

Memorandum 76-11

Subject: Study 78.50 - Lessor-Lessee Relations (Unlawful Detainer Proceedings)

Introduction

Mr. Ronald P. Denitz, Assistant General Counsel, Tishman Realty & Construction Co., Inc., has submitted to the Commission a proposal for amending Section 1174 of the Code of Civil Procedure and Section 1952 of the Civil Code relating to unlawful detainer. The proposal would clarify the relationship between the unlawful detainer statute and the rules of damages in actions for rent enacted in the Civil Code in 1970, and make certain substantive changes. A copy of the proposal is attached to this memorandum as Exhibit I.

Unlawful Detainer Damages Where the Lessee Remains in Possession Until Trial

Under present law, when the lessor brings an unlawful detainer proceeding and the lessee unlawfully remains in possession until the trial, the lessor may, as an incident of a judgment of restitution of the premises, obtain damages as follows:

(1) He may recover unpaid rent having accrued prior to the termination of the lessee's right to possession (normally the expiration of the three-day period specified in the notice to quit). See Code Civ. Proc. § 1174; Markham v. Fralick, 2 Cal.2d 221, 226, 39 P.2d 804, 806 (1934); Chase v. Peters, 37 Cal. App. 358, 360-361, 174 P. 116, 118 (1934); M. Moskowitz, P. Honigsberg, & D. Finkelstein, California Eviction Defense Manual § 15.8, at 144 (1971) [hereinafter cited as Moskovitz].

(2) He may recover damages¹ for the reasonable rental value of the premises from the beginning of the period of unlawful detention until the date of judgment.

1. Compensation for the period of unlawful detention is "damages," not "rent." Haig v. Hogan, 82 Cal. App.2d 876, 878, 187 P.2d 426, 427 (1947); Glouberman v. Coffey, 138 Cal. App.2d Supp. 906, 907-908, 292 P.2d 681, 682 (1955). The distinction between these two terms is often confused. Moskovitz, supra, § 15.8, at 144.

See Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52, 55 (1952);
Roberts v. Redlich, 111 Cal. App.2d 566, 569, 244 P.2d 933, 935 (1952);
Flournoy v. Everett, 51 Cal. App. 406, 408, 196 P. 916, 917 (1921).

(3) He may recover incidental damages occasioned by the detention and which occur during the detention to the time of trial. Roberts v. Redlich, supra at 569, 244 P.2d at 935. See Chase v. Peters, supra at 360, 174 P. at 118. Such incidental damages may include the cost of removing and storing the lessee's property, see Craig v. Reed, 98 Cal. App.2d 695, 696-697, 220 P.2d 771, 773 (1950), increased costs of remodeling caused by the delay, see Gwinn v. Goldman, 57 Cal. App.2d 393, 403, 134 P.2d 915, 919 (1943), and damages for waste, see Nolan v. Hentig, 138 Cal. 281, 282, 71 P. 440 (1903).

The lessor may not recover damages accruing after judgment (prospective damages) in an unlawful detainer proceeding. E.g., Cavanaugh v. High, 182 Cal. App.2d 714, 722-723, 6 Cal. Rptr. 525, 530-531 (1960); Roberts v. Redlich, supra at 569-570, 244 P.2d at 935. This is consistent with the rule existing prior to 1970 which denied the lessor in an action for rent the right to recover future installments of rent on a theory of anticipatory breach, or, if he took possession and relet the premises for the tenant's account, denied him the right to recover damages for loss of rent until after the expiration of the original term. See 3 B. Witkin, Summary of California Law, Real Property §§ 515-516, at 2186-2187 (8th ed. 1973).

Acting at the recommendation of the California Law Revision Commission [see 9 Cal. L. Revision Comm'n Reports 153-174 (1969)], the Legislature in 1970 added Sections 1951-1952.6 to the Civil Code which allow the lessor in an action for rent to collect prospective damages for loss of benefits of the lease. See Cal. Stats. 1970, Ch. 89. Section 1952 of the Civil Code provides, however, that, with one exception not important here,

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.

Hence, the 1970 legislation did not change the preexisting rule applicable to unlawful detainer proceedings which denied the recovery of damages occurring after judgment.

Damages in an Action Commenced as One For Unlawful Detainer Where Lessee Surrenders Possession Before Trial

If the lessee surrenders possession of the premises after commencement of the unlawful detainer proceeding, it is automatically converted into an ordinary civil action for damages. Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970). See Heller v. Melliday, 60 Cal. App.2d 689, 697, 141 P.2d 447, 451-452 (1973); Servais v. Klein, 112 Cal. App. 26, 35-36, 296 P. 123, 127 (1931). Since the action is no longer one for unlawful detainer, it would appear that Section 1952 of the Civil Code becomes inapplicable, and the prospective damage provisions of Section 1951.2 become applicable.² Hence, the lessor may recover (1) rent unpaid at the time of termination of the lessee's right to possession, with interest; (2) rent from termination until judgment less avoidable loss of rent proved by the lessee, with interest;³ (3) present value of rent which would have accrued after judgment until the end of the term less avoidable loss of rent proved by the lessee, with interest; and (4) any other amount necessary to compensate the lessor for all detriment proximately caused by or likely to result from the lessee's breach. See Civil Code § 1951.2.

2. It would appear that the provisions of Section 1951.4 of the Civil Code, allowing the lessor to leave the premises vacant and collect rent as it becomes due where the lease so provides and "the lessor does not terminate the lessee's right to possession," are inapplicable in this situation, since the lessor must terminate the lessee's right to possession before commencing an unlawful detainer proceeding. See Code Civ. Proc. § 1161; Moskovitz, supra § 3.12, at 13-14. But see Civil Code § 1952(c).
3. This is a change from pre-1970 law which terminated the lessee's liability for the reasonable rental value of the premises upon his surrender of the premises, see Chase v. Peters, 37 Cal. App. 358, 360, 174 P. 116, 118 (1934), except where the lease allowed the lessor to reenter and relet the premises for the tenant's account without declaring a forfeiture of the lease, e.g., Security Realty Co. v. Kost, 96 Cal. App. 626, 628-629, 274 P. 608, 609 (1929).

If the terms of the lease appear in the complaint, that may be a sufficient pleading to allow the plaintiff to recover all of the damages authorized by Section 1951.2 without any amendment of the complaint. See 3 B. Witkin, California Procedure, Pleading §§ 784-785, at 2399-2400, and §§ 793-794, at 2406-2407 (2d ed. 1971). The better practice, however, would be to file an amended pleading to include a specific claim for prospective damages.

If no answer or demurrer has been filed, the plaintiff may amend once as of right and without leave of court. Code Civ. Proc. § 472; 3 B. Witkin, supra § 1038, at 2617. Thereafter, the court may in its discretion allow such amendment, Code Civ. Proc. § 473, and is guided by a "policy of great liberality in permitting amendments at any stage of the proceeding" 3 B. Witkin, supra § 1040, at 2618. Among the reasons for which the court may properly refuse to allow an amendment are: (1) the proposed amendment is insufficient to state a cause of action; (2) the party seeking leave to amend has failed to submit a copy of the proposed amendment; (3) there has been unwarranted and prejudicial delay in submitting the proposed amendment; (4) the party seeking leave to amend has engaged in inequitable conduct during settlement negotiations. See 3 B. Witkin, supra §§ 1045-1050, at 2622-2627.

The fact that the plaintiff seeks additional damages in his complaint is no bar to the granting of leave to amend. A complaint may be amended to seek an additional or an entirely different remedy, to change the legal theory of recovery, or to change the cause of action, so long as recovery is sought "on the same general set of facts." 3 B. Witkin, supra §§ 1074-1075, at 2650-2651, and § 1080, at 2656.

Therefore; when the lessee surrenders possession in an unlawful detainer proceeding, the lessor should always be granted leave to amend to seek prospective damages unless there are equitable considerations to the contrary.

The Denitz Proposal and Staff Recommendations.

There are five basic elements of Mr. Denitz' proposal, set forth with staff recommendations as follows:

I

Proposal: Make the measure of damages specified in subdivisions (a)(1) and (a)(2) of Civil Code Section 1951.2 (rent to termination with interest, and rent from termination until judgment, less avoidable loss, with interest) the express measure of compensatory damages in all unlawful detainer proceedings, whether or not the tenant has surrendered possession. See proposed Code Civ. Proc. § 1174(b)(1).

Staff recommendation: Approve. This would codify what appears to be existing law where the tenant has surrendered possession, and would eliminate any doubt or confusion. It changes existing law slightly where the tenant has not surrendered possession by awarding "unpaid rent which would have been earned after termination" instead of damages for the reasonable rental value of the premises after termination. This is consistent with the approach recommended by the Commission and adopted by the Legislature in 1970, moving away from real property concepts and toward contract concepts in dealing with leases. See 9 Cal. L. Revision Comm'n Reports 157-159 (1969).

II

Proposal: Make a technical, conforming change in the formula for assessing punitive damages where malice is shown (compensatory damages plus, in the court's discretion, twice that sum instead of, as now, compensatory damages or treble that sum). See proposed Code Civ. Proc. § 1174(b)(2).

Staff recommendation: Approve.

III

Proposal: Make mandatory the present discretion to grant the plaintiff's application for leave to amend to plead prospective damages after the lessee has surrendered possession of the premises. See proposed Code Civ. Proc. § 1174(b)(3).

Staff recommendation: Disapprove the mandatory feature of the proposal. The court's present discretion is liberally exercised in favor of allowing amendment, and the court should retain discretion to deny leave to amend when equitable considerations warrant.

Approve in principle the language making explicit the applicability of the prospective damage provisions of Civil Code Section 1951.2 to unlawful detainer proceedings when the lessee has surrendered possession. This would codify what appears to be existing law, and would eliminate doubt and confusion.

IV

Proposal: Amend the provision allowing the tenant to regain possession of the premises after an unlawful detainer judgment for default in rent (if a forfeiture has not occurred) by paying into court the amount of the judgment within five days, to make it applicable when the lease has not "terminated," instead of when the lease has not "by its terms expired." See proposed amendment to Code Civ. Proc. § 1174(c).

Staff recommendation: Disapprove. The effect of the proposed change is not clear. The word "terminated" appears to have been borrowed from Section 1951.2(a) of the Civil Code (lease "terminates" before the end of the lease term by the tenant's breach plus either abandonment by the lessee or

termination of the right to possession by the lessor), but Section 1952 makes Section 1951.2 inapplicable to unlawful detainer actions. If the word "terminated" as added to Section 1174(c) of the Code of Civil Procedure has the meaning given to it by Section 1951.2(a) of the Civil Code, the proposed amendment will effectively repeal subdivision (c) since an unlawful detainer action cannot be maintained during the lease term without a breach by the tenant plus termination of the tenant's right to possession. See Code Civ. Proc. § 1161.

V

Proposal: Amend Section 1952 of the Civil Code (effect of 1970 legislation on unlawful detainer proceedings) to do the following:

(a) Make clear that the lessor may seek prospective damages either in an action for unlawful detainer after surrender of possession by the tenant, or in a separate action for damages, but not both.

(b) Require the court liberally to grant a motion by the plaintiff for consolidation or removal if two such actions are pending.

Staff recommendation: Approve (a) in principle. This would codify existing law and clarify the effect of Section 1952 in view of the proposed changes to the unlawful detainer statute. Disapprove (b) as unnecessary.

Respectfully submitted,

Robert J. Murphy III
Legal Counsel



Memorandum 76-11

EXHIBIT I

(213) 477-1010

Tishman Realty & Construction Co., Inc.

WEST COAST HEADQUARTERS

10860 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90024

B-1 CONTRACTOR'S LICENSE NO. 170730

December 8, 1975

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Incorporating Rent Claims into Unlawful Detainer Actions

Dear John:

As requested by you, enclosed are handwritten "paste-ups" showing proposed changes in Code of Civil Procedure Section #1174 and Civil Code Section #1952.

Hoping that the enclosures may be transmitted as such to the Commissioners in either their enclosed present form (or a substantially similar re-typed form) in time for the January Commission meeting, I am,

Cordially,

TISHMAN REALTY & CONSTRUCTION CO., INC.


Ronald P. Denitz
Assistant General Counsel

RPD:ere
Enclosures

CIVIL CODE § 1951.2

RPP
12/8/75

(FOR REFERENCE PURPOSES)

§ 1951.2. [Breach by lessee: Lessor's remedies: Indemnification for prior liabilities of lessee.] (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) Subject to subdivision (c), 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) The lessor may recover damages under paragraph (3) of subdivision (a) only if:

(1) The lease provides that the damages he may recover include 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, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss for the same period that the lessee proves could be reasonably avoided; or

(2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

(d) 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.

(e) 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. [1970 ch 89 § 2.] *Wilkin Summary (8th ed) pp 537, 2109, 2119, 2181, 2193, 2194, 2195, 2196, 2197, 2198, 2209, 2210.*

CODE OF CIVIL PROCEDURE

R.P.D
12/8/75

§ 1174. (Operative beginning January 1, 1976) [Judgment: Damages: Stay of execution: Enforcement of judgment.] (a) 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. (b) The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff AS FOLLOWS:

^{COMPENSATORY}
(1) DAMAGES FOR ~~BY~~ any forcible entry, or FOR ~~BY~~ any forcible or unlawful detainer, alleged in the complaint and proved on the trial, ~~and find~~ AND FOR THE AMOUNTS SET FORTH IN PARAGRAPHS (1) AND (2) OF SUBDIVISION (a) OF SECTION 1951.2 OF THIS CODE, AND COMPENSATORY DAMAGES, IF APPLICABLE, AS SET FORTH IN PARAGRAPH (3) OF THIS SUB-DIVISION (b); PLUS

^{EXEMPLARY}
(2) DAMAGES, if ~~the~~ the defendant is found guilty of forcible entry,

or forcible or unlawful detainer, and malice is shown, FOR DOUBLE ^{the amount of any rent} ~~of the alleged unlawful detainer or after default in the payment of rent~~ THROUGH THE DATE OF JUDGMENT AND DOUBLE THE DAMAGES FOR THE ENTRY OR DETAINER BUT SUCH EXEMPLARY DAMAGES SHALL BE AWARDED ONLY IN THE DISCRETION OF THE TRIER OF FACT;

(3) IF POSSESSION OF THE PREMISES HAS BEEN RETURNED TO PLAINTIFF AFTER THE FILING OF THE CASE BUT BEFORE THE VERDICT OF THE JURY OR, IF THE CASE BE TRIED WITHOUT A JURY, THE FINDINGS OF THE COURT, THEN THE COURT SHALL GRANT THE PLAINTIFF LEAVE TO AMEND HIS COMPLAINT AND TO PROCEED TO TRY THE CASE UPON SUCH ADDITIONAL ISSUES, AND COMPENSATORY DAMAGES SHALL BE AWARDED, AS PROVIDED IN PARAGRAPHS "(3)" AND "(4)" OF SUBDIVISION (a) OF SECTION 1951.2 OF THIS CODE, SUBJECT TO THE LIMITATIONS PROVIDED IN SUBDIVISIONS (b) AND (c) OF SUCH SECTION;

~~the~~
~~plaintiff may be awarded either damages and rent found due or punitive damages in an amount which does not exceed three times the amount of damages and rent found due. The trier of fact shall determine whether damages and rent found due or punitive damages shall be awarded, and judgment shall be entered accordingly.~~

(c) 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 ^{TERMINATED} ~~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.

(d) A plaintiff, having obtained a writ of restitution of the premises pursuant to an action for unlawful detainer, shall be entitled to have the premises restored to him by officers charged with the enforcement of such writs. Promptly upon payment of reasonable costs of service, the enforcing officer shall serve an occupant or post a copy of the writ in the same manner as upon levy of writ of attachment pursuant to subdivision (d) of Section 488.310. In addition, where the copy is posted on the property, another copy of the writ shall thereafter be mailed to the defendant at his business or residence address last known to the plaintiff or his attorney or, if no such address is known, at the premises. The writ of restitution of the premises shall include a statement that personal property remaining on the premises at the time of its restitution to the landlord will be sold or otherwise disposed of in accordance with Section 1174 of the Code of Civil Procedure unless the tenant or the owner pays the landlord the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the premises are restored to the landlord. If the tenant does not vacate the premises within five days from the date of service, or, if the copy of the writ is posted, within five days from the date of mailing of the additional notice, the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof. It shall be the duty of the party delivering the writ to the officer for execution to furnish the information required by the officer to comply with this section.

(e) Personal property remaining on the premises which the landlord reasonably believes to have been lost shall be disposed of pursuant to Article 1 (commencing with Section 2080) of Chapter 4 of Title 6 of Part 4 of Division 3 of the Civil Code. The landlord is not liable to the owner of any property which he disposes of in this manner. If the appropriate police or sheriff's department refuses to accept such property, it shall be deemed not to have been lost for the purposes of this subdivision.

(f) The landlord shall give notice pursuant to Section 1983 of the Civil Code to any person (other than the tenant) reasonably believed by the landlord to be the owner of personal property remaining on the premises.

(g) The landlord shall store the personal property in a place of safekeeping until it is either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i).

(h) The landlord shall release the personal property to the tenant or, at the landlord's option, to a person reasonably believed by the landlord to be its owner if such tenant or other person pays the costs of storage as provided in Section 1990 of the Civil Code and claims the property not later than the date specified in the writ of restitution before which the tenant must make his claim or the date specified in the notice before which a person other than the tenant must make his claim.

(i) Personal property not released pursuant to subdivision (h) shall be disposed of pursuant to Section 1988 of the Civil Code.

(j) Where the landlord releases personal property to the tenant pursuant to subdivision (h), the landlord is not liable with respect to that property to any person.

(k) Where the landlord releases personal property pursuant to subdivision (h) to a person (other than the tenant) reasonably believed by the landlord to be its owner, the landlord is not liable with respect to that property to:

- (1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or
- (2) Any other person, unless such person proves that, prior to releasing the property, the landlord believed or reasonably should have believed that such person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of such person.

(l) Where personal property is disposed of pursuant to Section 1988 of the Civil Code, the landlord is not liable with respect to that property to:

- (1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or
- (2) Any other person, unless such person proves that, prior to disposing of the property pursuant to Section 1988 of the Civil Code, the landlord believed or reasonably should have believed that such person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of such person.

(m) For the purposes of subdivisions (e), (f), (h), (k), and (l), the terms "owner," "premises," and "reasonable belief" have the same meaning as provided in Section 1980 of the Civil Code. [1872; 1873-74 ch 383 § 153; 1907 ch 37 § 1; 1931 ch 259 § 1; 1933 ch 741 § 1; 1939 ch 717 § 1; 1945 ch 593 § 1; 1967 ch 1600 § 2; 1968 ch 102 § 2; 1969 ch 480 § 1; 1970 ch 674 § 1; 1971 ch 1648 § 1; 1974 ch 331 § 3; ch 1516 § 21, operative January 1, 1976.] *Cal Jur 3d Appellate Review* § 205, *Assault and Other Wilful Torts* § 33; *Cal Jur 2d Actns* § 34, *Crops* § 14, *Damg* §§ 160, 183, *Forc E & D* §§ 3, 32, 34, 35, *L & T* §§ 278, 280, 287, 312, 362, 379 *et seq.*; *Cal Practice* §§ 1:6, 195:1, 195:3, 195:12, 195:13, 195:32, 195:34, 195:35, 208:2, 383:6, 383:26; *Witkin Procedure 2d* pp 459, 1647, 2168, 2172, 3202, 3442, 3543, 3553; *Summary* pp 1116, 1599.

R.P.D.
12/8/75

CIVIL CODE

§ 1952. [Effect of actions for unlawful detainer, forcible entry, forcible detainer.] (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) EXCEPT AS PROVIDED IN SUBDIVISION (c), 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, 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, THEN:

(1) LESSOR MAY SEEK THE RELIEF PROVIDED IN PARAGRAPHS (3) AND (4) OF SECTION 1951.2 IN ^{EITHER} ~~BUT NOT BOTH~~ AN UNLAWFUL DETAINER ACTION AND A SEPARATE ACTION FOR DAMAGES PURSUANT TO SECTION 1951.2, BUT THE COURT SHALL LIBERALLY GRANT MOTIONS OF PLAINTIFF FOR CONSOLIDATION OR REMOVAL, OR BOTH, IF IT AT ANY TIME APPEARS THAT PLAINTIFF SEEKS SUCH RELIEF IN BOTH SUCH ACTIONS;

(2) IF LESSOR OBTAINS SUCH POSSESSION under a judgment pursuant to Section

1174 of the Code of Civil Procedure, he is no longer entitled to the remedy provided under Section 1951.4 unless the lessee obtains relief under Section 1179 of the Code of Civil Procedure. [1970 ch 89 § 7.] *Witkin Procedure 2d*, p 984; *Summary (8th ed)* pp 2119, 2194, 2195, 2199, 2200, 2210.