the Feckenscher opinion appears in the following passage:

Objection is further made by the defendants as to the measure of damages applied by the trial judge in arriving at the judgment. . . . After the completion of the transaction and before the trial of the case, the measure of damages was changed by the legislature by an amendment and the new measure was in effect at the date of the trial. The case of Tulley v. Tranor, 53 Cal. 274, holds unequivocally that no one has a vested right in a measure of damages. The court there said: "We can conceive of no principle of constitutional law which is violated by a change in this rule, unless, at least, the new rule on its face deprives the party of every reasonable method of securing just compensation. No case has been referred to in which it has been held that to change an arbitrary and statutory rule of damages in cases of tort was a deprivation of any vested right of one who had previously suffered the wrong, and we can see no reason why it should be so held, even if it should be made to appear in a particular case that the plaintiff would not recover as much as he would have done had the former rule been contained."

The quoted passage suggests an obvious distinction. We are here dealing with the impairment of the obligation of contracts where the Feckenscher and Tulley cases were dealing with a change in the measure of damages for torts. Nevertheless, the cases provide strong support by analogy for the Commission's action, for those cases involved changes in the measure of damages after the cause of action had already accrued.

Even the minority of CAJ opposes the retroactive application of Section 3325, which relates to payment of advance consideration, advance rent, and the like. CAJ states that, "As a matter of fairness, such changes should not be imposed on those who have heretofore bargained under well known rules relating to the obligations and remedies of landlord and tenant."

It may be that the latest revision of the Commission's recommendation meets some of the objections raised by CAJ. The Commission has added Section 1954.5 to its recommendation to provide that the parties to a lease entered into after the effective date of the act cannot modify their available remedies and rights by the lease, but provisions of leases entered into prior to the effective date of the act which specify remedies and rights at variance with those specified in our act are valid. Thus, under the Commission's present recommendation, if the parties have actually bargained for and have specified remedies in their lease, our act will not affect those remedies. Our act will apply retroactively only if the parties have not specified their remedies.

Severability Section

CAJ suggests the addition of a severability section to preserve the force of the statute if some provision is held unconstitutional or if a particular application is held unconstitutional.

Such a section might be added, but we doubt if it would change any decisions relating to the statute. California cases dealing with unconstitutional statutes containing no severability clause have held:

The fact that a statute is unconstitutional in part does not necessarily invalidate the entire statute. The remaining parts of the statute may be preserved if they can be separated from the unconstitutional part without destroying the statutory scheme and purpose. [People v. McCaughan, 49 Cal.2d 409, 416 (1957).]

The unconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions. . . .

Where only a part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all the parts thereof must be so interdependent as that no one part may be eliminated without destroying the force of the whole statute. [People v. Lewis, 13 Cal.2d 280, 284 (1939).]

On the other hand, the presence of a severability clause does not save a statute where the courts determine that the unconstitutional part is such an integral part of the whole statute that it cannot be severed from the remainder. For example, in Fort v. Civil Service Commission, 61 Cal.2d 331, 339 (1964), the court held:

Where a provision encompasses both valid and invalid restrictions on free speech and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the provision is void in its entirety regardless of whether the particular conduct before the court could be constitutionally regulated and whether there is a severability clause applicable to the provision. [See also In re Blaney, 30 Cal.2d 643 (1947); In re Portnoy, 21 Cal.2d 237 (1942).]

Therefore, we see nothing to be gained by adding a severability clause.

Application to Mineral Leases

CAJ asks whether there should be an exclusion for mineral leases. The last time the Commission considered this subject it added Sections 1954.7

and 3327, both of which provide:

An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

This provision seems to meet the objection raised by CAJ.

"Repudiation" and "Breach"

CAJ's report raises two questions concerning the language used in the proposed statute. The first question, relating to the use of the word "abandoned" in Section 3325, has already been answered by the revision of Section 3325 to eliminate the use of the term. The second problem is that the damages sections use the term "breach" while Sections 1951 et seq. define "repudiation" and state the consequences of a repudiation. These sections do not affirmatively state that a repudiation is a breach. It is apparent, however, that Section 1953 treats a repudiation as a total breach. The only question is whether there should be an explicit statement somewhere in these sections that a repudiation is a breach.

Although we do not think that such a provision is essential, we could add such a provision to Section 1951 which defines "repudiation."

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

IV

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

GENERAL PURPOSES OF MEASURE:

This is a revised "tentative recommendation" (dated June 17, 1966) of a measure considered by this committee in 1965-66. Certain comments on the original text, under Board authority, were transmitted directly to the Commission. The revision made by the Commission appears to reflect favorable consideration of a number of such comments. The revised text of June 17, 1966 is substantially changed from the original form, both as to detail and as to mutuality of rights and remedies between lessor and lessee.

In its later form, this proposal does the following:

First, it substitutes for present statutory and case law relating to lessor's and lessee's remedies upon breach or abandonment of lease a comprehensive statutory statement setting forth such remedies and a statutory measure of damages based upon principles of contract law. See new CC 1951, 1951.1, 1952, 1953, 1953.5, 1954, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3387.5, CCP 1174 (amend) and present CC 3308 (repeal).

Second, it provides in CC 3324 that if a lease provides that one party to the lease may recover attorney's fees, then the other party to the lease may also recover attorney's fees, if he prevails.

Third, it provides in CC 3325 that if a lease of real property is terminated because of breach 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 the execution thereof, or by any other term)" that is in excess of (a) the "unused" part of said payment on a pro rata basis

(i.e., the amount in excess of the portion of the total....that is fairly allocable to the portion of the term prior to the termination or abandonment); and (b) any damages, including liquidated damages as provided by Section 3323, to which the lessor is entitled by reason of such breach or abandonment. Under this proposed section, according to the Commission's Report, p. 3, 29, the California law would be changed, particularly as to bona fide advance rent and bona fide consideration payments, for which the lessor presently need not account.

Fourth, an "actual" eviction of the lessee (in contrast with the present California law of "constructive eviction") is required, to constitute a "repudiation" of the lease by the lessor. See CC 1951, Report, p. 8-9.

Fifth, The Act is intended to have the fullest possible application, as applied to existing leases. It provides in Sec. 11 that: "This Act applies to all leases, whether executed, or entered into, before or after the effective date of this Act, to the full extent that it can be constitutionally so applied."

In reference to the changes referred to under "First," supra, the application of "contract" principles necessarily makes substantial changes in existing law relating to a lessor's remedies upon breach or abandonment by the lessee, and also in the lessee's remedies, though a breach by the lessor is not a common occurrence. In part, it may be noted that upon "repudiation" of a lease by a lessee, the lessor may rescind the lease, or terminate the lease and recover damages as provided in the Act, or obtain specific or preventive relief. (New CC 1953). The damages herein referred to are stated as follows:

CC 3320 (new). Subject to Section 3322,* if a lease of real property is terminated ... the measure of the lessor's damages ... 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 ordinary course of things would be likely to result therefrom.

RECOMMENDATIONS OF THIS COMMITTEE:

First, the committee by action at its General Meeting on December 12, 1966, recommends (10 to 4) that Sec. 11 of the Act be re-drafted to make the Act prospective in application, i.e., to apply to leases executed after its effective date. (The matter of renewals of existing leases after such effective date was not discussed.)

Those in the minority agree that Section 3325, relating to payment of consideration, advance rent and the like, should be prospective in operation only. They are thus in accord with the minority on this phase.

Reasons for Prospective Application of Entire Act.

In the view of the majority of the committee, the Act makes such substantial changes that it should be applied prospectively only. The

*Prescribes duty of innocent party to mitigate damages.

**Provides for "reciprocal" right to recover attorney's fees.

problems of consideration or advance rent paid* simply highlight the difficulties. As a matter of fairness, such changes should not be imposed on those who have heretofore bargained under well known rules relating to the obligations and remedies of landlord and tenant.

Minority view: The minority mentioned above agree that income tax and other considerations are such that Sec. 3325 should not be attempted to be made retrospective. However, as to the balance of the Act, except possibly for Sec. 3324 (attorney's fees), the Act provides a fairer measure of damages and fairer rights and duties between lessor and lessee. It believes that a reasonable change in remedies upon default and in the measure of damages may be applied to pre-existing leases, without constitutional objection. See Feckensher v. Gamble () 19 Cal. 2d 482, 499.

Second, certain changes of detail are recommended by the Northern Section.

The Northern Section states:

"Severability section. It is believed a section should be added, embracing not only legal provisions, but applications in particular circumstances. Example: The provision for mutuality of attorney's fees, where the lease provides for such fees for one party, might be held invalid, in some applications, without affecting other provisions of the Act.

*The following example was cited by the Northern Section:

"Example: A lessor in good faith in 1959 enters into a long term lease, selecting one of several offers from persons engaged in competing businesses and receiving bona fide 'consideration' for entering into the particular lease. In 1968 (after Sec. 3325 and Sec. 11 of the Act become operative), the tenant breaches the lease. Should the lessor now be held to the allocation and 'damage' formula of Sec. 3325, in respect of the 'consideration' paid in 1959? Is such application constitutional? Are there income tax complications?"

Application to Mineral Leases. Payment of 'consideration' for a mineral lease involving the right to explore for oil and gas is common. Not only in this respect, but in other respects, the Act does not appear designed for mineral and similar types of leases. Should there be an exclusion? Is 'abandonment' a 'repudiation'? A question of form is raised. Sec. 3325 indicates that a lease is terminated if the lessee 'abandons' the lease. Sec. 1951, which defines 'repudiation,' does not expressly include 'abandonment.' Seemingly, it should do so.

What Does 'Breach' Include? Again, as to form: In Sec. 3320 and 3321 (and elsewhere) the important term is 'breach.' Is this sufficient to include 'repudiation' and 'abandonment'? A cross reference to CC 3320 appears in CC 1953, relating to 'repudiation,' but such reference may be technically deficient." The Southern Section has concurred therein.

Finally, it is to be noted that the Sections characterize the proposed Act as a whole as well conceived and well drafted (subject to the specific comments herein).

As in the case of the two preceding items, the committee did not consider to what extent the proposed measure involves questions of substantive law or public policy. See prior discussion.

Respectfully submitted,

Nathan G. Gray, Chairman

Sidney H. Wall, Vice-Chairman

CC: Other Members of Committee
Messrs. Hayes, Ellingwood

**RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION**

relating to

ABANDONMENT OR TERMINATION OF A LEASE

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:

(1) 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 landlord'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 rent 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.

(2) 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 con-

tinued ownership of an estate in the leased property as an acceptance of the lessee's offer of surrender, whether or not such an 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 of all right to any damages for the loss of the future rentals.

(3) He may notify the lessee that the leased property will be relet for the benefit of the lessee, relet the property, and sue for the 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: (1) He may decline to terminate the lease and sue for damages. (2) He may cancel or rescind the lease, evict the lessee, and give up any right to damages for the loss of future rentals. (3) He may 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. If he has sufficient foresight to label this payment as an advance payment of rent or as consideration for the execution of the lease, the lessor 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.

RECOMMENDATIONS

The Law Revision Commission has concluded that the rules generally applicable under contract law 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 same remedies that are available upon the repudiation of a contract. Thus, the aggrieved party should have the right (1) to rescind the lease, (2) to treat the lease as ended for purposes of his own performance and to sue immediately for all damages caused by the repudiation and termination of the lease, or (3) to sue for specific or preventive relief if he has no adequate remedy at law.

3. When a lease has not been repudiated but has been breached in a sufficiently material respect to justify the termination of the lease, the aggrieved party should have the right to resort to the same remedies that are available upon a material breach of a 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 to 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 kinds of 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 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 and not for the lessee's. Of course, such a reletting should reduce the damages to which the lessor is entitled, but any profit made upon the reletting 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 by a breach of the lease 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 revised to limit its application to personal property. Section 3308 provides, in effect, that a lessor of real or personal property 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 insofar as real property is concerned. Section 3308 should also be revised to eliminate the implication that arises from its terms that a lessor of personal property cannot sue for all of his prospective damages unless the lease so provides.

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 proposed legislation, the lessor's right to damages does not depend upon the continuance of the lessee's estate; therefore, the provisions of Section 1174 that provide for such continuance are no longer necessary.

13. If a lease is actually a means for financing the acquisition or improvement of the leased property, 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 an improvement that he has agreed to construct for the benefit of the lessee. 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 amend Section 3308 of, to add Sections 1951, 1951.5, 1952, 1953, 1953.5, 1954, 1954.5, 1954.7, and 3387.5 to, and to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 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:

RIGHTS UPON REPUDIATION OR TERMINATION OF LEASE OF REAL PROPERTY

§ 1951. Repudiation of lease

SECTION 1. Section 1951 is added to the Civil Code, to read:

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

- (a) Either party communicates to the other party by word or act that he will not or cannot substantially perform his remaining obligations under the lease;
- (b) Either party by voluntary act, or by voluntarily engaging in a course of conduct, renders substantial performance of his remaining obligations under the lease impossible or apparently impossible; or
- (c) The lessor actually evicts the lessee from the the leased property.

Comment. Section 1951 is definitional. The substantive effect of a repudiation as defined in Section 1951 is described in the sections that follow in this chapter.

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). Subdivision (c) refers only to actual eviction, not "con-

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 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.

§ 1951.5. Termination of lease

Sec. 2. Section 1951.5 is added to the Civil Code, 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 quits 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 quit the property; or

(c) The lease is repudiated by either party thereto and (1) 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, or (2) the aggrieved party gives the other party written notice of his election not to seek such specific or preventive relief.

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 by Chapter 259 of the Statutes of 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 *Castello 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 perpetuate the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property.

Subdivision (c) changes the prior California law in part. Under the prior law, repudiation of a lease and abandonment of the property by the lessee did not terminate the lease. The courts stated that the lessor could regard the lease as continuing in existence and could recover the rents as they became due. See *Kulawitz v. Pacific Woodware & 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 regard the repudiated lease as continuing and enforce the payment of rental as it falls due unless the repudiation is nullified as provided in Section 1952 or unless the lessor is entitled to and obtains a decree requiring specific performance of the lease as provided in subdivision (c) of Section 1953. Instead, Section 1953 permits the lessor to recover all of the damages caused by the lessee's repudiation.

Subdivision (c) is consistent with the prior California law relating to a lessee's remedies. Under subdivision (c), as under the prior law, a lessee may regard the lease as terminated by the lessor's repudiation and either 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).

§ 1952. Retraction of repudiation

SEC. 3. Section 1952 is added to the Civil Code, 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).

§ 1953. Remedies upon repudiation

SEC. 4. Section 1953 is added to the Civil Code, 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 the amount that the lessor could in good faith procure by reletting. *Kulawitz v. Pacific Woodware & 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 cannot permit the property to 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. See Section 3320. 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).

§ 1953.5: Time for commencing action upon repudiation

SEC. 5. Section 1953.5 is added to the Civil Code, 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* and is consistent with the California law applicable to repudiation of contracts generally. See *Brewer v. Simpson*, 53 Cal.2d 567, 593, 2 Cal. Rptr. 609, 622-623, 349 P.2d 289, 302-303 (1960). Cf. *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal.2d 834, 36 Cal. Rptr. 741, 389 P.2d 133 (1964). Under the preexisting California law, the statute of limitations did not begin to run upon a cause of action for repudiation of a lease 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.

§ 1954. Remedies for material breach of lease

Sec. 6. Section 1954 is added to the Civil Code, 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.

§ 1954.5. Contractual control of remedies

SEC. 7. Section 1954.5 is added to the Civil Code, to read: 1954.5. (a) Except as provided in subdivision (b), the legal consequences of the actions of the parties to a lease of real property as provided in Sections 1951, 1951.5, and 1952, and the legal remedies available upon breach of a lease of real property as provided in Sections 1953 and 1954, are not subject to modification by the prior agreement of the parties.

(b) The parties to a lease of real property may, by contract made at any time, waive any right of either or both parties to specific enforcement of the lease.

(c) This section does not affect any agreement for the arbitration of any dispute that has arisen or may arise under a lease of real property.

(d) This section applies only to leases that were executed or renewed on or after the effective date of this section.

Comment. Sections 1951, 1951.5, 1952, 1953, and 1954 are designed to make the ordinary rules of contract law applicable to leases of real property and thus relieve both lessors and lessees of the forfeitures to which they had been subjected by the application of feudal property concepts. Subdivision (a) of Section 1954.5 will secure to the parties the benefits of the preceding sections by prohibiting the restoration of the previous system of lease law by standard provisions in leases.

Subdivision (b) permits a waiver of the right to specific performance because such a waiver does not result in a forfeiture or an uncompensated loss. A lease containing such a waiver provides in substance for

an alternative performance—actual performance or payment of damages in lieu thereof.

Subdivision (c) makes it clear that this section is not intended to limit the arbitrability of disputes arising under leases of real property, nor is it intended to limit the powers that may be exercised by the arbitrators of such disputes.

Under subdivision (d), a provision in a lease that specifies remedies at variance with those specified in Sections 1951-1954 may be enforced only if the lease containing the provision antedates the effective date of this section. Sections 1951-1954 prescribe the remedies that may be used to enforce a previously executed lease that does not contain any provisions governing the available remedies.

§ 1954.7. Agreements for exploration for or removal of natural resources

SEC. 8. Section 1954.7 is added to the Civil Code, to read:

1954.7. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been characterized by the California Supreme Court as a profit à prendre in gross. See *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962 (1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

The sections in this chapter dealing with leases of real property are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 1954.7 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to natural resources agreements. Section 1954.7 does not prohibit application to such agreements of any of the principles expressed in this chapter; it merely provides that the statutes found here do not require such application.

RIGHTS UPON TERMINATION OF LEASE OF
PERSONAL PROPERTY

§ 3308 (Amended)

Sec. 9. Section 3308 of the Civil Code is amended to read:
3308. ~~The parties to any lease of real or personal property may agree therein that if such~~ *If a lease shall be of personal property is 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 present 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 property for the same period.*

~~The rights of the lessor under this section are 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 but the election of the lessor to exercise the remedy provided by this section is hereinabove permitted shall be binding upon him and shall 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. The reference to leases of real property has been deleted from Section 3308 because, insofar as the section relates to real property, it has been superseded by Sections 1951-1954.5 and 3320-3326.

Section 3308 has also been revised to eliminate the implication that, unless the lease so provides, a lessor of personal property is not entitled to recover damages for prospective detriment upon termination of the lease by reason of the breach thereof by the lessee. No California case has so held, and the cases involving leases of real property that have held that a lessor cannot immediately recover all of his future damages have been based on feudal real property concepts that are irrelevant when personal property is involved. See Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised*, 54 CAL. L. REV. 1141 (1966), reprinted with permission in 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 731 (1967).

DAMAGES FOR BREACH OF LEASE OF REAL PROPERTY

SEC. 10. 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 for Breach of Lease of Real Property

Comment. This article sets forth in some detail the damages that may be recovered upon a total breach of a lease of real property. Some of the rules stated are also applicable in cases involving a partial 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 present 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 a 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, the phrase "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 the same as that formerly described in Civil Code Section 3308. The measure of damages described in Section 3308 was applicable, however, only when the lease so provided and the lessor chose to invoke that remedy. The measure of damages described in Section 3320 is applicable in all cases in which a lessor seeks damages upon termination of a lease of real property because of a lessee's breach.

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.

Subdivision
(2)

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 those expenses in caring for the property during this time 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, making repairs that the lessee was obligated to make, 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; 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 made "subject to Section 3324" in order to make it clear that any attorney's fees incurred by the lessor in enforcing his rights under the lease are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or the lessee.

Section 3320 also is made subject to Section 3322 in order to make it clear that, as under the law relating to contracts generally, the defaulting lessee is not liable under Section 3320 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. See Section 3322.

§ 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 present worth of the excess, if any, of the reasonable rental value of the property for the portion of the term following such termination over 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 lessor'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 a lease is terminated because of the lessor's breach. It is consistent with the prior 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); *Biechhold v. Sommarstrom Inv. 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 attorney's fees incurred by the lessee in enforcing his rights under the lease are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or the lessee.

§ 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 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 rent as it became 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 had 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, 15 (1951). Although no deci-

tion so holding has been reported, 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. The net 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 COM. CODE § 2706(6).

§ 3323. Liquidated damages.

3323. Notwithstanding Sections 3320 and 3321, upon breach of a provision of a lease of real property, liquidated damages may be recovered if so provided in the lease and if they 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 became 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 determined before the end of the term, they may be difficult to calculate in some cases. This will frequently be the case, for example, 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 prior decisions holding liquidated damages provisions in leases to be void are no longer authoritative and that such provisions are valid in appropriate cases.

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 *Soid 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 in enforcing or defending his rights under a lease of real property, he 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 of real property 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 reasonable attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. If a lease of real property provides that one party to the lease may recover attorney's fees incurred in successfully defending his rights under the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in successfully defending his rights under the lease. 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 is entitled to recover reasonable attorney's fees incurred in successfully enforcing or defending his rights in litigation arising out of the lease. Section 3324 makes it clear that the other sections in this 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 attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other party 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 party may recover such fees under similar circumstances. To prevent the provisions of subdivision (b) from being nullified by standard waiver provisions in leases, the third sentence of subdivision (b) prohibits the waiver of a party's right to recover attorney's fees under this subdivision until the right actually accrues.

§ 3325. Lessee's relief from forfeiture

3325. (a) 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, 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:

(1) 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 of the lease; and

(2) Any damages, including liquidated damages as provided in Section 3323, to which the lessor is entitled by reason of such breach.

(b) 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 willfully 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 willfully 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 amount due to the lessor as compensation for the use and occupation of the property and as damages for the detriment caused by the lessee's breach. Section 3325 does not require a pro rata allocation of the total consideration. The court must consider the entire agreement, the circumstances under which it was made, and the understanding of the parties. For example, the parties may have understood that the rental value of the property would rise during the term of the lease. The parties may have contemplated some initial compensation for special preparation of the property or to compensate for the surrender of a now-vanished opportunity to lease to someone else. In each case, the court must determine the consideration fairly allocable to the portion of the lease term prior to termination and, in addition, the lessor's damages so that the lessor can retain the full amount necessary to place him in the financial position he would have enjoyed had the lessee fully performed. Since any sum paid by the lessee in excess of this amount is a forfeiture insofar as the lessee is concerned and a windfall to the lessor, it is recoverable under Section 3325.

Subdivision (b) of Section 3325 is probably unnecessary. The *Freedman* and *Caplan* cases are based on the provisions of the Civil Code prohibiting forfeitures. These rules are applied despite contrary provisions in contracts. Nonetheless, subdivision (b) 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 could recover), liquidated damages (lessee could recover), an advance payment of rental (lessee could not recover), or a bonus or consideration for the execution of the lease (lessee could not recover). Compare *Warming v. Shapiro*, 118 Cal. App.2d 72, 257 P.2d 74 (1953) (\$12,000 forfeited because designated as both a bonus and an advance payment of rental), with *Thompson v. Swiryn*, 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 26 CAL. 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 him from bringing a separate 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 in this article. 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 claim for damages for any particular detriment.

§ 3327. Agreements for exploration for or removal of natural resources

3327. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been characterized by the California Supreme Court as a profit à prendre in gross. See *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962 (1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

The previous sections in this article are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 3327 limits these sections to their intended purpose. Of course, some of the principles expressed in this article may be applicable to natural resources agreements. Section 3327 does not prohibit application to such agreements of any of the principles expressed in this article; it merely provides that the statutes found here do not require such application.

§ 3387.5. Specific enforcement of real property lease

SEC. 11. 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 a purpose of the lease is (1) to provide a means for financing the acquisition of the leased property, or any improvement thereon, by the lessee or (2) to finance the improvement of the property for the use of the lessee during the term of the lease.

(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); *County of Los Angeles v. Nesvig*, 231 Cal. App.2d 603, 41 Cal. Rptr. 918 (1965).

Similarly, a lessor may, in reliance on the lessee's rental obligation under a long term lease, construct an improvement to the specifications of the lessee for the use of the lessee during the lease term. The specifically enforceable nature of the lessee's rental obligation gives the lessor, in effect, security for the repayment of the cost of the improvement.

These systems of financing the purchase or improvement of real property would be seriously jeopardized if the lessor's only right upon repudiation of the lease by the lessee 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 clear that a lease is specifically enforceable if it is actually a means for financing the acquisition by the lessee of the leased property or improvements thereon, or for financing the construction of improvements to be used by the lessee during the term of the lease. Because of 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.

CONFORMING AMENDMENT

Code of Civil Procedure Section 1174 (Amended)

SEC. 12. 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.

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 by prior amendment 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. Prior to that amendment, a lessor whose lessee defaulted in the payment of rent had to choose between (a) suing the lessee from time to time to collect the accruing rentals and (b) 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, 589 (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.

APPLICATION OF ACT

SEC. 13. 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 13 provides that this act is to be applied to leases executed before as well as after its effective date. The purpose of Section 13 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. Whether there is such a constitutional limitation on the retroactive application of this act, and the extent of such possible limitation, must be determined by the courts.