#50 12/9/69

Memorandum 70-1

Subject: Study 50 - Leases

At the November meeting, the Commission approved for printing a recommendation relating to real property leases. See attached Exhibit I. However, the Commission requested the staff to include this recommendation for further consideration on the agenda for the January meeting. Commissioner Miller noted that the affect of the present recommendation is to precisely reverse the remedial approach under existing law and queried whether this change was sound.

The basic premise of the recommendation is that a lease should be treated as a contract. Accordingly, the recommendation provides--with one very major exception--that, upon a material breach by the lessee and consequent termination by the lessor, the lessor has an immediate cause of action for damages, conditioned upon a duty to mitigate these damages, i.e., the basic measure of damages for breach of a lease is the same as for breach of a contract--loss of the benefit of the bargain. The recommendation makes the so-called "specific performance" remedy (collecting the rent as it becomes due even though the lessee has abandoned the property) available only as an exception. That is, to be available, this remedy must be provided for in the lease and the lease must give the lessee the right to sublet or assign subject to reasonable limitations and conditions.

In contrast, under existing law, it is necessary to include a provision making available the remedy of the loss of the benefit of the bargain but the right to collect the rent as it becomes due is available

even though no provision for this remedy is included in the lease.

The staff assumes that the immediate damage remedy should be available in every case without the need for a specific lease provision making the remedy available. Subject to minor qualifications and concern that the remedy should indeed be limited to the lessor's actual damages, this aspect of the recommendation seems to have received unanimous approval in the past both of the Commission and from the outside.

The problem of specific performance was handled in early (7/65) versions of the recommendation by simply providing:

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

In recognition of the lease as a financing device, the recommendation was revised prior to submission to the 1967 Legislature to provide:

> (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.

This section also failed to satisfy the lessors and the bill was withdrawn and has now evolved to its present form. We should note that this process has produced an enormous change in emphasis. Originally, specific performance was to be available only when damages were inadequate. The problem of when damages were "inadequate" would perhaps have occupied the courts for years, but it seems the thrust of the recommendation was

to make the damage remedy very much the primary, if not the sole and exclusive, remedy. Even the 1967 legislation did little more than furnish an example of when damages would, by statute, be inadequate. The present recommendation has, however, come practically full circle. Specific performance is generally available now, subject only to the precondition that the remedy be provided in the lease and that the remedy be available only if the lessee is given the opportunity to mitigate. The staff does not believe that the present recommendation would cause any significant drafting problems, and the statute would not be retroactive, so the change would only require lessors and lawyers for lessors to be alert to the requirement of inclusion if they desire this optional remedy.

The only issue remaining is whether the availability of specific performance should ever depend upon a provision in the lease. So stated, it is difficult to take sides on the issue. (Although it is not a limitation on the present right of the lessor to sit back and collect rent as it becomes due, we assume that the remedy of "specific performance" would, in any event, be made available only if the lessee could sublet or assign.)

The remedy of collecting the rent as it becomes due seems desirable only where the lessee is solvent, hence a damage award will be recoverable. The proposed statute attempts to make the damage award all-inclusive. Thus, the little-old-lady-widow-lessor should be made financially whole for all the problems of real estate commissions, remodeling, and so on. If she really wants the freedom of sitting back and collecting rent, then as always, her best protection is a competent broker or lawyer and, hence, a well-drafted lease. The point that weighs most heavily with the staff

is that the present recommendation seems to represent a delicate compromise of the views of all concerned--legislators, interest groups, the State Bar committee, as well as the Commission--and meets the approval of all who have commented on our proposal. (The only significant problem we had with the proposal at the 1969 session was the unrelated problem of how the damage remedy should be stated in the statute.) Further significant change would, of course, take time and would, we suspect, greatly jeopardize the chances of securing enactment of even the present modest improvements.

At the January meeting, the Commission should determine what action, if any, it wishes to take with regard to making changes in this recommendation.

Respectfully submitted,

Jack I. Horton
Associate Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Real Property Leases

November 1969

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Insert letter

November 21, 1969

October 21, 1968

To His Excellency, Ronald Reagan
Governor of California and
The Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make a study to determine whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.

The Commission has made previous recommendations on this subject. See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 Cal. L. Revision Comm'n Reports 701 (1967); *Recommendation Relating to Real Property Leases*, 9 Cal. L. Revision Comm'n Reports 401 (1969). However, the legislation previously recommended was not enacted.

This recommendation is the result of further study of this topic by the Commission.

Respectfully submitted,

Sho Sato

Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Real Property Leases

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. The influence of the common law of real property remains strong despite the trend in recent years to divorce the law of leases from its medieval setting and to adapt it to current conditions by the application of modern contract principles. The California courts state that a lease is both a contract and a conveyance and apply a mixture of contract and property law principles to lease cases. This mixture, however, is generally unsatisfactory and, depending upon the circumstances, its application may result in injustice to either the lessor or the lessee.

RECOMMENDATIONS

Right of Lessor to Recover Damages Upon Lessee's Abandonment

Under existing law, a lessee's abandonment of the property and refusal to perform his remaining obligations under the lease does not—absent a provision to the contrary in the lease—give rise to the usual contractual remedy of an immediate action for damages. Such conduct merely amounts to an offer to "surrender" the remainder of the term. *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891). As stated in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 671, 155 P.2d 24, 28 (1944), the lessor confronted with such an offer has three alternatives:

(1) He may refuse to accept the offered surrender and sue for the accruing rent as it becomes due under the terms of the lease. 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 the property remain vacant, for it still belongs to the lessee for the duration of the term. 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 damages caused by the lessee's default. *See De Hart v. Allen*, 26 Cal.2d 829, 832, 161 P.2d 453, 455 (1945).

(2) He may accept the surrender and regard the lease as terminated. This amounts to a cancellation of the lease or a rescission of its unexpired portion. In common law theory, however, the lessee's obligation to pay rent is inseparable from his leasehold interest in the property.

Accordingly, termination of the lease in this manner terminates the remaining rental obligation. The lessor can recover neither the unpaid future rent nor damages for its loss. *Welcome v. Hess, supra.* Moreover, any conduct by the lessor that is inconsistent with the lessee's continuing interest in the property is considered to be an acceptance of the lessee's offer of surrender, whether or not such an acceptance is intended. *Dorcich v. Time Oil Co.*, 103 Cal. App.2d 677, 230 P.2d 10 (1951). Hence, efforts by a lessor to minimize his damages frequently result in loss of the right to unpaid future rent as well as the right to damages for its loss.

(3) He may notify the lessee that the property will be relet for the lessee's benefit, take possession and 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. *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932). Hence, an action to recover any portion of the damages will be dismissed as premature if brought before expiration of the entire term. This leaves the lessor without an effective remedy where the term of the lease is of such duration that waiting for it to end would be impractical. The tenant under a 20-year lease, for example, may abandon the property after only one year. In addition, any profit made on the reletting probably belongs to the lessee, not the lessor, inasmuch as the lessee's interest in the property theoretically continues. Moreover, the lessor must be careful in utilizing this remedy or he will find that he has forfeited his right to the remaining rentals from his original lessee despite his lack of intention to do so. See, *e.g.*, *A. H. Busch Co. v. Strauss*, 103 Cal. App. 647, 284 Pac. 966 (1930). See also *Neuhaus v. Norgard*, 140 Cal. App. 735, 35 P.2d 1039 (1934).

The Commission has concluded that, when a lessee breaches the lease and abandons the property, the lessor should be permitted to sue immediately for all damages—present and future—caused by the breach. This, in substance, is the remedy that is now available under Civil Code Section 3308 if the parties provide for this remedy in the lease. Absent such a provision in the lease, the lessor under existing law must defer his damage action until the end of the term and run the risk that the defaulting lessee will be insolvent or unavailable at that time. The availability of a suit for damages would not abrogate the present right to rescind the lease or to sue for specific or preventive relief if the lessor has no adequate remedy at law. Rather, an action for damages would provide the lessor with a reasonable choice of remedies comparable to that available to the promisee when the promisor has breached a contract.

Right of Lessor to Recover Damages Upon Breach by Lessee Justifying Termination of Lease

Under existing law, the lessor whose lessee commits a sufficiently material breach of the lease to warrant termination has a choice of three remedies:

(1) He may treat the breach as only partial, decline to terminate the lease, and sue for the damages caused by the particular breach. If he does so, however, he obviously is continuing to deal with a lessee who has proven unsatisfactory.

(2) He may terminate the lease and force the lessee to relinquish the property, resorting to an action for unlawful detainer to recover possession if necessary. In such a case, his right to the remaining rent due under the lease ceases upon the termination of the lease. *Costello v. Martin Bros.*, 74 Cal. App. 782, 241 Pac. 588 (1925).

(3) Under some circumstances, he may decline to terminate the lease but still evict the lessee and relet the property for the account of the lessee. *Lawrence Barker, Inc. v. Briggs*, 39 Cal.2d 654, 248 P.2d 897 (1952); *Burke v. Norton*, 42 Cal. App. 705, 184 Pac. 45 (1919). See Code Civ. Proc. § 1174. As noted in connection with the remedies on abandonment, this procedure often proves unsatisfactory.

In dealing with these cases of material breach, the courts have felt bound to apply the mentioned common law rule that the lessee's obligation to pay rent depends entirely upon the continued existence of the term under technical property law concepts. When the term is ended, whether voluntarily by abandonment and repossession by the lessor or involuntarily under the compulsion of an unlawful detainer proceeding, the rental obligation also ends. In cases where the lessor has no reason to expect the lessee to remain available and solvent until the end of the term, continued adherence to this rule denies the lessor any effective remedy for the loss caused by a defaulting lessee.

The Commission has concluded that the lessor should be permitted to sue for the loss of present and future rentals and other damages at the time the lease is terminated because of a substantial breach by the lessee. This remedy—the substance of which is now available under Civil Code Section 3308 if the lease so provides—would be an alternative to other existing remedies that would continue to be available: (1) the right to treat the breach as partial, regard the lease as continuing in force, and recover damages for the particular default and (2) the right to rescind or cancel the lease, *i.e.*, declare a forfeiture of the lessee's interest.

Duty of Lessor to Mitigate Damages

Existing Law

As mentioned in connection with abandonment, if the lessee breaches the lease and abandons the property, the lessor may refuse to accept the lessee's offer to surrender the leasehold interest and may (1) sue for the accruing rent as it becomes due or (2) relet the property for the benefit of the lessee and sue at the end of the lease term for the damages caused by the lessee's default. Thus, although the lessor may mitigate damages—by reletting for the benefit of the lessee—he is not required to do so. Moreover, if the lessor does attempt to mitigate damages, he may lose his right to the future rent if the court finds he has accepted the lessee's offer to surrender his leasehold interest when he did not mean to do so as, for example, when his notice to the lessee is found to be insufficient. *Dorcich v. Time Oil Co.*, *supra*. The unfortunate result is that the existing law tends to discourage lessors from attempts to mitigate damages.

Recommendations

General duty to mitigate damages. Absent a contrary provision in the lease, when the lessee has breached the lease and abandoned the property or has been evicted because of his failure to perform, the lessor

should not be permitted to let the property remain vacant and still recover the rent as it accrues. Instead, the lessor should be required to make a reasonable effort to mitigate the damages by reletting the property.

To achieve this objective, the basic measure of the lessor's damages should be made the loss of the bargain represented by the lease—i.e., the amount by which the unpaid rent provided in the lease exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided. More specifically, the lessor should be entitled to recover (1) the rent that was due and unpaid at the time of termination plus interest from the time each installment was due; (2) the unpaid rent that would have been earned from the time of termination to the time of judgment less the amount of rental loss that could have been reasonably avoided plus interest on the difference from the time of accrual of each installment; and (3) the unpaid rent after the time of judgment less the amount of rental loss that could be reasonably avoided, the difference discounted to reflect prepayment to the lessor. The lessor should, of course, be permitted to relet the property for a rent that is more or less than the rent provided in the original lease if he acts reasonably and in good faith.

Discounting of the value of unpaid future rent is simply a substitute for payment as installments accrue. The rate of discount should therefore permit the lessor to invest the lump sum award at interest rates currently available in the investment market and recover over the period of the former term of the lease an amount equal to the unpaid future rentals less the amount of rental loss that could be reasonably avoided. The Federal Reserve Bank discount rate plus one percent satisfies this test. Moreover, it provides a rate subject to judicial notice under Evidence Code Section 452(h) and one that automatically adjusts to changes in the investment market.

The burden of proving the amount of rental loss that could have been or could be obtained by acting reasonably in reletting the property should be placed on the lessee. This allocation of the burden of proof is similar to the one applied in actions for breach of employment contracts. See *Erler v. Five Points Motors, Inc.*, 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967). The recommended measure of damages is essentially the same as that now provided in Civil Code Section 3308, but the measure of damages provided by that section applies only when the lease so specifies and the section is silent as to burden of proof.

In addition, the lessor should be entitled to recover other damages necessary to compensate him for all the detriment caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom. This is the rule applicable in contract cases under Civil Code Section 3300 and would permit the lessor to recover, for example, his expenses in retaking possession of the property, making repairs that the lessee was obligated to make, and in reletting the property.

The requirement of existing law that the lessor notify the lessee before reletting the property to mitigate the damages should be eliminated. This requirement has discouraged lessors from attempting to mitigate damages and serves no useful purpose in view of the recommended requirement that the lessor be required to relet the property to mitigate

damages in any case where he seeks to recover damages from the lessee for the loss of future rents. However, if the lessee has made an advance payment that exceeds the amount of rent due and unpaid, the lessor should be required—if the lessee so requests—to notify the lessee of the length of the term of the new lease and the amount of the rent under the new lease. Such notice should be required only upon the initial reletting of the property.

Lease provisions relieving lessor of duty to mitigate damages. The parties to a lease should be permitted to include provisions that will guarantee to the lessor that the lessee will remain obligated to pay the rent for the entire term if, but only if, the lease also permits the lessee to assign the lease or to sublet the property. If the lease contains such provisions, the lessor should be permitted to collect the rent as it accrues so long as he does not terminate the lessee's right to possession of the property. These lease provisions would allow the lessor to guard against the loss of the rentals provided in the lease and, at the same time, permit the lessee to protect his interests by obtaining a new tenant.

The lessor should be permitted to impose reasonable restrictions on the right to sublet or assign so that he can exercise reasonable control over the types of businesses and persons who will occupy his property.

The need to retain this traditional remedy for the lessor arises primarily from the advent of "net lease financing," a practice which has turned the lease into an important instrument for investing and for financing property acquisition and construction. An essential requirement in net lease financing is that there be no termination except in such drastic situations as a taking of the whole property by eminent domain, rejection of the lease by the tenant's trustee in bankruptcy, or a complete destruction of the land and building by a flood which does not recede. See Williams, *The Role of the Commercial Lease in Corporate Finance*, 22 BUS. LAW. 751, 752–753 (1967). Thus, it seems imperative that any change in the law of leases in California preserve the ability of the lessor under such a financing arrangement to hold the lessee unconditionally to the payment of the "rent."[1]

[1] These arrangements are often complex. One example of such a transaction is described in Williams, *The Role of the Commercial Lease in Corporate Finance*, 22 BUS. LAW. 751, 762, (1967): *A* Co. needs a new building to expand its operations. It arranges for *X* to purchase the land for the building. *X* purchases the land and leases it to *A* Co. on a short-term lease. *A* Co. builds the improvement and sells it to *X*. *X* makes payment by means of an unsecured promissory note. *X* then sells the land at cost to Investment Co., but retains the fee in the improvement. Investment Co. leases the land to *X* on a long-term lease with a net return that will provide Investment Co. with a fair rate of interest on its investment. *X* leases the improvement back to *A* Co. on a net lease basis, and subleases the land to *A* Co. on the same basis. *X* then mortgages the ground lease and the improvement to Investment Co. for an amount equal to the cost of the building. *X* uses the proceeds of the mortgage transaction to pay the promissory note given by *X* to *A* Co. for the purchase of the improvement. Thus, *A* Co. has possession of the land and the improvement and has paid out no cash which has not been returned; the only obligation of *A* Co. is to pay the periodic rentals. *X* has spent no money which has not been returned, is the mortgagor of the improvement and the sublease, and is primarily liable on the ground lease. *X* has security for the performance of *A* Co. in his ownership of the equity in the improvement. Investment Co., the investor, owns the land and has it and the improvement as security for the payment of rent by *A* Co. Investment Co. also has the obligation of *X*, as sublessor, as security. Investment Co. has an investment which is now paying interest equivalent to a mortgage in the form of rent.

Where the lease is used as a financing instrument, the "rent" is in substance interest and return of capital investment and the rate of the rent depends on the credit rating of the lessee. Ordinarily, a major lessee with a prime credit rating will be given a long-term lease at a lower rent than would be asked of another lessee. If the original lessee abandons, the lessor may be able to relet at a higher rental, but the new lessee may not have the credit rating of the former lessee and, if the lease had been made with the new lessee originally, a higher rent would have been charged to reflect the increased risk in lending the money secured by the lease. In this case, a requirement to mitigate damages would deprive the lessor of the benefit of the transaction since the credit rating of the lessee involved in the transaction determines the rent. Even where the lease is not part of a financing arrangement, the same consideration applies because a lessee with a prime credit rating will often be required to pay less rent than a tenant whose ability to pay the rent is suspect. In addition, where a financing arrangement is not involved, the desirability of a particular tenant may be a factor that significantly influences the amount of the rental. For example, the lessor of a shopping center may offer a very favorable rental to a particular tenant who will attract customers for the entire center. If this tenant later wishes to leave the location, the available replacements may be stores that cater to a different clientele; but the lessor may not want any of these stores because he wishes to preserve the quality of the merchandising in the shopping center. Under existing law, the coercive effect of the full rental obligation can be used by the lessor to make the original tenant live up to its bargain. This recommended remedy will permit the parties to retain this effect of the existing law.

Effect on Unlawful Detainer

Section 1174 of the Code of Civil Procedure provides that the lessor may notify the lessee to quit the premises and that such a notice does not terminate the leasehold interest unless the notice so specifies. This permits a lessor to evict the lessee, relet the property, and recover from the lessee at the end of the term for any deficiency in the rentals. The statutory remedy falls short of providing full protection to the rights of both parties. It does not permit the lessor to recover damages immediately for future losses; nor does it require the lessor to mitigate damages.

An eviction under Section 1174 should terminate the lessee's rights under the lease and the lessor should be required to relet the property to minimize the damages. The lessor's right to recover damages for loss of the benefits of the lease should be independent of his right to bring an action for unlawful detainer to recover the possession of the property. The damages 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 damages.

Civil Code Section 3308

Section 3308 of the Civil Code 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 recommenda-

tions of the Commission would make Section 3308 superfluous insofar as real property is concerned. The section should, therefore, be amended to limit its application to personal property. The Commission has not made a study of personal property leases, and no attempt has been made to deal with this body of law in the recommended legislation.

Effective Date; Application to Existing Leases

The recommended legislation should take effect on July 1, 1971. This will permit interested persons to become familiar with the new legislation before it becomes effective.

The legislation should not apply to any leases executed before July 1, 1971. This is necessary because the parties did not take the recommended legislation into account in drafting leases now in existence.

PROPOSED LEGISLATION

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

An act to add Sections 1951, 1951.2, 1951.4, 1951.5, 1951.6, 1951.7, 1951.8, 1952, 1952.2, 1952.4, and 1952.6 to, and to amend Section 3308 of, the Civil Code, and to add Sections 337.3 and 339.5 to the Code of Civil Procedure, relating to leases.

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

SECTIONS ADDED TO CIVIL CODE

§ 1951. "Rent" and "lease" defined

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

1951. As used in Sections 1951.2 to 1952.6, inclusive:
(a) "Rent" includes charges equivalent to rent.
(b) "Lease" includes a sublease.

Comment. Subdivision (a) makes clear that "rent" includes all charges or expenses to be met or defrayed by the lessee in exchange for use of the leased property. Inclusion of these items in "rent" is necessary to make various subsequent sections apply appropriately. 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 should be included in the damages the lessor is entitled to recover under Section 1951.2. The same would be true where the lease imposes on the lessee the obligation to provide fire, earthquake, or liability insurance.

Subdivision (b) merely makes clear that the provisions of the statute apply to subleases as well as leases.

§ 1951.2. Termination of real property lease; damages recoverable

SEC. 2. Section 1951.2 is added to the Civil Code, to read:

1951.2. (a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his

right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:

(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;

(3) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and

(4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

(b) The "worth at the time of award" of the amounts referred to in paragraphs (1) and (2) of subdivision (a) is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The worth at the time of award of the amount referred to in paragraph (3) of subdivision (a) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

(c) Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages under this section.

(d) Nothing in this section affects the right of the lessor under a lease of real property to indemnification for liability arising prior to the termination of the lease for personal injuries or property damage where the lease provides for such indemnification.

Comment. Section 1951.2 states the measure of damages when the lessee breaches the lease and abandons the property or when his right to possession is terminated by the lessor because of a breach of the lease. As used in this section, "rent" includes "charges equivalent to rent." See Section 1951.

Nothing in Section 1951.2 affects the rules of law that determine when the lessor may terminate the lessee's right to possession. See generally 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* §§ 276–278 (1960). Thus, for example, the lessor's right to terminate the lessee's right to possession may be waived under certain circumstances. *Id.* at § 278. Likewise, nothing in Section 1951.2 affects any right the lessee may have to an offset against the damages otherwise recoverable under the section. For example, where the lessee has a claim based on the failure of the lessor to perform all of his obligations under the lease, Section 1951.2 does not affect the right of the lessee to have the amount he is entitled to recover from the lessor on such claim offset against the damages otherwise recoverable under the section.

Subdivisions (a) and (b). Under paragraph (1) of subdivision (a), the lessor is entitled to recover the unpaid rent which had been earned at the time the lease terminated. Pursuant to subdivision (b), interest must be added to such rent at such lawful rate as may be specified in the lease or, if none is specified, at the legal rate of seven percent. Interest accrues on each unpaid rental installment from the time it becomes due until the time of award, *i.e.*, the entry of judgment or the similar point of determination if the matter is determined by a tribunal other than a court.

A similar computation is made under paragraph (2) of subdivision (a) except that the lessee may prove that a certain amount of rental loss could have been reasonably avoided. The lessor is entitled to interest only on the amount by which each rental installment exceeds the amount of avoidable rental loss for that rent period.

The lump sum award of future rentals under paragraph (3) of subdivision (a) is discounted pursuant to subdivision (b) to reflect prepayment. The amount by which each future rental installment exceeds the amount of avoidable rental loss for that rent period is discounted from the due date under the lease to the time of award at the discount rate of the Federal Reserve Bank of San Francisco plus one percent. Judicial notice can be taken of this rate pursuant to Evidence Code Section 452(h).

In determining the amount recoverable under paragraphs (2) and (3) of subdivision (a), the lessee is entitled to have offset against the unpaid rent not merely all sums the lessor has received or will receive by virtue of a reletting of the property which has actually been accomplished but also all sums that the lessee can *prove* the lessor could have obtained or could obtain by acting reasonably in reletting the property. The duty to mitigate the damages will often require that the property be relet at a rent that is more or less than the rent provided in the original lease. The test in each case is whether the lessor acted reasonably and in good faith in reletting the property.

The general principles that govern mitigation of damages apply in determining what constitutes a "rental loss that the lessee proves" could be "reasonably avoided." These principles were summarized in *Green v. Smith*, 261 Cal. App.2d 392, 396–397, 67 Cal. Rptr. 796, 799–800 (1968):

> A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures. . . . The frequent statement of the principle in the terms of a "duty" imposed on the injured party has been criticized on the theory that a breach of the "duty" does not give rise to a correlative right of action. . . . It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part. . . .
>
> The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. . . . The fact that reason-

able measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. . . . "If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen." . . . The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. . . . It is sufficient if he acts reasonably and with due diligence, in good faith. [Citations omitted.]

Paragraph (4) of subdivision (a) makes clear that the measure of the lessor's recoverable damages is not limited to damages for the loss of past and future rentals. This paragraph adopts language used in Civil Code Section 3300 and provides, in substance, 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. For example, to the extent that he would not have had to incur such expense, had the lessee performed his obligations under the lease, the lessor is entitled to recover his reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting the property. Other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee would include damages for the lessee's breach of specific covenants of the lease—for example, a promise to maintain or improve the premises or to restore the premises upon termination of the lease. Attorney's fees may be recovered only if they are recoverable under Section 1951.6.

If the lessee proves that the amount of rent that could reasonably be obtained by reletting after termination exceeds the amount of rent reserved in the lease, such excess is offset against the damages otherwise recoverable under paragraph (4) of subdivision (a). Subject to this exception, however, the lease having been terminated, the lessee no longer has an interest in the property, and the lessor is not accountable for any excess rents obtained through reletting.

The basic measure of damages provided in Section 1951.2 is essentially the same as that formerly set forth in Civil Code Section 3308. The measure of damages under Section 3308 was applicable, however, only when the lease so provided and the lessor chose to invoke that remedy. Except as provided in Section 1951.4, the measure of damages under Section 1951.2 is applicable to all cases in which a lessor seeks damages upon breach and abandonment by the lessee or upon termination of the lease because of the lessee's breach of the lease. Moreover, Section 1951.2 makes clear that the lessee has the burden of proving the amount he is entitled to have offset against the unpaid rent, while Section 3308 was silent as to the burden of proof. In this respect, the rule stated is similar to that now applied in actions for breach of employment contracts. See discussion in *Erler v. Five Points Motors, Inc.*, 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967).

Subdivision (c). Under former law, attempts by a lessor to mitigate damages sometimes resulted in an unintended acceptance of the lessee's surrender and, consequently, in loss of the lessor's right to future rentals. See *Dorcich v. Time Oil Co.*, 103 Cal. App.2d 677, 230

P.2d 10 (1951). One of the purposes of Section 1951.2 is to require mitigation by the lessor, and subdivision (c) is included to insure that efforts by the lessor to mitigate do not result in a waiver of his right to damages under Section 1951.2.

Subdivision (d). The determination of the lessor's liability for injury or damage for which he is entitled to indemnification from the lessee may be subsequent to a termination of the lease, even though the cause of action arose prior to termination. Subdivision (d) makes clear that, in such a case, the right to indemnification is unaffected by the subsequent termination.

Effect on other remedies. Section 1951.2 is not a comprehensive statement of the lessor's remedies. When the lessee breaches the lease and abandons the property or the lessor terminates the lessee's right to possession because of the lessee's breach, the lessor may simply rescind or cancel the lease without seeking affirmative relief under the section. Where the lessee is still in possession but has breached the lease, the lessor may regard the lease as continuing in force and seek damages for the detriment caused by the breach, resorting to a subsequent action if a further breach occurs. In addition, Section 1951.4 permits the parties to provide an alternative remedy in the lease—recovery of rent as it becomes due. See also Section 1951.5 (liquidated damages) and Section 1951.8 (equitable relief).

One result of the enactment of Section 1951.2 is that, unless the parties have otherwise agreed, the lessor is excused from further performance of his obligations after the lease terminates. In this respect, the enactment of Section 1951.2 changes the result in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 155 P.2d 24 (1944).

Statute of limitations. The statute of limitations for an action under Section 1951.2 is four years from the date of termination in the case of a written lease and two years in the case of a lease not in writing. See Code of Civil Procedure Sections 337.2 and 339.5.

§ 1951.4. Continuance of lease after breach and abandonment

SEC. 3. Section 1951.4 is added to the Civil Code, to read:

1951.4. (a) The remedy described in this section is available only if the lease provides for this remedy.

(b) Even though a lessee of real property has breached his lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:

(1) Sublet the property, assign his interest in the lease, or both.

(2) Sublet the property, assign his interest in the lease, or both, subject to standards or conditions, and the lessor does not require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment.

(3) Sublet the property, assign his interest in the lease, or both, with the consent of the lessor, and the lease provides that such consent shall not unreasonably be withheld.

(c) For the purposes of subdivision (b), the following do not constitute a termination of the lessee's right to possession:

(1) Acts of maintenance or preservation or efforts to relet the property.

(2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease.

Comment. Even though the lessee has breached the lease and abandoned the property, Section 1951.4 permits the lessor to continue to collect the rent as it becomes due under the lease rather than to recover damages based primarily on the loss of future rent under Section 1951.2. This remedy is available only if the lease so provides and contains a provision permitting the lessee to mitigate the damages by subletting or assigning his interest in the property. The lease may give the lessee unlimited discretion in choosing a subtenant or assignee. See subdivision (b)(1). However, generally the lease will impose standards for or conditions on such subletting or assignment or require the consent of the lessor. See subdivision (b)(2), (3). In the latter case, the lessor may not require compliance with an unreasonable standard or condition nor unreasonably withhold his consent. Occasionally, a standard or condition, although reasonable at the time it was included in the lease, is unreasonable under circumstances existing at the time of subletting or assignment. In such a situation, the lessor may resort to the remedy provided by Section 1951.4 if he does not require compliance with the now unreasonable standard or condition. Common factors that may be considered in determining whether standards or conditions on subletting or assignment are reasonable include: the credit rating of the new tenant; the similarity of the proposed use to the previous use; the nature or character of the new tenant—the use may be similar, but the quality of the tenant quite different; the requirements of the new tenant for services furnished by the lessor; the impact of the new tenant on common facilities.

The right to continue to collect the rent as it becomes due terminates when the lessor evicts the lessee; in such case, the damages are computed under Section 1951.2. The availability of a remedy under Section 1951.4 does not preclude the lessor from terminating the right of a defaulting lessee to possession of the property and then utilizing the remedy provided by Section 1951.2. However, nothing in Section 1951.4 affects the rules of law that determine when the lessor may terminate the lessee's right to possession. See generally 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* §§ 276–278 (1960). Thus, for example, the lessor's right to terminate the lessee's right to possession may be waived under certain circumstances. *Id.* at § 278.

Where the lease complies with Section 1951.4, the lessor may recover the rent as it becomes due under the terms of the lease and at the same time has no obligation to retake possession and relet the property in the event the lessee abandons the property. This allocation of the burden of minimizing the loss is most useful where the lessor does not have the desire, facilities, or ability to manage the property and to acquire a suitable tenant and for this reason desires to avoid the burden that Section 1951.2 places on the lessor to mitigate the damages by reletting the property.

The allocation of the duty to minimize damages under Section 1951.4 is important. It permits arrangements for financing the purchase or improvement of real property that might otherwise be seriously jeopardized if the lessor's only right upon breach of the lease and abandonment of the property were the right to recover damages under Section 1951.2. For example, because the lessee's obligation to pay rent under a lease could be enforced under former law, leases were utilized by public entities to finance the construction of public improvements. The lessor constructed the improvement to the specifications of the public entity-lessee, leased 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 vested in the public entity. See, *e.g.*, *Dean v. Kuchel*, 35 Cal.2d 444, 218 P.2d 521 (1950). Similarly, a lessor could, 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 remedy available under Section 1951.4 retains the substance of the former law and gives the lessor, in effect, security for the repayment of the cost of the improvement in these cases.

Section 1951.4 also facilitates assignment by the lessor under a long-term lease of the right to receive the rent under the lease in return for the discounted value of the future rent. The remedy provided by Section 1951.4 makes the right to receive the rental payments an attractive investment since the assignee is assured that the rent will be paid if the tenant is financially responsible.

Subdivision (c) makes clear that certain acts by the lessor do not constitute a termination of the lessee's right to possession. The first paragraph of the subdivision permits the lessor, for example, to show the leased premises to prospective tenants after the lessee has breached the lease and abandoned the property.

The second paragraph of subdivision (c) makes clear that appointment of a receiver to protect the lessor's rights under the lease does not constitute a termination of the lessee's right to possession. For example, an apartment building may be leased under a "master lease" to a lessee who then leases the individual apartments to subtenants. The appointment of a receiver may be appropriate if the lessee under the master lease collects the rent from the subtenants but fails to pay the lessor the rent payable under the master lease. The receiver would collect the rent from the subtenants on behalf of the lessee and pay to the lessor the amount he is entitled to receive under the master lease. This form of relief would protect the lessor against the lessee's misappropriation of the rent from subtenants and at the same time would preserve the lessee's obligation to pay the rent provided in the master lease.

Under this section, in contrast to Section 1951.2, so long as the lessor does not terminate the lease, he is obliged to continue to perform his obligations under the lease.

§ 1951.5. Liquidated damages

SEC. 4. Section 1951.5 is added to the Civil Code, to read:

1951.5. Sections 1670 and 1671, relating to liquidated damages, apply to a lease of real property.

Comment. The amount of the lessor's damages may be difficult to determine in some cases since the lessor's right to damages accrues at the time of the breach and abandonment or when the lease is terminated by the lessor. See Section 1951.2. This difficulty may be avoided in appropriate cases by a liquidated damage provision that meets the requirements of Civil Code Sections 1670 and 1671.

Under former law, provisions in real property leases for liquidated damages upon breach by the lessee were held to be void. *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130 (1899). However, such holdings were based on the former rule that the lessor's cause of action upon breach of the lease and abandonment of the property or upon termination of the lessee's right to possession was either for the rent as it became due or for the rental deficiency at the end of the lease term.

So far as provisions for liquidated damages upon a lessor's breach are concerned, such provisions were upheld under the preexisting law if reasonable. See *Seid Pak Sing v. Barker*, 197 Cal. 321, 240 Pac. 765 (1925). Nothing in Section 1951.5 changes this rule.

§ 1951.6. Attorney's fees

SEC. 5. Section 1951.6 is added to the Civil Code, to read:

1951.6. Section 1717, relating to contract provisions for attorney's fees, applies to leases of real property and the attorney's fees provided for by Section 1717 shall be recoverable in addition to any other relief or amount to which the lessor or lessee may be entitled.

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 1951.6 makes clear that nothing in the other sections of the statute impairs a party's rights under such a provision and that Civil Code Section 1717 applies to leases of real property. Thus, attorney's fees are recoverable only if the lease so provides and if the lease provides that one party to the lease may recover attorney's fees, both parties have this right. See CIVIL CODE § 1717.

§ 1951.7. Notice required upon reletting property

SEC. 6. Section 1951.7 is added to the Civil Code, to read:

1951.7. (a) As used in this section, "advance payment" means moneys paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or any other payment which is the substantial equivalent of either of these. A payment that is not in excess of the amount of one month's rent is not an advance payment for the purposes of this section.

(b) The notice provided by subdivision (c) is required to be given only if:

(1) The lessee has made an advance payment;

(2) The lease is terminated pursuant to Section 1951.2; and

(3) The lessee has made a request, in writing, to the lessor that he be given notice under subdivision (c).

(c) Upon the initial reletting of the property, the lessor shall send a written notice to the lessee stating that the prop-

erty has been relet, the name and address of the new lessee, and the length of the new lease and the amount of the rent. The notice shall be delivered to the lessee personally, or be sent by regular mail to the lessee at the address shown on the request, not later than 30 days after the new lessee takes possession of the property. No notice is required if the amount of the rent due and unpaid at the time of termination exceeds the amount of the advance payment.

Comment. Section 1951.7 does not in any way affect the right of the lessor to recover damages nor the right of a lessee to recover prepaid rent, a security deposit, or other payment. The section is included merely to provide a means whereby the lessee whose lease has been terminated under Section 1951.2 may obtain information concerning the length of the term of the new lease and the rent provided in the new lease. The notice is required only if the lessee so requests and only upon the initial reletting of the property. If the new lease is terminated, the notice, if any, required by Section 1951.7 need be given only to the lessee under the new lease.

§ 1951.8. Equitable relief

SEC. 7. Section 1951.8 is added to the Civil Code, to read:

1951.8. Nothing in Section 1951.2 or 1951.4 affects the right of the lessor under a lease of real property to equitable relief where such relief is appropriate.

Comment. Generally, where the lessee has breached a lease of real property, the lessor will simply recover damages pursuant to Civil Code Section 1951.2. However, Section 1951.8 makes clear that the lessor remains entitled to equitable relief where such relief is appropriate. For example, even though the lease has terminated pursuant to subdivision (a) of Section 1951.2 and the lessor has recovered damages under that section for loss of rent, he is not precluded from obtaining equitable relief, *e.g.*, an injunction enforcing the lessee's covenant not to compete.

§ 1952. Effect on unlawful detainer actions

SEC. 8. Section 1952 is added to the Civil Code, to read:

1952. (a) Except as provided in subdivision (c), nothing in Sections 1951 to 1951.8, inclusive, 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 lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, 1951.6, and 1951.8, but no damages shall be recovered in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action.

(c) After the lessor obtains possession of the property under a judgment pursuant to Section 1174 of the Code of Civil Procedure, he is no longer entitled to the remedy pro-

vided under Section 1951.4 unless the lessee obtains relief under Section 1179 of the Code of Civil Procedure.

Comment. Section 1952 is designed to clarify the relationship between Sections 1951–1951.8 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 chapter are designed to provide a summary method of recovering possession of property.

Subdivision (b) 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 secure the relief to which he is entitled under Sections 1951.2, 1951.5, 1951.6, and 1951.8. 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 Sections 1951.2, 1951.5, and 1951.6. Under Section 1952, 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.

Under subdivision (c), however, when the lessor has evicted the lessee under the unlawful detainer provisions, he cannot proceed under the provisions of Section 1951.4; i.e., a lessor cannot evict the tenant and refuse to mitigate damages. In effect, the lessor is put to an election of remedies in such a case. Under some circumstances, the court may order that execution upon the judgment in an unlawful detainer proceeding not be issued until five days after the entry of the judgment; if the lessor is paid the amount to which he is found to be entitled within such time, the judgment is satisfied and the tenant is restored to his estate. In such case, since the lessor never obtains possession of the property, his right to the remedy provided by Section 1951.4 is not affected by the proceeding. If the court grants relief from forfeiture and restores the lessee to his estate as authorized by Code of Civil Procedure Section 1179, the lease—including any provision giving the lessor the remedy provided in Section 1951.4—continues in effect.

§ 1952.2. Leases executed before July 1, 1971

SEC. 9. Section 1952.2 is added to the Civil Code, to read:

1952.2. Sections 1951 to 1952, inclusive, do not apply to:

(a) Any lease executed before July 1, 1971.

(b) Any lease executed on or after July 1, 1971, if the terms of the lease were fixed by a lease, option, or other agreement executed before July 1, 1971.

Comment. Section 1952.2 is included because the contents of the leases therein described may have been determined without reference to the effect of the added sections.

§ 1952.4. Natural resources agreements

SEC. 10. Section 1952.4 is added to the Civil Code, to read:

1952.4. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of Sections 1951 to 1952.2, inclusive.

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 extraction of the valuable resources of the property with compensation for such extraction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

Sections 1951–1952.2 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 1952.4 limits these sections to their intended purpose. Section 1952.4 does not prohibit application to such agreements of any of the principles expressed in Sections 1951 to 1951.8; it merely provides that nothing in those sections requires such application.

§ 1952.6. Lease-purchase agreements of public entities

SEC. 11. Section 1952.6 is added to the Civil Code, to read:

1952.6. Where a lease or an agreement for a lease of real property from or to any public entity or any nonprofit corporation whose title or interest in the property is subject to reversion to or vesting in a public entity would be made invalid if any provision of Sections 1951 to 1952.2, inclusive, were applicable, such provision shall not be applicable to such a lease. As used in this section, "public entity" includes the state, a county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

Comment. Section 1952.6 is included to prevent the application of any provision of Sections 1951 to 1952.2 to lease-purchase agreements by public entities if such application would make the agreement invalid.

CONFORMING AMENDMENT OF CIVIL CODE SECTION 3308

SEC. 12. 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 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~~ *property* 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 has been amended to exclude reference to leases of real property; insofar as the section related to real property, it has been superseded by Sections 1951–1952.6. Neither deletion of real property leases from Section 3308 nor enactment of Sections 1951–1952.6 affects any remedy or benefit available to a lessor or a lessee of personal property under Section 3308, under Section 3300, or under the rules applicable to contracts generally.

SECTIONS TO BE ADDED TO CODE OF CIVIL PROCEDURE

§ 337.2. Damages recoverable upon abandonment or termination of written lease of real property

SEC. 13. Section 337.2 is added to the Code of Civil Procedure, to read:

337.2. Where a lease of real property is in writing, no action shall be brought under Section 1951.2 of the Civil Code more than four years after the breach of the lease and abandonment of the property, or more than four years after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Comment. The four-year period provided in Section 337.2 is consistent with the general statute of limitations applicable to written contracts. See Section 337. Although the former law was not clear, it appears that, if the lessor terminated a lease because of the 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 Civil Code Section 1951.2, however, an aggrieved lessor may sue immediately for the damages resulting from the loss of the rentals that would have accrued under the lease. Accordingly, Section 337.2 relates the period of limitations to breach and abandonment or to termination of the right of the lessee to possession.

§ 339.5. Damages recoverable upon abandonment or termination of oral lease of real property

SEC. 14. Section 339.5 is added to the Code of Civil Procedure, to read:

339.5. Where a lease of real property is not in writing, no action shall be brought under Section 1951.2 of the Civil Code more than two years after the breach of the lease and abandonment of the property, or more than two years after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Comment. The two-year period provided in Section 339.5 is consistent with the general statute of limitations applicable to contracts not in writing. See Section 339. See also the Comment to Section 337.2.

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