

2/16/67

Memorandum 67-20

Subject: Senate Bill No. 252 (Abandonment or Termination of a Lease)

Attached as Exhibit I (pink) is a revision of this bill designed to effectuate the decisions made at the January meeting. Exhibit II (yellow) attached is a draft of a report for the Senate Committee on Judiciary to revise the comments to reflect the amendments to this bill.

The Board of Governors of the State Bar instructed that the Commission be advised that the Board takes no position concerning the merits of CAJ's report but concurs in the view of CAJ that the proposed legislation should be prospective only. The revision of Section 3325 (made at the January meeting in response to the CAJ report) may satisfy the State Bar, but it appears that the State Bar will have no position on the merits of the proposed legislation.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

SENATE BILL

No. 252

Introduced by Senator Bradley

February 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

*An act to amend Section 3308 of, to add Sections 1951, 1951.5, 1952, 1953, 1953.5, 1954, 1954.5, 1954.7, and 3387.5 to, and to add Article 1.5 (commencing with Section 3320) to Chapter 2 of Title 2 of Part 1 of Division 4 of, the Civil Code, and to amend Section 1174 of the Code of Civil Procedure, relating to leases.*

1951.7.

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

- 1 SECTION 1. Section 1951 is added to the Civil Code, to
- 2 read:
- 3 1951. A lease of real property is repudiated when, without
- 4 justification:
- 5 (a) Either party communicates to the other party by word
- 6 or act that he will not or cannot substantially perform his re-
- 7 maining obligations under the lease;

LEGISLATIVE COUNSEL'S DIGEST

SB 252, as introduced, Bradley (Ind.). Leases.

Adds and amends various provisions, Civ.C., and amends Sec. 1174, C.C.P.

Designates circumstances under which a lease is repudiated or terminated.

Provides repudiating party may retract and nullify repudiation if aggrieved party has not brought action or changed position.

Specifies remedies available to aggrieved party upon repudiation of lease or breach of lease.

Fixes time for running of statute of limitation upon repudiation of lease.

Specifies measure of damages for breach and termination of lease.

Provides that certain rights and remedies may be modified by prior agreement of the parties.

Vote—Majority; Appropriation—No; State Expense—No.

1 (b) Either party by voluntary act, or by voluntarily en-  
2 gaging in a course of conduct, renders substantial performance  
3 of his remaining obligations under the lease impossible or ap-  
4 parently impossible; or

5 (c) The lessor actually evicts the lessee from the the leased  
6 property.

7 Sec. 2. Section 1951.5 is added to the Civil Code, to read:

8 1951.5. A lease of real property is terminated prior to the  
9 expiration of the term when:

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

12 (b) The lessee quits the property pursuant to a notice  
13 served pursuant to Sections 1161 and 1162 of the Code of Civil  
14 Procedure or pursuant to any other notice or request by the  
15 lessor to quit the property; or

16 (c) The lease is repudiated by either party thereto and (1)  
17 the aggrieved party is not entitled to or does not seek specific  
18 or preventive relief to enforce the provisions of the lease as  
19 provided in subdivision (c) of Section 1953, or (2) the ag-  
20 grievied party gives the other party written notice of his elec-  
21 tion not to seek such specific or preventive relief.

Sec. 2.5. Section 1951.7 is added to the  
Civil Code, to read:

1951.7. A repudiation of a lease of real  
property is a breach of the lease in a material  
respect.

22 Sec. 3. Section 1952 is added to the Civil Code, to read:

23 1952. The effect of a repudiation of a lease of real property  
24 is nullified if, before the other party has brought an action for  
25 damages caused by the repudiation or otherwise changed his  
26 position in reliance on the repudiation, the repudiator becomes  
27 ready, willing, and able to perform his remaining obligations  
28 under the lease and the other party is so informed.

29 Sec. 4. Section 1953 is added to the Civil Code, to read:

30 1953. When a party repudiates a lease of real property, the  
31 other party may do any one of the following:

32 (a) Rescind the lease in accordance with Chapter 2 (com-  
33 mencing with Section 1688) of Title 5 of Part 2 of Division 3.

34 (b) Recover damages in accordance with Article 1.5 (com-  
35 mencing with Section 3320) of Chapter 2 of Title 2 of Part 1  
36 of Division 4.

37 (c) Obtain specific or preventive relief in accordance with  
38 Title 3 (commencing with Section 3366) of Part 1 of Division  
39 4 to enforce the provisions of the lease if such relief is ap-  
40 propriate.

41 Sec. 5. Section 1953.5 is added to the Civil Code, to read:

42 1953.5. The time for the commencement of an action based  
43 on the repudiation of a lease of real property begins to run:

44 (a) If the repudiation occurs before any failure of the re-  
45 pudiator to perform his obligations under the lease, at the time  
46 of the repudiator's first failure to perform the obligations of  
47 the lease.

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

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

2     1954. When a party breaches a lease of real property in a  
3 material respect without repudiating the lease, the other party  
4 may do any one of the following:

5     (a) Rescind the lease in accordance with Chapter 2 (com-  
6 mencing with Section 1688) of Title 5 of Part 2 of Division 3.

7     (b) Terminate the lease and recover damages in accordance  
8 with Article 1.5 (commencing with Section 3320) of Chapter  
9 2 of Title 2 of Part 1 of Division 4.

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

14    (d) Obtain specific or preventive relief in accordance with  
15 Title 3 (commencing with Section 3366) of Part 1 of Division  
16 4 to enforce the provisions of the lease if such relief is ap-  
17 propriate.

18     Sec. 7. Section 1954.5 is added to the Civil Code, to read:

19     1954.5. (a) Except as provided in subdivision (b), the  
20 legal consequences of the actions of the parties to a lease of  
21 real property as provided in Sections 1951, 1951.5, and 1952, — 1951.7,  
22 and the legal remedies available upon breach of a lease of real  
23 property as provided in Sections 1953 and 1954, are not sub-  
24 ject to modification by the prior agreement of the parties.

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

28     (c) This section does not affect any agreement for the arbi-  
29 tration of any dispute that has arisen or may arise under a  
30 lease of real property.

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

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

34     1954.7. An agreement for the exploration for or the re-  
35 moval of natural resources is not a lease of real property  
36 within the meaning of this chapter.

37     Sec. 9. Section 3308 of the Civil Code is amended to read:

38     3308. The parties to any lease of real or personal property  
39 may agree therein that if such ~~If~~ a lease shall be of personal  
40 property is terminated by the lessor by reason of any breach  
41 thereof by the lessee, the lessor shall thereupon be entitled to  
42 recover from the lessee the ~~present~~ worth at the time of such  
43 termination, of the excess, if any, of the amount of rent and  
44 charges equivalent to rent reserved in the lease for the balance  
45 of the stated term ~~or any shorter period of time~~ over the then  
46 reasonable rental value of the premises ~~property~~ for the same  
47 period.

48     The rights of the lessor under this section are such agree-  
49 ment shall be cumulative to all other rights or remedies now  
50 or hereafter given to the lessor by law or by the terms of the  
51 lease; ~~provided, however, that~~ but the election of the lessor  
52 to exercise the remedy ~~provided by this section is hereinabove~~

1 permitted shall be binding upon him and shall exclude re-  
2 course thereafter to any other remedy for rental or charges  
3 equivalent to rental or damages for breach of the covenant  
4 to pay such rent or charges accruing subsequent to the time  
5 of such termination. The parties to such lease may further  
6 agree therein that unless the remedy provided by this section  
7 is exercised by the lessor within a specified time the right  
8 thereto shall be barred.

9 SEC. 10. Article 1.5 (commencing with Section 3320) is  
10 added to Chapter 2 of Title 2 of Part 1 of Division 4 of the  
11 Civil Code, to read:

12 Article 1.5. Damages for Breach of Lease of Real Property

13 3320. Subject to Section 3322, if a lease of real property  
14 is terminated because of the lessee's breach thereof, the meas-  
15 ure of the lessor's damages for such breach is the sum of the  
16 following:  
17

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

22 (b) Subject to Section 3324, any other damages necessary  
23 to compensate the lessor for all the detriment proximately  
24 caused by the lessee's breach or which in the ordinary course  
25 of things would be likely to result therefrom.

26 3321. Subject to Section 3322, if a lease of real property  
27 is terminated because of the lessor's breach thereof, the meas-  
28 ure of the lessee's damages for such breach is the sum of the  
29 following:  
30

31 (a) The present worth of the excess, if any, of the reason-  
32 able rental value of the property for the portion of the term  
33 following such termination over the rent and charges equiv-  
34 alent to rent reserved in the lease for the same period.

35 (b) Subject to Section 3324, any other damages necessary  
36 to compensate the lessee for all the detriment proximately  
37 caused by the lessor's breach or which in the ordinary course  
38 of things would be likely to result therefrom.

39 3322. (a) A party to a lease of real property that has been  
40 breached by the other party may not recover for any detri-  
41 ment caused by such breach that could have been avoided  
42 through the exercise of reasonable diligence without undue  
43 risk of other substantial detriment.

44 (b) When a lease of real property is terminated because of  
45 the lessee's breach thereof and the lessor relets the property,  
46 the lessor is not accountable to the lessee for any profits made  
47 on the reletting, but any such profit shall be set off against  
48 the damages to which the lessor is otherwise entitled.

49 3323. Notwithstanding Sections 3320 and 3321, upon  
50 breach of a provision of a lease of real property, liquidated  
51 damages may be recovered if so provided in the lease and if  
52 they meet the requirements of Sections 1670 and 1671.

1 3324. (a) In addition to any other relief to which a lessor  
2 or lessee is entitled in enforcing or defending his rights under  
3 a lease of real property, he may recover reasonable attorney's  
4 fees incurred in obtaining such relief if the lease provides for  
5 the recovery of such fees.

6 (b) If a lease of real property provides that one party to  
7 the lease may recover attorney's fees incurred in obtaining  
8 relief for the breach of the lease, then the other party to the  
9 lease may also recover reasonable attorney's fees incurred in  
10 obtaining relief for the breach of the lease should he prevail.  
11 If a lease of real property provides that one party to the lease  
12 may recover attorney's fees incurred in successfully defending  
13 his rights under the lease, then the other party to the lease  
14 may also recover reasonable attorney's fees incurred in success-  
15 fully defending his rights under the lease. The right to recover  
16 attorney's fees under this subdivision may not be waived prior  
17 to the accrual of such right.

18 3325. (a) Subject to the lessor's right to obtain specific  
19 enforcement of the lease, if a lease of real property is termi-  
20 nated because of the breach thereof by the lessee, the lessee  
21 may recover from the lessor any amount paid to the lessor in  
22 consideration for the lease (whether designated rental, bonus,  
23 consideration for execution thereof, or by any other term)  
24 that is in excess of the sum of:

25 (1) The portion of the total amount required to be paid  
26 to or for the benefit of the lessor pursuant to the lease that  
27 is fairly allocable to the portion of the term prior to the ter-  
28 mination of the lease; and

29 (2) Any damages, including liquidated damages as pro-  
30 vided in Section 3323, to which the lessor is entitled by reason  
31 of such breach.

32 (b) The right of a lessee to recover under this section may  
33 not be waived prior to the accrual of such right.

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

34 3326. (a) Nothing in this article affects the provisions of  
35 Chapter 4 (commencing with Section 1159) of Title 3 of  
36 Part 3 of the Code of Civil Procedure, relating to actions  
37 for unlawful detainer, forcible entry, and forcible detainer.

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

46 3327. An agreement for the exploration for or the removal  
47 of natural resources is not a lease of real property within the  
48 meaning of this chapter.

49 Sec. 11. Section 3387.5 is added to the Civil Code, to read:

50 3387.5. (a) A lease of real property may be specifically  
51 enforced by any party, or assignee of a party, to the lease  
52 when a purpose of the lease is (1) to provide a means for

1 financing the acquisition of the leased property, or any im-  
2 provement thereon, by the lessee or (2) to finance the im-  
3 provement of the property for the use of the lessee during the  
4 term of the lease.

5 (b) Nothing in this section affects the right to obtain spe-  
6 cific or preventive relief in any other case where such relief  
7 is appropriate.

8 Sec. 12. Section 1174 of the Code of Civil Procedure is  
9 amended to read:

10 1174. If upon the trial, the verdict of the jury, or, if the  
11 case be tried without a jury, the findings of the court be in  
12 favor of the plaintiff and against the defendant, judgment  
13 shall be entered for the restitution of the premises; and if the  
14 proceedings be for an unlawful detainer after neglect, or fail-  
15 ure to perform the conditions or covenants of the lease or  
16 agreement under which the property is held, or after default  
17 in the payment of rent, the judgment shall also declare the  
18 forfeiture of such lease or agreement if the notice required by  
19 Section 1161 of the code states the election of the landlord to  
20 declare the forfeiture thereof, but if such notice does not so  
21 state such election, the lease or agreement shall not be for-  
22 feited.

23 The jury or the court, if the proceedings be tried without a  
24 jury, shall also assess the damages occasioned to the plaintiff  
25 by any forcible entry, or by any forcible or unlawful detainer,  
26 alleged in the complaint and proved on the trial, and find the  
27 amount of any rent due, if the alleged unlawful detainer be  
28 after default in the payment of rent. Judgment against the de-  
29 fendant guilty of the forcible entry, or the forcible or unlawful  
30 detainer may be entered in the discretion of the court either  
31 for the amount of the damages and the rent found due, or for  
32 three times the amount so found.

33 When the proceeding is for an unlawful detainer after de-  
34 fault in the payment of rent, and the lease or agreement under  
35 which the rent is payable has not by its terms expired, and the  
36 notice required by Section 1161 has not stated the election of  
37 the landlord to declare the forfeiture thereof, the court may,  
38 and, if the lease or agreement is in writing, is for a term of  
39 more than one year, and does not contain a forfeiture clause,  
40 shall order that execution upon the judgment shall not be  
41 issued until the expiration of five days after the entry of the  
42 judgment, within which time the tenant, or any subtenant, or  
43 any mortgagee of the term, or any other party interested in  
44 its continuance, may pay into the court, for the landlord, the  
45 amount found due as rent, with interest thereon, and the  
46 amount of the damages found by the jury or the court for the  
47 unlawful detainer, and the costs of the proceedings, and there-  
48 upon the judgment shall be satisfied and the tenant be restored  
49 to his estate.

50 But if payment as here provided be not made within five  
51 days, the judgment may be enforced for its full amount, and

1 for the possession of the premises. In all other cases the judg-  
2 ment may be enforced immediately.

3 Sec. 18. This act applies to all leases, whether executed,  
4 renewed, or entered into before or after the effective date of  
5 this act, to the full extent that it constitutionally can be so  
6 applied.

Sec. 14. If any provision of this act or ap-  
plication thereof to any person or circumstance  
is held invalid, such invalidity shall not affect  
any other provision or application of this act  
which can be given effect without the invalid  
provision or application, and to this end the  
provisions of this act are declared to be severable.



EXHIBIT II

DRAFT OF REPORT FOR SENATE COMMITTEE ON JUDICIARY

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL NO. 252

In order to indicate more fully its intent with respect to Senate Bill No. 252, the Senate Committee on Judiciary makes the following report.

Except for the new and revised comments set out below, the comments contained under the various sections of Senate Bill No. 252 as set out in the Recommendation of the California Law Revision Commission Relating to Abandonment or Termination of a Lease (October 1966) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill No. 252.

The following new and revised comments to various sections of Senate Bill No. 252 also reflect the intent of the Senate Committee on Judiciary in approving Senate Bill No. 252.

Civil Code Section 1951.7

Comment. Section 1951.7 is included to make it clear that the provisions of Article 1.5 (commencing with Section 3320) of Chapter 2 of Title 2 of Part 1 of Division 4 of the Civil Code are applicable when a lease terminates as a result of its repudiation.

Civil Code Section 1954.5

1951.7,

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

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

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

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

[Note: We do not consider it necessary to have a comment to Section 14 -- the severability section.]