#50 6/4/66

Memorandum 66-28

Subject: Study 50 - Leases

A quorum was not present when Memorandum 66-24 relating to leases was considered at the last meeting. A subcommittee considered a revised recommendation, recommended that the Commission proceed on the basis of the revised recommendation, and then suggested several changes in the revised recommendation. This memorandum and the attached revised recommendation (pink) are based on the recommendations and suggestions of the subcommittee.

To accommodate the suggesticns of the subcommittee, the format of the statute has been modified somewhat. The scheme of the statute is now as follows:

Repudiation of a lease is defined in Section 1951. Section 1951.5 provides that either an eviction or a repudiation terminates a lease. The purpose of Section 1951.5 is to make it abundantly clear that a lessor cannot evict a lessee and still preserve the lessor-lessee relationship and a lessor cannot regard that relationship as continuing after a lessee has repudiated the lease and abandoned the property. Note the discussion of total breach and partial breach in the excerpt from Corbin on Contracts that is attached to this memorandum as Exhibit I (yellow). Corbin points out there that the aggrieved party does not have the option of treating a breach as a partial breach when there has been a repudiation, but the aggrieved party can treat any breach as a partial breach if there has been no repudiation. Section 1951.5 carries out this analysis by providing that repudiation always terminates a lease. Of course, this broad statement must be qualified in those cases where the aggrieved party is entitled to specific performance.

We have provided for that situation in Section 1952(b), which provides that a decree of specific performance nullifies the effect of a repudiation.

Section 1952(a) provides for the nullification of a repudiation by retraction.

Section 1952.5 prescribes the remedies available upon a repudiation. In accordance with Corbin's analysis, the right to regard it as a partial breach is not included.

Section 1953 gives the remedies available upon a material breach where there has been no repudiation. Again in accordance with Corbin's analysis, we have provided here for the right to treat the breach as a partial breach. Otherwise the remedies are the same as for a repudiation--the same remedies that are available for any total breach.

Section 1953.5 clarifies the starting date for the statute of limitations in repudiation cases. Section 1954 deals with personal property left behind by a lessee. Sections 3320-3327 deal with the measure of damages. Section 3387.5 clarifies the right to specific performance of leases that are really purchase contracts. The remainder of the statute consists of technical amendments and provisions.

That is the general format. Specific matters to consider are as follows:

Section 1951

The question of voluntariness in (b) was discussed by the subcommittee. Involuntary inability to perform a contract is usually regarded as an excuse for performance but not a breach. Corbin and the Restatement both indicate that a repudiation must be voluntary.

The question of communication was also raised. We believe that a breach is a breach, and the time the other party finds out about it relates to the question of remedies only.

Section 1951.5

Subdivisions (a) and (b) were approved by the subcommittee subject to further consideration of the need for the whole section. Subdivision (c) has been revised to conform to the deletion of "abandonment."

We think the section serves a valuable purpose in clearly putting an end to the fiction that a lessor-lessee relationship can exist when the lessee has no rights under the lease.

Section 1952

Subdivision (a) has been revised to indicate that the repudiator must be able and willing to perform and, in addition, this information must be communicated.

Subdivision (b) has been added to provide for the specific performance cases.

Sections 1952.5-1953

The subcommittee asked the staff to provide for the remedies available in case of a partial breach. To do this, we added a new Section 1953 and modified Section 1952.5 to conform.

Section 1953.5 was approved by the subcommittee.

Section 1954

This has been modified in accordance with the subcommittee's suggestion to provide for notice to lienholders.

Sections 3320-3322 were approved by the subcommittee.

Remainder

The remainder of the statute was not considered by the subcommittee. The Comments below are from Memorandum 66-24, and references to the tentative recommendation are to the recommendation distributed for comments last year.

Section 3323

Section 3323 is based on Section 3321 as contained in the tentative recommendation. It has been revised, however, to reflect the fact that it can be used under this draft when the lessee is suing for damages as well as when the lessor is suing for damages.

Note that Professor Verrall suggested that this provision might be subject to abuse and that the State Bar, Southern Section, objected to the provision because of the varying terms and conditions under which the property might be relet.

Section 3324

This section was previously approved as part of the tentative recommendation (it was numbered 3323 in the tentative recommendation). The last paragraph has been added to the comment because the statute now deals with lessee's rights as well as lessor's.

Section 3325

Professor Verrall raises the question whether the section should cover leases where provision is made that the lessor shall recover attorney's fees if the lessee sues.

He suggests that rescission of a lease may end the right to attorney's fees. This would be true only if the rescission were effective. If the lessee sued for breach of the covenant of quiet enjoyment, he would still be entitled to attorney's fees under this section if the lessor's rescission were ineffective--and the lessee would be entitled to substantive relief only if the rescission were ineffective.

He also asks if Civil Code Section 794 is repealed by implication. Section 794 of the Civil Code provides that upon the termination or abandonment of an oil and gas lease, the lessee must, on demand, execute a quitclaim deed. Failure to do so makes the lessee liable to the lessor for any damages caused by such failure and, in addition, for reasonable attorney's fees. We see no inconsistency between that section and Section 3324, so we do not see how it could be repealed by implication.

The Northern Section suggests the amendment of (a)(2) to read:

> (2) If the lease provides that one party may recover fees then the other party to the lease may also recover attorney's fees incurred in obtaining relief for the breach of the lease should he prevail.

Section 3326

Section 3326 was approved as Section 3325 of the tentative recommendation. A reference to Section 3324 was added to meet an objection of Professor Verrall. We think this change is nonsubstantive.

Section 3327

This section was approved as part of the tentative recommendation. It has been revised to prevent recovery on a claim for damages where the claim was previously denied.

Section 3308

The repeal of Section 3308 was previously approved.

Section 3387.5

This section is new, and it is designed to meet the lease-purchase problem raised by George Herrington, Los Angeles County, and Orange County.

C.C.P. § 1174

The amendment of this section was previously approved.

Commissioner Stanton has raised a question concerning Code of Civil Procedure Section 1174 that should be decided by the Commission before a final recommendation on this subject is made.

Section 1174 provides (as the Commission proposed to amend it) that a judgment for unlawful detainer after default in the performance of the obligations of a lease must declare the forfeiture of the lease. But, if the three-day notice sent by the lessor (as a condition of bringing the action) did not

state the election of the lessor to declare the forfeiture of the lease, the court is empowered to delay execution upon the judgment for five days during which time the lessee has the right to cure his default. And, if the lease is for a term of more than one year, it does not contain a provision forfeiting the lessee's interest upon default, and the three-day notice does not contain a declaration of forfeiture, the court is required to delay execution for five days during which time the lessee has the right to cure his default.

Thus, a lessor is entitled to immediate execution in any case where he declares a forfeiture of the lessee's interest in the three-day notice. Failure to so declare may result in a five-day delay in execution in any case, and in the case of certain long term leases that do not contain forfeiture clauses, such failure results in an automatic five-day delay in execution.

In any case, however, Section 1179 of the Code of Civil Procedure empowers the court to relieve a tenant "in case of hardship" from forfeiture of his interest if the tenant applies for such relief within 30 days after the forfeiture is declared and fully cures his default in performance under the lease.

Although the language is archaic--"termination" should be used instead of "forfeiture"--we made no change in the substantive parts of these sections other than to eliminate the portion that permits a lessee to be evicted without termination of his interest. But, inasmuch as it will make little difference substantively under Section 1952 whether the lessor declares a forfeiture or termination or whether he doesn't--in either event the lease must terminate if the lessee vacates pursuant to the notice or is evicted--should Section 1174 continue to distinguish between cases where the lessor declares a forfeiture and where he does not. The only substantive effect of the declaration will be that the lessee cannot obtain the five-day stay of execution.

If no substantive change is desired--that is, if the lessor should be entitled to get immediate execution of the unlawful detainer judgment when he wants it--should the relevant sections be revised to require a more meaningful declaration of the lessor's intent on the three-day notice? If this were done, the statutes would provide in substance that if the lessor declared that immediate surrender of the premises (at the end of the three-day period) is demanded, he could obtain immediate execution. But without such a declaration, the court could order a five-day delay.

Thus, the questions for the Commission to decide are:

Should a lessor have a right to immediate execution of an unlawful detainer judgment where he declares his intent to exercise such right?

If so, should the Code of Civil Procedure be revised to require the lessor to declare his election in more meaningful language?

Small claims jurisdiction

Mr. J. H. Petry suggests that small claims court jurisdiction be broadened to include unlawful detainer actions. He argues that unlawful detainer proceedings are now too expensive in the small case.

This argument seems based on a false premise. Code of Civil Procedure Section 117 provides that a municipal court sitting as a small claims court

has jurisdiction in unlawful detainer proceedings. It is true that this provision was held unconstitutional in Mendoza v. Small Claims Court, 49 Cal.2d 668 (1958), but that decision was met by a 1959 amendment. Witkin gives the history of the section as follows:

> By amendments in 1955 and 1957 the Legislature attempted to give a municipal judge sitting as the small claims court jurisdiction over "proceedings in unlawful detainer after default in rent for residential property where the term of the tenancy is not greater than month to month, and where the whole amount claimed is one hundred fifty dollars ($150) or less." . . . This provision was held unconstitutional in Mendoza v. Small Claims Court (1958) 49 C.2d 668, 321 P.2d 9, on the following analysis: (1) Due process requires a hearing with the right to counsel, which is not allowed in the small claims court. (2) Ordinarily the plaintiff by electing to sue there waives the right, and the defendant may appeal to the superior court, with an automatic stay, and have a trial de novo with representation by counsel . . . . (3) But in unlawful detainer proceedings stay pending appeal is discretionary with the trial judge . . . , and the result under the amendment would be that the tenant's right of possession could be taken from him initially without the kind of hearing required by the due process clause.
>
> Responding to the implied suggestion in the Mendoza case the Legislature in 1959 adopted the following addition to C.C.P. 117j . . . : "If, in an unlawful detainer proceeding . . . judgment is for plaintiff, proceedings on the judgment are automatically stayed, without the filing of a bond by defendant, until the expiration of the time for appeal, and, if an appeal is perfected, until the appeal is decided." [Witkin, California Procedure 1965 Supplement 104. Emphasis is Witkin's.]

In effect, then, the proposal is to give justice court judges unlawful detainer jurisdiction in small claims, for municipal judges sitting in small claims now have unlawful detainer jurisdiction. A sizeable percentage of justice court judges are nonlawyers. Justice courts have jurisdiction in unlawful detainer when not sitting in small claims. C.C.P. § 112. Should we propose to extend the jurisdiction of the small claims court?

Retroactivity

The Northern Section of the State Bar Committee strongly urges that a section be added limiting the effect of the legislation to leases executed

after its effective date. The Southern Section, however, comments:

> . . . the advisability of having two sets of laws covering this field over an indefinite period of years should be given serious consideration.

We added Section 12 to the revised recommendation to carry out the Northern Section's suggestion. This avoids any constitutional question involving impairment of the obligation of contracts.

Respectfully submitted,

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Assistant Executive Secretary

§ 946. The Terms "Total Breach" and "Partial Breach"

For every breach of contract, irrespective of its size or kind, the law will give an immediate remedy. What this remedy may be, is discussed in the chapter dealing with Remedies for Breach of Contract. The terms total breach and partial breach are frequently used by the courts in determining the remedies that are available to the injured party. It might reasonably be supposed, from the form of these expressions, that a total breach is the non-performance of everything undertaken in the contract, and that a partial breach is the non-performance of something less than the whole. Actual usage by the courts, however, is somewhat different. (A total breach of contract is a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end.) Whether or not a breach is thus material and important is a question of degree; and it must be answered by weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case. A total breach by A will usually terminate B's duty to perform any further on his part, but it does not always do so. The promises of the two parties may have been independent promises, or the breach by A may occur after he has already performed all conditions precedent to B's duty to proceed. Nor does a total breach by A always effectually terminate A's own duty to render the promised performance. B can sometimes get a decree for specific performance; and even in cases where this is not possible, the subsequent rendering by A of the promised performance has often been held not to be a sufficient consideration for a new promise by B, for the reason that A is doing nothing more than his contractual duty still requires of him. Nor does a total breach by A always terminate the power of B to earn the full compensation promised to him by continuing to render his own performance. In spite of his breach, A may still assure B that he will perform or he may request B to go ahead.

Circumstances may be such as to make it unreasonable to require B to stop performance, as where he is bound by a duty to others to proceed or where greater injury will result from stopping than from continuing. Therefore, it is not correct to say that a total breach terminates all the primary contractual relations and substitutes secondary and remedial ones; but it is clear that, wherever the court will hold that A's breach is a total breach, B can regard A's performance as at an end and at once maintain

action for damages for all of his injury, past, present, and future.[5] If A's breach is not sufficiently material and important for this, the breach is called a partial breach.

5. It is a total breach of contract, by prevention of performance, in case a principal contractor on construction work forbids a subcontractor to use non-union labor in rendering performance of the subcontract, there being clearly in the subcontract no limitation on the kind of labor to be employed. Moore v. Whitty, 149 A. 93, 299 Pa. 58 (1930). Since the more recent acts of Congress dealing with labor relations the action of the principal contractor might be held to be no breach at all.

Where a defendant has contracted to support the plaintiff for life or to pay to the plaintiff wages for life for such service as the plaintiff is able to render and the defendant commits a total breach of the contract by a partial non-performance accompanied by a repudiation, the plaintiff can get judgment for damages for his entire injury, future as well as past, in a single action. Pierce v. Tenn. Coal, Iron & R. Co., 19 S.Ct. 335, 173 U.S. 1, 43 L.Ed. 591 (1899); Parker v. Russell, 133 Mass. 74 (1882); Schell v. Plumb, 55 N.Y. 592 (1874); Eastern Tenn., etc. R. R. v. Staub, 7 Lea 397 (Tenn., 1881).

The question whether a breach is "total" or "partial" is a different form of the question whether a breach goes "to the essence" or not. The term "vital breach" is also in use. In Boone v. Eyre, 1 H.Bl. 273 (1777), the purchaser of a plantation and slaves paid £500 in cash and promised to pay an annuity of £160. When sued for failure to pay the annuity he pleaded that title to the slaves had failed. Since he had good title to the plantation, the court held that the breach did not "go to the whole of the consideration" and that the annuity must be paid. The breach was not total. The rule there laid down by Lord Mansfield is not capable of mechanical application; the matter is one of degree. Clarke Const. Co. v. New York, 128 N.E. 241, 229 N.Y. 413 (1920) is a case in which the court held that the city's failure to prepare four of the fourteen dumps for the collection of garbage that it had promised went to the essence (was a "total" breach) and justified the contractor in stopping performance and suing for damages for a total breach. Pound, J. dissented, quoting from Boone v. Eyre. There are thousands of cases dealing with a similar problem.

In Pierce v. Tenn. Coal, Iron & R. R. Co., supra, the court said: "The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action once for all as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing he would simply recover the value of the contract to him at the time of the breach, including all the damages past or future, resulting from the total breach of the contract. The

For a partial breach the injured party can maintain action at once; but he is not permitted to stop further performance by the wrongdoer and get damages for the anticipated future non-performance, as well as for the past non-performance constituting the partial breach. The non-payment of an instalment of money when due will always create a right of action for that money, but it will not always be a total breach.[6] A partial breach by one party, as here defined, does not justify the other party's subsequent failure to perform; both parties may be guilty of breaches, each having a right to damages.[7]

While in the case of a total breach the injured party can at once get judgment for his entire injury, it is not always necessary for him to elect this remedy. In some cases he may elect to regard the breach as partial, proceed with his own performance, sue for the partial injury, and maintain a second suit in case a further breach occurs.[8] He generally has no such election, however, in

difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract than they would have been if he had sued the defendant in an action of tort to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on."

Ballantine, "Anticipatory Breach," 22 Mich.L.Rev. 341 (1924), says: "A total breach of the contract simply means that the situation is such that the plaintiff need not await further performance by the defendant, but may at once claim damages representing the value of the promised performance. This does not mean that the duties of the defendant are as yet totally broken."

6. In Helgar Corp. v. Warner's Features, 119 N.E. 113, 222 N.Y. 449 (1918), the purchaser of a large amount of film to be delivered and paid for in instalments was guilty of a delay of 48 hours in making a payment of $10,000. The court held that although this was a breach of contract it was a minor one and did not justify repudiation by the seller. The seller could get judgment for the instalment due with interest, but not for damages as for total breach including prospective profits.

Restatement, Contracts, § 313, Comment c: "Though a breach to any extent of a contractual duty of immediate performance gives rise to a right of action, a slight breach does not terminate the duty of the injured person or the right of the party committing the breach (§ 274), unless non-performance of an express condition requires this result."

7. Mass.—Minot v. Minot, 66 N.E. 2d 5, 15, 319 Mass. 253, 270 (1946), citing Restatement, Contracts, § 357(1), comment a.

8. Restatement, Contracts, § 317: "(2) Where there has been such a total breach of contract as is stated in subsection (1) the injured party may by continuance or assenting to the continuance of performance, or by otherwise manifesting an intention to do so, treat the breach as partial, except that

case the wrongdoer has repudiated the contract, expressing his intention to perform no further. In such a case the injured party has one entire cause of action. The breach must be treated as total, and no such second action will be maintainable. Thus, if on a building contract the owner fails to make payment of a large instalment in the course of performance, the building contractor will usually be privileged to stop work and can maintain suit for damages as for a total breach. But if the owner does not also repudiate the contract, the builder can get judgment for the instalment due, proceed with construction, and get a second judgment in case of a later breach.

If the seller of goods delivers an instalment of nonconforming goods, in breach of some warranty, even though the breach may be such as to operate as a total breach the buyer is not required to treat it so. He may keep the defective instalment, retaining his right to damages or recoupment, and demand delivery of the remaining instalments required by the contract. When sued for the price of the instalments received by him, he may recoup for breach of warranty and claim damages for the seller's failure to deliver the subsequent instalments.[9] The seller has committed one breach, treated by the buyer as partial, and a second breach that is total.

The terms "total breach" and "partial breach" can render useful service, even though actual usage is not altogether consistent, if it is recognized that such a variation exists and that they do not in themselves determine the result that a court should reach. They may be properly used in stating a result that the court has reached by a careful weighing of the importance of the facts and events before it, a reasonable interpretation of the expressions of the parties, a consideration of existing doctrines and antecedent cases, and a determination of what public welfare and sound policy require. In this they differ in no respect from other legal terms and phrases.[10]

where there has been one of the acts of repudiation enumerated in Section 318, whether anticipatory or not, subsequent assent of the wrongdoer to the continuance of the contract is requisite in order to permit this result."

See § 1030, Avoidable consequences.

9. Mass.—Lander v. Samuel Heller Leather Co., 50 N.E.2d 902, 314 Mass. 592 (1943).

10. Restatement, Contracts, § 313: "(1) A total breach of contract is a breach where remedial rights provided by law are substituted for the existing contractual rights, or can be so substituted by the injured party.

In one sense of the word, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal. But not infrequently the term material breach is used to mean one that the injured party can elect to treat as a total breach.[11] If a contractor's failure of performance causes such slight harm that the courts will give no remedy therefor, adopting and applying the maxim *de minimis non curat lex,* it is proper to say that there has been no breach of duty.

(2) A partial breach of contract is a breach where remedial rights provided by law can be substituted by the injured party for only a part of the existing contractual rights."

11. See Restatement, Contracts, §§ 276, 271, 311.

Revised June 4, 1966

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

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

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

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

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

Revised June 4, 1956

TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION relating to THE RIGHTS AND DUTIES ATTENDANT UPON ABANDONMENT OR TERMINATION OF A LEASE OF REAL PROPERTY

BACKGROUND

Section 1925 of the Civil Code provides, in effect, that a lease is a contract. Historically, however, a lease of real property was regarded as a conveyance of an interest in land. 2 POWELL, REAL PROPERTY ¶ 221 (1950). The California courts state that a lease is both a contract and a conveyance. 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). But while at times they apply principles of contract law in determining the rights and duties attendant upon abandonment or termination of a lease (see, e.g., Medico-Dental Bldg. Co. v. Horton & Converse, supra), the courts seem to be guided principally by common law property concepts in determining these rights and duties (see, e.g., Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944); Welcome v. Hess, 90 Cal. 507, 25 Pac. 369 (1891)). See, generally, The California Lease--Contract or Conveyance? 4 STAN. L. REV. 244 (1952).

As a result of the clash of contract and conveyance concepts 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 is sometimes precluded from recovering damages for all of the detriment caused by the defaulting lessee, and a defaulting lessee is sometimes subjected to forfeitures that are not countenanced under the law relating to contracts generally. See 26 CALIF. L. REV. 385 (1938).

For example, under the law applicable to most contracts, repudiation constitutes a total breach for which an action 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, a material 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). In contrast, when a lessee repudiates or breaches a lease, the courts have held that the lessor must choose among rescinding the lease and forfeiting his right to damages for future injury, continuing to enforce the lease without attempting to mitigate damages, and deferring recovery of his damages until the end of the term. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 671, 155 P.2d 24, 28 (1944); Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932).

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). 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, 370 (1891). Confronted with such an offer, the lessor has three courses of action among which he may choose. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 671, 155 P.2d 24, 28 (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, 455 (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 the 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 an estate in the leased 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. Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932). The courts have held that prior notification

to the lessee is essential to this course of action and that without such notification the lessor's relctting of the property will be treated as an acceptance of the lessee's offer to surrender, terminating 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 a lessor when a lessee commits a sufficiently substantial breach of the lease to legally justify 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, on the other hand, 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. If the lease is terminated, 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. But in such a case, it may be that any profit made on the relctting 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 the 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. Strauss, 103 Cal. App. 647, 284 Pac. 966 (1930).

Adhering to 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. Because the lessor usually cannot expect the lessee to remain available and solvent until the end of the term, continued adherence to these property concepts frequently denies the lessor any effective remedy for the loss caused by a defaulting lessee.

Adherence to ancient common law property concepts in the decision of cases involving leases has caused hardship to lessees as well as to lessors. Under the existing law, lessees may be subjected to forfeitures that would not be permitted under any other kind of contract. Although 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)), and although 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)), other provisions that are substantively indistinguishable have been held valid. Joffe, Remedies of California Landlord upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34, 44 (1961); note, 26 CAL. L. REV. 385, 388 (1938). Thus, if a lessee's advance payment to the lessor is designated 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).

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

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 worth of the excess of the rents that would have accrued during the remainder of the term over the reasonable rental value of the property for the same period. 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.

Code of Civil Procedure Section 1174 has also been amended in an effort to alleviate the problems faced by a lessor when the 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 recover from the lessee at the end of the term 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 immediately for future losses; it does not require the lessor to mitigate damages; and it does not protect the lessee from forfeiture.

RECOMMENDATION

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

1. Repudiation of a lease, like repudiation of any other contract, should be a total breach of the lease and give rise immediately to remedial rights on the part of the aggrieved party.

2. When a lease has been repudiated, the aggrieved party should have the right to resort to the usual contract remedies that are available upon repudiation of any other contract. The aggrieved party should have the right to rescind the lease, treat the lease as ended for purposes of performance and sue for any damages caused, or sue for specific or preventive relief if the remedy of damages is not adequate.

3. When a lease has been breached in a sufficiently material respect to legally justify the termination of the lease by the aggrieved party, and there has been no repudiation of the lease, the aggrieved party should have the right to resort to the usual contract remedies that are available upon a material breach of any other contract. The aggrieved party should have the right to regard the lease as continuing in effect, recovering damages for the breach or obtaining specific or preventive relief to assure the continued performance of the lease. He should also have the right to rescind the lease. And he should have the right to treat the lease as ended for purposes of performance and sue for any damages caused.

4. It should be clear that, except where a lessor is entitled to specific enforcement of the lease, the lessor may not treat a repudiated lease as still in existence and enforce the payment of the rents as they accrue. Moreover, it should be clear that the eviction of the lessee from the leased property terminates the lease. The right of the lessor to recover damages should be provided directly so that there is no longer any need to continue the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property.

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

6. When a lease has been repudiated or terminated because of a material breach, the aggrieved party should have an immediate right to recover all of the damages caused by the other's default--both past and prospective. When the lessee abandons the property, or when the lessee is justifiably evicted, the lessor 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.

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

8. If a lessor relets property after termination of a lease by reason of its breach, the rental provided in the new lease should be presumed to be the fair rental value of the property. Thus, if the lessee abandons the lease and the lessor relets the property, 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 actually more than the new lease provides.

9. The validity of a reasonable liquidated damages provision in a lease should be recognized. The amount of the prospective damage that may be caused by a particular breach 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.

10. 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.

11. 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.

12. A lessor's right to recover damages should be independent of his right to bring an action for unlawful detainer to recover the possession of the property, and the damages recommended herein should be recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action. Of course, the lessor should not be entitled to recover twice for the same items of damage.

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

14. 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.

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

PROPOSED LEGISLATION

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

An act to add Sections 1951, 1951.5, 1952, 1952.5, 1953, 1953.5, and 1954 to Chapter 2 of Title 5 of Part 4 of Division 3 of, to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 of, to add Section 3387.5 to, and to repeal Section 3308 of, the Civil Code, and to amend Section 1174 of the Code of Civil Procedure, relating to leases.

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

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

1951. A lease of real property is repudiated by either the lessor or the lessee when he, without justification:

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

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

(c) In the case of a lessor, actually evicts the lessee from the leased property.

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

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

Subdivision (c) refers to an eviction "without justification." This

refers to an eviction that the lessor did not have a right to make under the terms of the lease or under the substantive law governing the rights of lessors and lessees generally. If the lessor had the right to evict the lessee, the lease is terminated by the eviction under the provisions of Section 1951.5. The word "actually" is intended to make clear that subdivision (c) refers to actual eviction, not "constructive eviction." Under Section 1951.5, a lessee must treat an actual eviction as a termination of the lease--unless he can obtain a decree for specific performance. For wrongful conduct not amounting to an actual eviction (sometimes referred to in the past as "constructive eviction"), the lessee has the right to treat the lease as continuing and recover damages for the detriment caused by the wrongful conduct. See Section 1953.

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

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

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

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

(c) The lease is repudiated by either party thereto.

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

Subdivisions (a) and (b) change the California law. Under Code of Civil Procedure Section 1174 (as amended in 1931), a lessee could be evicted from the leased property without terminating the lease. Presumably that provision was designed to overcome such cases as Costello v. Martin Bros., 74 Cal. App. 782, 241 Pac. 588 (1925), which held that the eviction of the lessee terminated the lease and ended the lessor's right to recover either the remaining rentals due under the lease or damages for the loss of such rentals. Because Sections 1952.5 and 1953 provide for the recovery of damages despite the termination of the lease and the eviction of the lessee, there is no further need to continue the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property.

Subdivision (c) changes the California law in part. Under prior California law, a repudiation of the lease by the lessee and his abandonment of the property did not terminate the lease. The courts stated that the lessor could regard the lease as continuing in existence and recover the rents as they came due. See Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24 (1944); Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891). Subdivision (c) makes it clear that a lessor may no longer utilize this remedy. Upon a repudiation of the lease by the lessee, the lessor cannot regard the lease as continuing and enforce the payment of rental as it falls due unless he is entitled to specific performance of the lease as provided in Sections 1952 and 1952.5. Instead, Section 1952.5 grants the lessor the right to recover all of the damages caused by the lessee's repudiation.

Subdivision (c) is consistent with the California law relating to a lessee's remedies. Under subdivision (c) as under the prior California law, a lessee may regard the lease as terminated by the lessor's repudiation and either sue for his damages under Section 1952.5 or rescind the lease. The lessee may, instead, seek specific performance of the lease under subdivision (c) of Section 1952.5. Cf., 30 CAL. JUR.2d, Landlord and Tenant, § 314 (1956).

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

1952. The effect of a repudiation of a lease of real property is nullified if, before the other party has brought an action for damages caused by the repudiation or otherwise changed his position in reliance on the repudiation, the repudiator:

(a) Becomes ready, willing, and able to perform his remaining obligations under the lease and the other party is so informed; or

(b) Is required to specifically perform his obligations under the lease by a judgment for specific or preventive relief as provided in subdivision (c) of Section 1952.5.

Comment. Subdivision (a) of Section 1953 codifies the rule applicable to contracts generally that a party who repudiates a contract may retract his repudiation, and thus nullify its effect, if he does so before the other party to the contract has materially changed his position in reliance on the repudiation. RESTATEMENT, CONTRACTS §§ 280, 319; 4 CORBIN, CONTRACTS § 980 (1951).

Subdivision (b) is included to make clear that a lease is not terminated by a repudiation under Section 1951.5 if the injured party recovers a judgment for specific performance.

SEC. 4. Section 1952.5 is added to said chapter, to read:

1952.5. When a party repudiates a lease of real property, the other party may:

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

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

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

Comment. Except where a mining lease is involved (see Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 142 P.2d 22 (1943)), the California courts have not applied the contractual doctrine of anticipatory repudiation to a lessee's abandonment of the leasehold or repudiation of the lease. See Oliver v. Loydon, 163 Cal. 124, 124 Pac. 731 (1912); Welcome v. Hess, 90 Cal. 507, 27 Pac. 369 (1891). Section 1952.5 is designed to overcome the holdings in these cases and to make the contractual doctrines of anticipatory breach and repudiation applicable to leases generally. Cf. 4 CORBIN, CONTRACTS §§ 954, 959-989 (1951).

Under the prior California law, when a lessee abandoned the leased property and repudiated the lease, the lessor had three alternative remedies: (1) to consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to consider the lease as terminated and retake possession for his own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee at the end of the lease term for the difference between the lease

rentals and what the lessor could in good faith procure by reletting. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 671, 155 P.2d 24, 28 (1944); Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932).

Under Section 1952.5, a lessor may still terminate the lease and retake possession for his own account by rescinding the lease under subdivision (a). But a lessor will not be able to let the property remain vacant and recover the rent as it becomes due, for Section 1951.5 provides that the lessee's repudiation terminates the lease and, hence, there is no more rent due. Under Section 1952.5, if a lessor wishes to nullify the effect of the lessee's repudiation and retain his right to the accruing rental installments, the lessor is required to seek specific enforcement of the lease under subdivision (c). Under subdivision (b), the lessor may recover damages for the loss of the remaining rentals that would have accrued under the lease. Under the prior law, too, the lessor could recover such damages; but under subdivision (b) the lessor's cause of action accrues upon the repudiation while under the prior law the lessor's cause of action did not accrue until the end of the original lease term. See Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932).

The remedies specified in Section 1952.5 may also be used by a lessee when the lessor breaches the lease, but in this respect Section 1952.5 merely continues the preexisting law without significant change. See 30 CAL. JUR.2d, Landlord and Tenant § 314 (1956).

SEC. 5. Section 1953 is added to said chapter, to read:

1953. When a party breaches a lease of real property in a material respect without repudiating the lease, the other party may:

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

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

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

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

Comment. If a party to a lease repudiates the lease, whether or not he commits any other breach of the lease, the remedies of the aggrieved party are governed by Section 1952.5. Section 1953 prescribes the remedies available to the aggrieved party when a lease is breached in a material respect but there is no repudiation of the lease. The remedies prescribed are those that are usually available to an aggrieved party to any contract when that contract is breached in a material respect without an accompanying repudiation. See Coughlin v. Blair, 41 Cal.2d 587, 262 P.2d 305 (1953); 4 CORBIN, CONTRACTS § 946 (1951).

Section 1953 makes little, if any, change in the law insofar as it prescribes a lessee's remedies upon breach by the lessor. See 30 CAL. JUR.2d, Landlord and Tenant, §§ 313-320 (1956). Subdivisions (a), (c), and (d) make

little change in the remedies available to a lessor upon breach of the lease by the lessee. See 30 CAL. JUR.2d, Landlord and Tenant, § 344 (1956).

Subdivision (b), however, probably changes the law relating to the remedies of an aggrieved lessor. Although the prior law is not altogether clear, it seems likely that if a lessor terminated a lease because of a lessee's breach and evicted the lessee, his cause of action for the damages resulting from the loss of the rentals due under the lease did not accrue until the end of the original lease term. See De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945); Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932). Under subdivision (b), an aggrieved lessor may terminate the lease and immediately sue for the damages resulting from the loss of the rentals that would have accrued under the lease.

SEC. 6. Section 1953.5 is added to said chapter, to read:

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

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

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

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

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

SEC. 7. Section 1954 is added to said chapter to read:

1954. (a) Whenever a lessor of real property finds personal property remaining upon the leased property following the termination of the lease and the lessor knows or has reason to believe that the personal property belongs to the former lessee, the lessor shall give written notice of such finding to the former lessee and to any other person the lessor knows or has reason to believe holds an interest in the property. Such notice shall be given by mail addressed to the former lessee or other interest holder at his post-office address, if known, and if not known, such notification shall be addressed to the former lessee or other interest holder at the location of the leased property. Personal delivery of such notice may be substituted for delivery by mail.

(b) If notice of the finding is given as provided in subdivision (a) within 21 days after the termination of the lease, title to the property vests in the lessor upon the expiration of six months from the date of the termination of the lease unless, within such six months, the owner of the property or any other interest holder appears, proves his ownership of or interest in the property, and tenders payment of all reasonable charges for the storage and preservation of the property. If notice of the finding is not given as provided in subdivision (a) within 21 days after the termination of the lease, title to the property vests in the lessor upon the expiration of six months from the date of the mailing or delivery of the notice to the last person to be notified under subdivison (a) or three years from the date of the termination of the lease, whichever is earlier, unless within such time the owner of the property or any other interest holder appears, proves his ownership of or interest in the property, and tenders payment of all reasonable charges for the storage (for not

to exceed six months) and preservation of the property.

(c) If the lessor refuses to restore the property to a person who has made reasonable proof of his ownership or interest and tendered payment for the storage and preservation of the property as provided in subdivision (b), such person may recover the property or the value of his interest, together with damages for its detention and a reasonable attorney's fee, by civil action commenced within six months after the date of such refusal.

(d) The lessor may, in lieu of holding the property for the owner or other interest holder pursuant to subdivision (b), sell the property in the manner specified in subdivision (3) of Section 9504 of the Uniform Commercial Code and hold the proceeds of such sale for the owner or other interest holder pursuant to subdivision (b) in the following cases:

(1) When the property is in danger of perishing or of losing the greater part of its value; or

(2) When the lessor's charges for the storage and preservation of the property amount to two-thirds of its value.

Comment. Section 1954 is designed to provide a lessor with a simple procedure for disposing of personal property found remaining on the leased property following the termination of the lease. The section relates to property to which the lessor has no claim. If the lessor has a lien claim against the property, Sections 1861 and 1861a of the Civil Code and Sections 9101-9507 of the Uniform Commercial Code govern the parties' rights.

SEC. 8. Article 1.5 (commencing with Section 3320) is added to Chapter 2 of Title 2 of Part 1 of Division 4 of the Civil Code, to read:

Article 1.5. Damages Upon Breach and Termination of Lease of Real Property

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

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

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

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

(b) Subject to Section 3325, any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

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

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

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

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

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

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

In addition, the lessor should be entitled to recover for his expenses in retaking possession of the property, repairing damage caused by the lessee, and in reletting the property. There may be other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee, and if so, the lessor should be entitled to recover them also. Subdivision (b), which is based on Civil Code Section 3300, provides that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. This would include, of course, damages for the lessee's breach of specific covenants of the lease.

Subdivision (b) is "subject to Section 3325" in order to make clear that the lessor's attorney's fees are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or lessee.

Section 3320 has been made subject to Section 3322 in order to make it clear that 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. Moreover, if the lessor relets the property for a rental in excess of the rental provided in the original lease, the damages the lessor is entitled to recover under Section 3320 must be reduced accordingly.

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

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

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

(b) Subject to Section 3325, any other damages necessary to compensate the lessee for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

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

Section 3321 is subject to Section 3322 to make clear that the defaulting lessor is not liable for any consequences that the lessee can reasonably avoid. Subdivision (b) is subject to Section 3325 in order to make clear that the lessee's attorney's fees are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or lessee.

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

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

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

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 when reletting for the account of the lessee

than was provided in the original lease, the lessee is entitled to the profit.

Under Section 3322, a lessor who relets property after the original lessee has abandoned it does so for his own account; and under subdivision (b) any profit received belongs to the lessor rather than to the defaulting lessee. Profit received on the reletting, however, reduces the damages suffered by the lessor for which the lessee is liable.

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

§ 3323. Rental upon reletting presumed to be reasonable rental value

3323. If leased real property is relet following the termination of the original lease because of the breach thereof, 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 Sections 3320 and 3321, the damages a lessor or lessee is entitled to recover upon termination of the lease because of a breach are based in part on the difference between the value of the rentals which would have been due under the original lease for the remainder of the term and the reasonable rental value of the property for the same period. Section 3323 provides that the "reasonable rental value" of the property is presumptively fixed by the new lease when the lessor relets the property. The effect of this presumption may be overcome by proof that the reasonable rental value of the property is in fact higher or lower than rental fixed by the new lease. EVIDENCE CODE § 606.

§ 3324. Liquidated damages

3324. Notwithstanding Sections 3320 and 3321, upon any breach of the provisions of a lease of real property, liquidated damages may be recovered if they are provided in the lease and meet the requirements of Sections 1670 and 1671.

Comment. Section 3324 does not create a right to recover liquidated damages, it merely recognizes that such a right may exist if the conditions specified in Civil Code Sections 1670 and 1671 are met. Provisions in leases for liquidated damages upon repudiation of the lease by the lessee have been held to be void. Redmon v. Graham, 211 Cal. 491, 295 Pac. 1031 (1931); Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899). Such holdings were proper so long as the lessor's cause of action upon repudiation of a lease was either for the rent as it came due or for the rental deficiencies as of the end of the lease term. Under such circumstances, there could be little prospective uncertainty over the amount of the lessor's damages. Under Section 1952.5 and this article, however, the lessor's right to damages accrues at the time of the repudiation; and because they must be fixed before the end of the term, they may be difficult to calculate in some cases. This will frequently be the case if the property is leased under a percentage lease. It may be the case if the property is unique and its fair rental value cannot be determined. Accordingly, Section 3324 is included as a reminder that the cases holding liquidated damages provisions in leases to be void are no longer authoritative, and that in some cases such provisions may be valid.

So far as provisions for liquidated damages upon a lessor's breach are concerned, Section 3325 is declarative of the preexisting law under which such provisions were upheld if reasonable. See Seid Pak Sing v. Barker, 197 Cal. 321, 240 Pac. 765 (1925).

§ 3325. Attorney's fees

3325. (a) In addition to any other relief to which a lessor or lessee is entitled by reason of the breach of a lease of real property by the other party to the lease, the lessor or lessee may recover reasonable attorney's fees incurred in obtaining such relief if:

(1) The lease provides for the recovery of such fees; or

(2) The lease provides that the other party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease.

(b) The right to recover attorney's fees as provided in paragraph (2) of subdivision (a) may not be waived prior to the accrual of such right.

Comment. Leases, like other contracts, sometimes provide that a party forced to resort to the courts for enforcement is entitled to a reasonable attorney's fee. Section 3325 makes it clear that the remaining sections in the article do not impair the lessor's rights under such a provision.

Subdivision (b) and paragraph (2) of subdivision (a) are included in the section to equalize the operation of leases that provide for the recovery of an attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other seldom has sufficient bargaining power to require the inclusion of a provision for attorney's fees that works in his favor. Under Section 3325, if either party is entitled by a provision in the lease to recover attorney's fees, the other may recover such fees when he is forced to resort to the courts to enforce his rights under the lease. To prevent paragraph (2) of subdivision (a) from being nullified by standard waiver provisions in leases, subdivision (b) prohibits the waiver of a party's right to recover under that paragraph until the right actually accrues.

§ 3326. Lessee's relief from forfeiture

3326. Subject to the lessor's right to obtain specific enforcement of the lease, if a lease of real property is terminated because of the breach thereof by the lessee or if the lessee abandons the lease, the lessee may recover from the lessor any amount paid to the lessor in consideration for the lease (whether designated rental, bonus, consideration for execution thereof, or by any other term) that is in excess of (a) the portion of the total amount required to be paid to the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the termination or abandonment of the lease and (b) any damages, including liquidated damages as provided in Section 3324, to which the lessor is entitled by reason of such breach or abandonment. The right of a lessee to recover under this section may not be waived prior to the accrual of such right.

Comment. Section 3326 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 3326 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 3326 is probably unnecessary. The Freedman and Caplan cases are based on the provisions of the code prohibiting forfeitures. These rules are applied despite contrary provisions in contracts. Nonetheless, the sentence is included to make it clear that the provisions of this section may not be avoided by the addition to leases of provisions waiving rights under this section.

Section 3326 will change the California law. Under the existing California law the right of a lessee to recover an advance payment depends on whether the advance payment is designated a security deposit (lessee may recover), liquidated damages (lessee may recover), an advance payment of rental (lessee may not recover), or a bonus or consideration for the execution of the lease (lessee may not recover). Compare Warming v. Shapiro, 118 Cal. App.2d 72, 257 P.2d 74 (1953)($12,000 forfeited because designated as both a bonus and an advance payment of rental) with Thompson v. Swiryn, 95 Cal. App.2d 619, 213 P.2d 740 (1950)(advance payment of $2,800 held recoverable as a security deposit). See discussions in Joffe, Remedies of California Landlord upon Abandonment by Lessee, 35 SO. CAL. L. REV. 34, 44 (1961) and Note, 26 CAL. L. REV. 385 (1938). See also Section 3324 and the Comment to that section.

§ 3327. Unlawful detainer actions

3327. (a) Nothing in this article affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

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

Comment. Section 3327 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 3327 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 3327, such damages may be recovered in either action; but the lessor is entitled to but one determination of the merits of a damages claim for any particular detriment.

SEC. 9. Section 3308 of the Civil Code is repealed.

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

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

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

SEC. 10. Section 3387.5 is added to the Civil Code, to read:

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

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

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

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

Comment. Under the existing California law, if a lessee defaults in the payment of rent, abandons the property, or otherwise breaches the lease, the lessor may refuse to terminate the lease and may sue to collect the rental installments as they accrue. Because the lessee's obligation under a lease has been, in effect, specifically enforceable through a series of actions, leases have been utilized by public entities to finance the construction of public improvements. The lessor constructs the improvement to the specifications of the public entity-lessee, leases the property as improved to the public entity, and at the end of the term of the lease all interest in the property and the improvement vests in the public entity. See, e.g., Dean v. Kuchel, 35 Cal.2d 444, 218 P.2d 521 (1950); City of Los Angeles v. Offner, 19 Cal.2d 483, 122 P.2d 14 (1942). Sometimes the public entity's right to acquire the property or the improvement is absolute under the terms of the agreement, sometimes it depends on the exercise of an option. In either event, this system of

financing public improvements would be seriously jeopardized if upon repudiation of the lease by the lessee the lessor's only right were the right to recover damages measured by the difference between the worth of the remaining rentals due under the lease and the rental value of the property. See Section 3320.

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

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

SEC. 11. Section 1174 of the Code of Civil Procedure is amended to read:

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

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

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

writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

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

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

Inasmuch as Civil Code Sections 1952.5 and 1953 permit a lessor to recover his damages for the loss of the future rentals due under the lease despite the termination of the lease, the deleted language is no longer necessary.