

#50(L)

7/2/65

Memorandum 65-34

Subject: Study No. 50(L) - Rights of Lessor

Attached to this memorandum is a tentative recommendation and a statute that is designed to spell out in some detail the rights of lessors and lessees upon termination of a lease as a result of a breach, abandonment, or repudiation. You will receive a supplement to this memorandum containing alternative recommendations and statutes that are less detailed. You should note the following matters:

The question was raised at the last meeting whether a breach of the lease by the lessee gave the lessor a right to recover prospective damages as in the case of a breach of another kind of contract. Our research reveals that the lessor's position is no better when his lessee breaches the lease than it is when the lessee abandons the lease. He has the option of terminating the lease and evicting the lessee, in which case the lessee's obligation to pay rent terminates. He also has the option of treating the breach as a partial breach and continuing to recognize the lessee's interest in the property. Costello v. Martin Brothers, 74 Cal. App. 782, 786, 241 Pac. 588 (1925). Burke v. Norton, 42 Cal. App. 705, 184 Pac. 45 (1919), held that a lease could provide that an eviction of the lessee for breach would not terminate the lessee's interest, and the lessor could reenter the property and relet for the benefit of the lessee. The case did not mention Code of Civil Procedure Section 1174, and was directly contrary to the language of the section as it then read. However, Section 1174 was amended in 1931 to codify the rule in the Burke case, and it now states the law. Lawrence Barker, Inc. v. Briggs, 39 Cal.2d 654, 248 Pac.2d 897 (1952). Apparently, the cause of action for rental deficiencies does not accrue until the end of the term when

the lessee is evicted . just as it does not accrue until the end of the term when the lessee abandons. Of course, under Civil Code Section 3308, the lease itself may provide for the right to recover such damages immediately following the eviction or abandonment. The revised recommendation and statute reflects the above research.

In accordance with the Commission's instructions, the basic section provides that the lessor is entitled to damages for the loss of his bargain. This is measured by the excess of the rental payable under the original lease over the rental value of the property. Subdivision (a) has been so worded to make it clear that rental installments overdue at the time of computation should be taken at full value plus interest while rental installments not yet due at the time of computation should be discounted.

Section 3321 merely gives evidentiary effect to the rentals prescribed in a new lease. They are presumptively the reasonable rental value of the property. As the section is now worded, the lessor would prove the new lease and, without more, would be entitled to recover the difference between the rentals in the new lease and the rentals in the old (that is, if the new lease represented a loss). The lessee could prevent a recovery in that amount by showing that the fair rental value was in fact higher than the rent called for in the new lease.

We considered requiring the lessor to show that the new lease was made in good faith and a reasonable manner, but we omitted such a requirement because it seemed to confuse the burden of proof problem. The real question, of course, is the reasonable rental value of the property, not the manner in which the new lease was made. The new lease could have been made in quite an unreasonable manner, yet the rental called for could nonetheless be the reasonable rental value of the property. If the lessee demonstrated that the

lease was made in an unreasonable manner, this would not necessarily demonstrate that the rental prescribed was unreasonable. We finally concluded that the statute allocates the burden of proof much more clearly if it gives presumptive effect to any new lease and requires the lessee to show that a different value is in fact the reasonable rental value of the property.

Section 3322 has been revised somewhat so that all of its subdivisions apply either upon repudiation or upon termination for breach. Subdivision (f) has been added. Its substance formerly appeared in Section 3320. Its language has been taken from Section 3300 of the Civil Code, which prescribes the measure of damages for breach of contract.

The amendment to Section 1174 of the Code of Civil Procedure has been added to the statute. In substance, the amendment restores the section to the form in which it appeared prior to 1931. In effect, it now provides that a lessor may evict a lessee and still hold the lessee responsible under the lease. This seems to be letting the lessor have his cake and eat it too. If the lessor is going to kick the lessee off the property, it should be recognized that the lease is at an end for purposes of performance. But, of course, the lessor still has his remedy in damages for the breach, and such remedy includes the loss of future rentals. The language which is stricken was put in the section to provide a lessor with a right to damages after evicting a defaulting lessee. Its procedure for doing so, however, is clumsy and inconsistent with the general rules relating to contract remedies. We have stricken the language because the lessor's right to damages is provided in a much more direct and reasonable way in Civil Code Sections 3320-3328.

We have attached two copies of the tentative recommendation to this

memorandum so that you can mark your suggested changes in the language of the recommendation and sectional comments on one and turn it in to the staff at the July meeting.

Respectfully submitted,

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Assistant Executive Secretary

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE RIGHTS AND DUTIES ATTENDANT UPON

ABANDONMENT OR TERMINATION OF A LEASE

Section 1925 of the Civil Code provides, in effect, that a lease is a contract. The cases involving leases, however, have repeatedly pointed out that a lease is also a conveyance, for it transfers to the lessee an estate in property. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457 (1942); Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122 (1939). And, although principles of contract law are frequently applied in determining cases involving leases (see, e.g., Medico-Dental Bldg. Co. v. Horton & Converse, *supra*), the courts have been guided principally by common law property concepts in determining the rights of the parties upon a total breach of a lease by the lessee. See Welcome v. Hess, 90 Cal. 507, 513, 27 Pac. 369 (1891); Maurice Mercantile Co. v. Am. Employers' Ins. Co., 140 Cal. App. 354, 35 P.2d 1047 (1934). See also, The California Lease--Contract or Conveyance, 4 STAN. L. REV. 244 (1952).

As a result of this development, the present law does not afford adequate relief to either lessors or lessees when the leasehold is abandoned or the lease is otherwise terminated because of the lessee's breach. Under existing law, a lessor frequently is precluded from recovering damages for all of the detriment caused by the defaulting lessee, and a defaulting lessee may be subjected to forfeitures that are not countenanced under the law relating to contracts generally. See 26 CALIF. L. REV. 385 (1938).

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

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

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

A similar range of choices confronts the lessor whose lessee commits a sufficiently substantial breach of the lease to warrant termination thereof. He may treat the breach as a partial breach, decline to terminate the lease, and sue for the damages caused by the particular breach. In such a case, the lessor must continue to deal with a lessee who has proven to be unsatisfactory. The lessor may also terminate the lease and force the lessee to relinquish the property, resorting to an action for unlawful detainer to recover the possession of the property if necessary. In such a case, the lessor's right to the remaining rentals due under the lease ceases upon the termination of the lease. Costello v. Martin Bros., 74 Cal. App. 782, 241 Pac. 588 (1925). Under some circumstances, the lessor 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. In such a case, 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

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this remedy or he will find that he has forfeited his right to the remaining rentals from his original lessee despite his lack of intent to do so. See, e.g., Neuhaus v. Norgard, 140 Cal. App. 735, 35 P.2d 1039 (1934); A.H. Busch Co. v. Straus, 103 Cal. App. 647, 284 Pac. 966 (1930).

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In contrast, under the law applicable to most contracts, if one party repudiates or commits a substantial breach of his obligations under the contract, the other party may consider the contract at an end for purposes of performance and recover damages for all of his injury, past, present, and future. He does not forfeit his right to damages for the future injury by considering the contract at an end for purposes of performance. See 4 CORBIN, CONTRACTS § 946 (1951). Repudiation, whether or not accompanied by a failure to perform a contractual duty, constitutes a total breach for which an action for damages can be maintained even though the time for full performance has not yet elapsed. Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22 (1943); Remy v. Olds, 88 Cal. 537, 26 Pac. 255 (1891). And, under the law applicable to most contracts, repudiation or other breach by the promisor gives rise to a duty on the part of the promisee to mitigate damages, i.e., the promisee cannot recover damages for any detriment that is reasonably avoidable. See discussion in Bomberger v. McKelvey, 35 Cal.2d 607, 613-615, 220 P.2d 729 (1950).

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Except where a mining lease is involved (see Gold Mining & Water Co. v. Swinerton, supra), the doctrine of anticipatory breach has not been applied to leases. Oliver v. Loydon, 163 Cal. 124, 124 Pac. 731 (1912); Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891); In re Bell, 85 Cal. 119, 24 Pac. 633 (1890). Bound by common law property concepts, the courts have considered the lessee's obligation to pay rent as dependent on the continued existence of the term. 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 dependent thereon also ends. Continued adherence to these property concepts thus forces a lessor to choose among several courses of action none of which provides an immediate remedy that will compensate him for all of the detriment caused by the lessee.

In addition, the courts by adhering to these property concepts have permitted lessees to be subjected to forfeitures that would not be permitted under any other kind of contract. The courts have been quick to hold that provisions in leases for liquidated damages are void. Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899). Similarly, provisions for the acceleration of the unpaid rental installments have been held invalid. Ricker v. Rombough, 120 Cal. App. 2d Supp. 912, 261 P. 2d 328 (1953). But, if the lessee makes an advance payment to the lessor as an advance payment of rental or "in consideration for the execution of the lease," the lessor is entitled to keep the payment regardless of his actual damages when the lease is terminated by reason of the lessee's breach. A-1 Garage v. Lange Investment Co., 6 Cal. App. 2d 593, 44 P. 2d 681 (1935); Curtis v. Arnold, 43 Cal. App. 97, 184 Pac. 510 (1919); Ramish v. Workman, 33 Cal. App. 19, 164 Pac. 26 (1917). See 26 CAL. L. REV. 385, 388 (1938).

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

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

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

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Code of Civil Procedure Section 1174 has also been amended in an effort to alleviate the problems faced by a lessor when his lessee refuses to pay rent or otherwise breaches the lease. Section 1174 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 to another, and hold the lessee liable for any deficiency in the rentals. But again, the statutory remedy falls short of providing full protection to the rights of both parties. It does not permit the lessor to recover damages for future losses; it does not require the lessor to mitigate damages; and it does not protect the lessee from forfeiture.

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

1. When a lease is abandoned or otherwise terminated by reason of the lessee's breach or repudiation of the lease, the lessor should have an immediate right to recover all of the damages caused by the lessee's default, past, present, and future. He should not be required to defer action until the end of the term and run the risk that the defaulting lessee will then be solvent and available.

2. The basic measure of the lessor's damages should be the loss of the bargain represented by the lease. He should be entitled to recover the difference between the remaining rentals provided in the lease and the fair rental value of the property for the remainder of the term. He should also be entitled to recover any incidental damages resulting from the lessee's default, such as expenses necessarily incurred. But, this should be the limit of his right to exact payment from the lessee. If the lessor chooses to let the property remain idle, he should not be permitted to recover from the lessee the entire remaining rental obligation, as he may do under existing law. Here, as under contract law generally, there should be no right to recover for any loss that is reasonably avoidable.

3. If a lessor relets property after termination of a lease by reason of the lessee's abandonment or other breach, the lessor should not forfeit his right to damages. On the contrary, he should be entitled to recover all reasonable expenses incurred in reletting the property in addition to his basic measure of damages. The rental provided in the new lease should be presumed to be the fair rental value of the property. Thus, the lessor should be entitled to recover the difference between the rentals called for in the old lease and the rentals called for in the new lease unless the defaulting lessee persuades the trier of fact that the reasonable rental value of the property is more than the new lease provides.

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

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

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

7. It should be clear that a lessor's right to damages for the loss of the remainder of the lease term does not impair his right to specific or preventive relief under the lease in any case where such a form of relief is otherwise appropriate. It should be clear also that a lessor's right to recover such damages is independent of his right to bring an action for unlawful detainer to recover the possession of the property, and that the damages recommended herein are recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action. Of course, the lessor should not be entitled to recover twice for the same items of damage.

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

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

PROPOSED LEGISLATION

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

An act to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 of, and to repeal Section 3308 of, the Civil Code, and to amend Section 1174 of the Code of Civil Procedure, relating to leases.

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

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

Article 1.5. Damages Upon Termination or Repudiation of Lease

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

§ 3320. Lessor's damages upon termination of a lease for breach, abandonment, or repudiation

3320. Subject to Section 3326, if a lease of real or personal property is terminated because of the lessee's breach thereof, or if the lessee abandons the leased property or otherwise repudiates the lease, the measure of the lessor's damages for such breach, abandonment, or repudiation is the sum of the following:

(a) The excess, if any, of the value of the rentals which would have been due to the lessor under the lease for the remainder of the term over the reasonable rental value of the property for the same period, such values to be computed as of the time of computation.

(b) Any incidental damages provided in Section 3322.

Comment. Section 3320 prescribes the basic measure of the damages a lessor is entitled to recover when the lessee abandons the property or the lease is otherwise terminated by reason of the lessee's breach.

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

Section 3320 has been made subject to Section 3326 in order to make it clear that if the lessor relets the property for a rental in excess of its reasonable rental value, the damages the lessor is entitled to recover under Section 3320 must be reduced accordingly.

Under Section 3320, the value of the rentals due to the lessor under the original lease should be computed as of the time the computation is made. If some rental installments are then due or overdue, they should be taken at full value plus interest. Those that are not then due should be appropriately discounted. The value of rentals due to the lessor under any new lease and the reasonable rental value of the property should similarly be computed as of the time the computation is made.

In addition to the basic measure of damages prescribed by Section 3320, the lessor is entitled to recover from the lessee certain incidental damages described in Section 3322. See the Comment to that section. And, if the lease so provides, the lessor may be entitled to recover his attorney's fees in addition. See Section 3324.

§ 3321. Rental upon reletting presumed to be reasonable rental value

3321. If leased real or personal property is relet following the termination of the original lease because of the lessee's breach thereof, or following the abandonment of the leased property or other repudiation of the lease by the lessee, the rental due to the lessor under the new lease is presumed to be the reasonable rental value of the property for the term covered by the new lease. This presumption is a presumption affecting the burden of proof.

Comment. Under Section 3320, a lessor is entitled to recover from a defaulting lessee the excess of the value of the rentals which would have been due under the original lease for the remainder of the term over the reasonable rental value of the property for the same period. Section 3321 provides that the "reasonable rental value" of the property is presumptively fixed by the new lease when the lessor relets the property. The lessee may overcome the effect of this presumption by persuading the trier of fact that the reasonable rental value of the property is in fact higher than rental fixed by the new lease. But, if the trier of fact is not persuaded that the reasonable rental value of the property is higher than the new rental agreement, the lessor is entitled to recover under Section 3320 the excess of the rentals provided in the old lease over the rentals provided in the new lease.

§ 3322. Lessor's incidental damages

3322. If a lease of real or personal property is terminated because of the lessee's breach thereof, or if the lessee abandons the leased property or otherwise repudiates the lease, the incidental damages to a lessor under this article are:

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

(b) The amount due to the lessor under the lease for any reasonable time granted by the lessor to the lessee to retract the repudiation or cure the breach, together with any reasonable expenses incurred in caring for the property during such time.

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

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

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

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

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

When leased property is abandoned or the lease is otherwise terminated, it will usually be necessary for the lessor to take possession for a time in order to prepare the property for reletting and to secure a new tenant. A lessor must be entitled to recover the rentals due under the lease for this period if the damages awarded are to put him in as good a position as would performance by the lessee of his contractual obligations. The lessor should also be entitled to recover for his expenses in caring for the property during this time, for these are expenses that he would not have had to bear if the lessee had not abandoned the property or breached the lease.

In some cases, too, a lessor may wish to give a lessee an opportunity to retract his repudiation or cure his breach and resume his obligations under the lease. If the lessor does so and the lessee does not accept the opportunity to cure his default, the lessor should be entitled to recover the full amount of the rentals due under the lease for this period of negotiation as well as his expenses in caring for the property during this period.

In addition, Section 3322 provides that the lessor may recover for his expenses in retaking possession of the property, repairing damage caused by the lessee, and in reletting the property. There may be other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee, and if so, the lessor may recover them also.

Subdivision (f), which is based on Civil Code Section 3300, provides that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease.

§ 3323. Liquidated damages

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

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

§ 3324. Attorney's fees

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

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

§ 3325. Lessee's relief from forfeiture

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

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

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

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

§ 3326. Lessor's benefits on reletting

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

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

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

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

§ 3327. Specific or preventive relief

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

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

§ 3328. Unlawful detainer actions

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

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

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

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

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

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

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

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

SEC. 3. Section 1174 of the Code of Civil Procedure is amended to read:

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

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

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in

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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.

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

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

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Inasmuch as Civil Code Sections 3320-3328 permit a lessor to terminate a lease without forfeiting his right to damages for the loss of the future rentals due under the lease, the deleted language is no longer necessary.