

Memorandum 68-48

Subject: Study 50 - Abandonment or Termination of Lease

The attached staff recommended draft (yellow and pink pages) includes revisions that take into account comments and suggestions made at the last meeting. Also attached (green pages) is an alternative draft that follows, we believe, the approach suggested at the last meeting by Mr. Stanton.

We suggest that the Commission go through the staff recommended draft (yellow and pink pages) section by section. You will note that the statute sections are on yellow pages; the comments are on pink pages.

Section 1951 (page 1)

Revisions suggested at the last meeting have been incorporated. No further changes in substance were made.

Section 1951.2 (page 6)

Revised to incorporate suggestions made at the last meeting.

Section 1951.4 (page 11)

No significant substantive changes, but two changes should be noted:

First, the lease if printed must contain a recital that it contains a provision permitting the lessor to retain the deposit or advance payment as damages. This provision, found in subdivision (b), is the same in substance as the provision found in Section 1945.5 of existing law.

Second, the manner of giving notice has been revised to require that notice be given in the same manner as a notice to quit (Section 1162 of the Code of Civil Procedure).

Section 1951.5 (page 13)

We have included this section as an optional section for your consideration. The section permits a liquidated damages provision in a lease. Subdivision (a) uses the same wording as subdivision (1) of Section 2718 of the California Commercial Code with such modifications as are necessary to adapt that provision to leases. It is interesting to note that one legal writer has suggested that this approach may be a desirable method of dealing with the liquidated damages problem in leases. See Baird, A Study of Arizona Lease Terminations, 9 Ariz. L. Rev. 187, 206 n.120 (1967). The pertinent portion of the Commercial Code section reads:

2718. (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Subdivision (b) is based on the similar requirement found in existing Section 1945.5.

Section 1951.6 (page 15)

No change from prior draft.

Sections 1951.8 and 1952 (pages 17, 19)

These two sections were not included in the prior draft. The sections are designed to make it clear that the lessor, under certain circumstances, may retake possession and relet the property and still retain his right to damages.

Section 1952.2 (page 22)

Most of the revisions of the former draft are clarifying except for the addition of the introductory clause "unless the parties otherwise agree."

Sections 1952.4, 1952.6, 1952.8, 1953, 1953.2 (pages 24, 27, 29, 31, 33)

No change in substance from prior draft.

Section 3308 (page 25)

Section 3308 has been revised to conform to the comparable section dealing with real property (Section 1951) and the measure of damages provided in revised Section 3308 has been made applicable "unless the lease otherwise provides."

Sections 337.5 and 339.5 (pages 38 and 40)

These sections reflect the policy previously approved. However, the sections have been included in the statute of limitations provisions of the Code of Civil Procedure, rather than in the lease law provisions in the Civil Code.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STAFF RECOMMENDED DRAFT

SECTIONS TO BE ADDED TO CIVIL CODE

Section 1951. Damages recoverable upon abandonment or termination of
lease of real property

1951. Except as otherwise provided in Sections 1951.2 to 1951.6, inclusive, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the amount that the lessor may recover from the lessee is limited to (a) the amount by which the present worth of the unpaid rent, including charges equivalent to rent, exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided and (b) any other damages proximately caused by the lessee's breach.

Section 1951

Comment. Section 1951 states the measure of damages when the lessee breaches the lease and abandons the property or when his right to possession is terminated by the lessor.

Section 1951 is not a comprehensive statement of the lessor's remedies. When the lessee breaches the lease and abandons the property or the lessor terminates the lessee's right to possession because of the lessee's breach, the lessor may simply rescind or cancel the lease without seeking affirmative relief under Section 1951. Where the lessee is still in possession but has breached the lease, the lessor may regard the lease as continuing in force and seek damages for the detriment caused by the breach, resorting to a subsequent action if a further breach occurs. Section 1951 makes no change in these remedies. See 30 Cal. Jur.2d Landlord and Tenant § 344 (1956). In appropriate cases, the lessor may seek specific performance of the lessee's obligations under the lease, or he may seek injunctive relief to prevent the lessee from interfering with his rights under the lease. See Section 1952.4. For example, the lessor's recovery of damages under Section 1951 would not necessarily preclude him from obtaining preventive relief to enforce the lessee's covenant not to compete. Where there is a surrender of the lessee's estate, the lessee is relieved of future liability from and after the date of the surrender and Section 1951 is not applicable. The lessor may, of course, recover for any unpaid rent or other damages accruing prior to the surrender. However, a surrender will take place only where there is an unequivocal manifestation of acceptance by the lessor. See Sections 1951.8 and 1952.

Other sections permit the parties to provide alternative remedies in the lease. See Section 1951.2 (recovery of rent as it becomes due) and Section 1951.4 (retention of deposit or advance payment as damages). If the parties wish, they may in an appropriate case provide for liquidated damages which will be in lieu of the damages provided in the other sections of the statute. See Section 1951.5.

The basic measure of the lessor's damages under Section 1951 is the present worth of the unpaid "rent, including charges equivalent to rent." In this context, the phrase, "rent, including charges equivalent to rent," refers to all obligations the lessee undertakes in exchange for 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 either containing such a provision or providing sufficient additional rental to cover the accruing taxes, the loss of the defaulting lessee's assumption of the tax obligation would be included in the damages the lessor is entitled to recover under this section.

Under Section 1951, the lessee is entitled to a credit against the unpaid rent not only of all sums the lessor has received or will receive upon a reletting of the property, but also of all sums that the lessee can prove the lessor could obtain by acting reasonably in reletting the property. The obligation of the lessor to act reasonably in reletting the property to mitigate the damages is not to be interpreted to compel the lessor to relet to any replacement tenant. The lessor has the right under Section 1951 to refuse to allow possession of his property to fall into certain hands. The rules to be applied under Section 1951 are those developed by the courts in

establishing limits to the lessor's obligations in those situations where the lease specifically provides that the lessor has a duty to use reasonable diligence to procure another tenant upon abandonment of the leased property by the lessee before the end of the term. The case law interpreting this contract duty establishes, generally, that the lessor need not relet to a tenant who would use the premises for a purpose different than that contemplated in the original lease; nor is the lessor obligated to alter or increase his obligations in order to secure a replacement tenant as, for example, by re-leasing the property for a longer term than the original lease. See Groll, Landlord-Tenant: The Duty to Mitigate Damages, 17 DePaul L. Rev. 311, 319 (1968).

The basic measure of damages provided in Section 1951 is essentially the same as that formerly described in Civil Code Section 3308. The measure of damages described in Section 3308 was applicable, however, only when the lease so provided and the lessor chose to invoke that remedy. Except as provided in Sections 1951.2, 1951.4, and 1951.5, the measure of damages under Section 1951 is applicable to all cases in which a lessor seeks damages upon breach and abandonment by the lessee or upon termination of the lease because of the lessee's breach of the lease. Moreover, Section 1951 makes clear that the lessee has the burden of proving the amount he is entitled to have offset against the unpaid rent, while Section 3308 was silent as to the burden of proof. In this respect, the rule stated is similar to that now applied in actions for breach of employment contracts. See discussion in Erler v. Five Point Motors, 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967).

Section 1951 also makes it clear that the measure of the lessor's recoverable damages is not limited to damages for the loss of future rentals. The section provides, in substance, that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. For example, it will usually be necessary for the lessor to take possession for a time to prepare the property for reletting and to secure a new tenant. The lessor is entitled to recover for the expenses incurred for this purpose that he would not have had if the lessee had not abandoned the property or breached the lease. In addition, the lessor is entitled to recover his expenses in retaking possession of the property, making repairs that the lessee was obligated to make, and in reletting the property. If there are other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee, the lessor is entitled to recover them also. These would include, of course, damages for the lessee's breach of specific covenants of the lease. Reasonable attorney's fees may be recovered if the lease so provides. See Section 1951.6.

The statute of limitations for an action under Section 1951 is four years in the case of a written lease and two years in the case of a lease not in writing. See Code of Civil Procedure Sections 337.5 and 339.5.

Section 1591.2. Election to recover rent as it becomes due

1951.2. Unless the lessee's right to possession of the property has been terminated by the lessor, the lessor may elect, in lieu of the damages provided in Section 1951, to recover from the lessee the amount of the rent, including charges equivalent to rent, as it becomes due under the lease if the lease so provides and meets either or both of the following requirements:

(a) The lease permits the lessee to sublet or sublease the property to any person reasonably acceptable as a tenant to the lessor and does not set any unreasonable standards for the determination of whether a person is reasonably acceptable as a tenant or for such subletting or subleasing.

(b) The lease requires, upon such reasonable notice from the lessee as is specified in the lease, that the lessor exercise reasonable diligence to relet the property to a person reasonably acceptable to the lessor as a tenant and does not set any unreasonable standards for the determination of whether a person is reasonably acceptable as a tenant or for such reletting.

Section 1951.2

Comment. Even though the lessee has breached the lease and abandoned the property, Section 1951.2 permits the lessor to elect to recover the rent as it becomes due under the lease rather than to recover damages based primarily on the loss of future rent under Section 1951. This remedy is available only if the lease so provides and contains a provision permitting the lessee to mitigate the damages (by subletting or subleasing the property) or requiring the lessor to mitigate the damages (by exercising reasonable diligence to relet the property). The section does not apply if the lessor evicts the lessee; in such case, the damages are computed under Section 1951 or 1951.4. The availability of a remedy under Section 1951.2 does not preclude the lessor from electing the remedy provided by Section 1951.

Where the lease gives the lessor the Section 1951.2 remedy and also permits the lessee to sublet or sublease the property, the lessor may recover the rent as it becomes due under the terms of the lease and at the same time has no obligation to retake possession and relet the property in the event the lessee abandons the property. This allocation of the burden of minimizing the loss will be most useful where the lessor does not have the desire, facilities, or ability to manage the property and to supervise the location of a suitable tenant and for this reason desires to avoid the burden that Section 1951 places on the lessor to mitigate the damages by reletting the property.

The allocation of the duty to minimize damages feature of Section 1951.2 is important. However, the primary reason that this form of relief has been provided is that systems for financing the purchase

or improvement of real property would be seriously jeopardized if the lessor's only right upon breach of the lease and abandonment of the property were the right to recover damages under Section 1951. For example, because the lessee's obligation to pay rent under a lease can be enforced under existing law, 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); County of Los Angeles v. Nesvig, 231 Cal. App.2d 603, 41 Cal. Rptr. 918 (1965). Similarly, a lessor may, in reliance on the lessee's rental obligation under a long term lease, construct an improvement to the specifications of the lessee for the use of the lessee during the lease term. The remedy available under Section 1951.2 gives the lessor, in effect, security for the repayment of the cost of the improvement in these cases.

Section 1951.2 also permits the lessor under a long term lease to assign the right to receive the rent under the lease in return for the discounted value of the future rent. The Section 1951.2 remedy makes the right to receive the rental payments an attractive investment since the assignee is assured that the rent will be paid if the tenant is financially responsible.

Even though the lease imposes no obligation on the lessor to relet the property, the remedy provided by Section 1951.2 remains

available when the lessor relets or attempts to relet the property after the lessee has abandoned the property or has requested that the lessor relet the property. The reletting of the property under these circumstances does not waive the lessor's rights under Section 1951.2. The lessor is entitled to recover the rent as it becomes due and the original lessee is entitled to have the rent received on the reletting, less the reasonable expenses on reletting, set off against the amount of rent payable under the original lease. See Section 1952 and the Comment to that section. This rule is designed to encourage the lessor to mitigate the damages caused by the defaulting lessee and at the same time retain his rights under Section 1951.2. It should be noted, however, that if the lessor evicts the lessee, the remedy provided by Section 1951.2 is no longer available.

Section 1951.4. Retention of deposit or advance payment as damages

1951.4. If a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lessor may elect to retain as damages, in lieu of the damages provided in Sections 1951 and 1951.2, any amount paid to the lessor as a deposit or advance payment if all of the following requirements are met:

(a) The amount to be retained is not an unconscionable sum.

(b) The lease expressly provides that the lessor may retain such amount as damages for the lessee's failure to perform his obligations under the lease and, if the lease is printed, a recital of the fact that such provision is contained in the lease appears in at least eight-point boldface type immediately prior to the place where the lessee executes the agreement or, if the lease contains a provision described in Section 1945.5, immediately prior to the recital referred to in that section.

(c) Not later than 60 days after such breach and abandonment, or after the termination by the lessor of the lessee's right to possession, whichever is the earlier, the lessor gives the lessee written notice that he elects to utilize his remedy under this section and waives all other rights and remedies against the lessee. Such notice shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure.

Section 1951.4

Comment. Section 1951.4 provides that a lease may include a provision that a deposit or advance payment made by the lessee may be retained by the lessor as damages if the lessee fails to perform his obligations under the lease. The parties may include such a provision in the lease in order to avoid the necessity of determining damages under the rules provided in Section 1951 or 1951.2.

Section 1951.4 contains two provisions designed to protect the unwary tenant. First, the amount to be retained must not be an unconscionable sum. Second, if the lease is printed, it must contain a recital of the fact that the lessor may retain the deposit or advance payment as damages. This requirement is similar to the one found in Civil Code Section 1945.5 (automatic renewal or extension provision).

The remedy provided by Section 1951.4 is an alternative remedy to those provided by Sections 1951 and 1951.2. The lessor is required to give the lessee written notice of his election to utilize the remedy under Section 1951.4 within 60 days after the abandonment or the termination of the lessee's right to possession. The notice is given in the same manner as a notice to quit under Code of Civil Procedure Section 1162. Failure to give timely notice results in a waiver of the remedy provided by Section 1951.4.

Section 1951.4 changes the prior California law. Under the prior California law, the right of the lessor to retain an advance payment depended on the nomenclature used by the parties. The former law relating to the various prepayment devices was recently summarized as follows:

"[T]he monies paid upon the execution of a lease . . . fall into four classes: (1) advance payment of rent; (2) as a bonus or consideration for the execution of the lease; (3) as liquidated damages; and (4) as a deposit to secure faithful performance of the terms of the lease." . . . [I]f the payment was made under the first two classes it may be retained by the landlord if the lease is terminated due to the fault of the tenant. Payments under class three are penalties, result in forfeitures, are invalid as such, and may be recovered by the tenant. Payments made under the fourth class are retainable by the landlord only to the extent of the amount of damage actually suffered. [Warming v. Shapiro, 118 Cal. App.2d 72, 75, 257 P.2d 74, 76 (1963).]

Although the labels differ, these various prepayment provisions are the same in substance. However, under former law, the name applied to the prepayment by the parties to the lease determines whether the sum may be retained by the lessor upon the lessee's default. Section 1951.4 changes the California law so that the substance of a prepayment clause, rather than its technical terminology, controls the right of the lessor to retain the advance payments.

1951.5. Liquidated damages

1951.5. (a) Damages for breach of a lease of real property by either the lessor or lessee may be liquidated in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A provision in the lease fixing unreasonably large liquidated damages is void as a penalty.

(b) If the lease is printed, a provision for liquidated damages is valid only if a recital of the fact that such a provision is contained in the lease appears in at least eight-point boldface type immediately prior to the place where the lessee executes the agreement or, if the lease contains a provision described in Section 1945.5, immediately prior to the recital referred to in that section.

Section 1951.5

Comment. Subdivision (a) of Section 1951.5 establishes the criterion for determining the validity of a liquidated damage provision in a lease. The subdivision is the same in substance as subdivision (1) of Section 2718 of the California Commercial Code and is in more liberal terms than Civil Code Sections 1670 and 1671 which apply to contracts in general and under which all clauses fixing damages are void except when "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Under prior California law, a liquidated damage provision in a lease was void. E.g., Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130 (1899); McCarthy v. Tally, 46 Cal.2d 577, 297 P.2d 981 (1956). The provision that liquidated damages must be reasonable is consistent with California law. E.g., Freedman v. Rector, Wardens & Vestrymen of St. Matthais Parish, 37 Cal.2d 16, 230 P.2d 629 (1951).

Subdivision (b) is designed to protect the unwary. The subdivision is based on the similar requirement found in Civil Code Section 1945.5 (automatic renewal or extension provision).

Section 1951.6. Attorney's fees

1951.6. If the lease so provides, a lessor or lessee of real property may recover, in addition to any other relief or amount to which he may be entitled, reasonable attorney's fees incurred in enforcing or defending his rights under the lease.

Section 1951.6

Comment. Leases, like other contracts, sometimes provide that a party is entitled to recover reasonable attorney's fees incurred in successfully enforcing or defending his rights in litigation arising out of the lease. Section 1951.6 makes it clear that nothing in the other sections of the statute impairs a party's rights under such a provision.

Section 1951.8. Acceptance of surrender

1951.8. To establish a surrender of the leasehold estate, the lessee of real property must prove an unequivocal manifestation of consent by the lessor to the surrender.

Section 1951.8

Comment. Section 1951.8 requires that the lessee must prove an unequivocal manifestation of consent on the part of the lessor before a surrender of the lessee's estate is established. A surrender is a yielding up of the lessee's estate to the owner of the reversion or remainder; by agreement, the tenancy is submerged in the reversion or remainder and extinguished. A surrender may be either by agreement of the parties or by operation of law. 32 Am. Jur. Landlord and Tenant § 900 (1941). A surrender terminates the lessee's estate and, from and after the date of surrender, the lessee is relieved of future liability under the lease. See Groll, Landlord-Tenant: The Duty to Mitigate Damages, 17 DePaul L. Rev. 311, 312 (1968).

Section 1951.8 changes prior California law. Under prior law, any act by the lessor suggesting an assertion of ownership over the property resulted in a surrender of the lessee's estate by operation of law. E.g., Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 683, 230 P.2d 10, 13 (1951). Under Section 1951.8, however, if the lessee desires to surrender, he must secure the lessor's consent, and, if he claims surrender, he must establish an unequivocal manifestation of consent to the surrender by the lessor. The reletting or attempting to relet the property by the lessor is not such a manifestation of consent. See Section 1952.

Section 1952. Reletting by lessor

1952. (a) The lessor of real property may relet the property after:

- (1) The lessee breaches the lease and abandons the property;
- (2) The lessee's right to possession of the property has been terminated by the lessor; or
- (3) The lessee has made an unequivocal request that the lessor attempt to relet the property.

(b) Reletting or attempting to relet the property under subdivision (a) is not a manifestation of intent to accept a surrender of the leasehold interest.

(c) A reletting or attempting to relet the property under subdivision (a) does not waive the rights of the lessor under Sections 1951 to 1951.6, inclusive. Unless the parties otherwise agree, if the lessor relets the property under subdivision (a), he is not accountable to the lessee for any rent, including charges equivalent to rent, received from the reletting; but such rent, less the reasonable expenses of reletting, shall be offset against any amount sought to be recovered under Section 1951 or 1951.2.

Section 1952

Comment. Section 1952 is designed to encourage the lessor to attempt to mitigate the damages caused by a defaulting lessee. It permits the lessor to relet the property under the circumstances listed in the section without affecting his right to recover damages for the lessee's default. However, if the lessor evicts the lessee, the remedy provided in Section 1951.2 is no longer available. See Section 1951.2 and the Comment to that Section.

No notice of the intention to relet the property under Section 1952 is required. The lessee does not need to be told what his obligations under the lease are. He knows that he is required to pay damages for his default. It is to his benefit, not his detriment, if the lessor is willing to relet the property and thus mitigate the damages. Under the prior law, if the lessor did not wish to accept the lessee's offer to surrender his estate, the lessor was permitted to relet the property and retain his right to recover for any deficiency in future rent only if he notified the lessee that he was retaking possession of the property on behalf of the lessee and that he intended to re-lease the property for the account of the lessee. This notice requirement discouraged lessors from reletting to mitigate damages and has been eliminated. In this respect, Section 1952 is consistent with the law concerning a wrongfully discharged employee; a wrongfully discharged employee does not have to notify his former employer before taking another job. 1 Witkin, Summary of California Law Agency § 96 at 471 (1960)(by implication).

Under prior law, the lessor could relet the property after the original lessee had breached the lease and abandoned the property.

The lessor could relet the property for his own account (in which case the lessee's rental obligation was terminated) or for the account of the lessee (in which case he could recover any deficiency from the lessee). See discussion in Dorcich v. Time Oil Co., 103 Cal. App.2d 677, 685, 230 P.2d 10, 15 (1951). Although no decision so holding has been reported, the rationale of the California cases indicates that, if the lessor received a higher rental when reletting for the account of the lessee than was provided in the original lease, the lessee was entitled to the profit. See Harvey, A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised, 54 Cal. L. Rev. 1141, 1156-1166 (1966), reprinted with permission in 8 Cal. Law Revision Comm'n Reports 701, 731 (1967). Under Section 1952, the lessor has the right to relet the property after abandonment, but the fiction of an "agency to relet" is abolished and, unless the parties otherwise agree, the lessor is entitled to retain any "profit" made on the reletting.

Section 1952.2. Lessor relieved of obligations after retaking possession

1952.2. Unless the parties otherwise agree, when the lessor of real property retakes possession of the property after the lessee has relinquished possession of the property to the lessor or after the lessee has breached the lease and abandoned the property before the end of the term or after the lessee's right to possession has been terminated by the lessor because of a breach of the lease, the obligation of the lessor thereafter to perform his obligations under the lease is excused. Nothing in this section relieves the lessor of his obligation under a provision of the lease that requires that he exercise reasonable diligence to relet the property. Nothing in this section affects the right of the lessor to seek relief for the default in performance or to enforce any other provisions of the lease.

Section 1952.2

Comment. Section 1952.2 changes the prior California law. Under prior law, when the lessor retook possession of the property after a breach of the lease and abandonment by the lessee, the lessor nevertheless remained obligated to perform his obligations under the lease. If the lessor violated any of the provisions of the lease, he in effect excused the lessee from further rental payments and from any liability for prospective damages caused by the lessee's abandonment. 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). Section 1952.2 makes it clear that the lessor is no longer required to act after he retakes possession of the property as if the lessee's right to have the lessor perform his obligations continued in existence; unless the parties otherwise agree, the lessor is excused from further performance of his obligations after he retakes possession of the property.

Section 1952.4. Right to other appropriate relief

1952.4. Nothing in Sections 1951, 1951.2, or 1951.6 affects the right of the lessor under a lease of real property to obtain the appointment of a receiver, or to obtain specific or preventive relief, in any case where such relief is appropriate.

Section 1952.4

Comment. Section 1952.4 makes it clear that the statute sections therein listed do not affect the right of the lessor to obtain equitable relief where such relief is appropriate.

For example, an apartment building may be leased under a "master lease" to a lessee who then leases the individual apartments to subtenants. The appointment of a receiver may be appropriate if the lessee under the master lease collects the rent from the subtenants but fails to pay the lessor the rent payable under the master lease. The receiver would collect the rent from the subtenants on behalf of the lessee and pay to the lessor the amount he is entitled to receive under the master lease. This form of relief would protect the lessor against the lessee's misappropriation of the rent from subtenants and at the same time would preserve the lessee's obligation to pay the rent provided in the master lease.

In some cases, other forms of relief may be appropriate. For example, a lessor of property in a shopping center may include a covenant in a particular lease that the lessee shall operate a particular business in the leased property and shall not open another business engaged in the same activity within a specified area. If the lessee repudiates the lease and the lessor, to minimize his damages, relets the property to another for the same or a similar purpose, the seeking of damages from the first lessee for the repudiation and abandonment should not preclude the lessor from also obtaining specific enforcement of the original lessee's covenant not to compete. The right to specific enforcement of the lessee's covenant not to compete would be in addition to the lessor's right to damages for loss of rent, for the failure to continue in business, and for other damages resulting from the repudiation of the lease.

§ 1952.4

Under prior law, there were no cases considering specific enforcement of the covenant to pay rent because the lessor could allow the property to remain vacant and sue for the rent as it accrued. Thus, the remedy at law was equivalent to specific performance. In addition, the suit was for money damages and the remedy at law was deemed adequate. Under Section 1951, however, the lessor must sue for damages within four years of the breach of a written lease and within two years of the breach of an oral lease. See Code of Civil Procedure Sections 337.5 and 339.5. Under such circumstances, a situation might arise where the court would consider rendering a judgment of specific performance of a covenant to pay rent or remain in business on the premises because of the impossibility of computing money damages or because the lease called for payment in something other than money. Such a situation might occur under a lease calling for the rental to be paid from a specific percentage of the gross or net receipts. Section 1952.4 is designed to make it clear that the remedy will be available if proper under the circumstances; Sections 1951, 1951.2, and 1951.6 do not preclude an action for specific performance of a lease provision if that remedy is appropriate.

Section 1952.6. Effect on unlawful detainer, forcible entry, and forcible detainer actions

1952.6. (a) Except as provided in subdivision (c), nothing in Sections 1951 to 1952.2, inclusive, affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

(b) The bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure does not affect the lessor's right to bring a separate action to recover damages under Sections 1951, 1951.4, 1951.5, and 1951.6, but no damages shall be recovered in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action.

(c) Notwithstanding the fact that the judgment referred to in Section 1174 of the Code of Civil Procedure does not declare the forfeiture of the lease, the lessor's right to damages after the lessor evicts the lessee is limited to the damages that the lessor is entitled to recover under Sections 1951, 1951.4, 1951.5, and 1951.6. Nothing in this subdivision affects the right of the lessor to obtain specific or preventive relief in any case where that relief is appropriate.

Section 1952.6

Comment. Section 1952.6 is designed to clarify the relationship between Sections 1951-1952.2 and the chapter of the Code of Civil Procedure relating to actions for unlawful detainer, forcible entry, and forcible detainer. The actions provided for in the Code of Civil Procedure chapter are designed to provide a summary method of recovering possession of property. Those actions may be used by a lessor whose defaulting lessee refuses to vacate the property after termination of the lease.

Subdivision (b) of Section 1952.6 provides that the fact that a lessor has recovered possession of the property by an unlawful detainer action does not preclude him from bringing a separate action to recover the damages to which he is entitled under Sections 1951, 1951.4, 1951.5, and 1951.6. Some of the incidental damages to which the lessor is entitled may be recovered in either the unlawful detainer action or in an action to recover the damages specified in Sections 1951, 1951.4, 1951.5, and 1951.6. Under Section 1952.6, such damages may be recovered in either action, but the lessor is entitled to but one determination of the merits of a claim for damages for any particular detriment.

Subdivision (c) does not preclude the lessor from recovering damages under Sections 1951, 1951.4, 1951.5, and 1951.6 or obtaining specific relief to enforce a covenant not to compete. If the lease is not terminated, it continues in force for purposes of a covenant, such as a covenant not to compete. However, when the lessor has evicted the lessee under the unlawful detainer provisions, he cannot proceed under the provisions of Section 1951.2; a lessor cannot evict the tenant and refuse to mitigate damages. In effect, the lessor is put to an election of remedy in such a case.

Section 1952.8. Leases executed before January 1, 1970

1952.8. Sections 1951 to 1952.6, inclusive, do not apply to:

- (a) Any lease executed before January 1, 1970.
- (b) Any lease executed on or after January 1, 1970, if the terms of the lease were fixed by a lease or other contract executed before January 1, 1970.

Section 1952.8

Comment. Section 1952.8 is included to preclude the application of the new statute to existing leases.

Section 1953. Natural resources agreements

1953. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of Sections 1951 to 1952.6, inclusive.

Section 1953

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been characterized by the California Supreme Court as a profit a prendre in gross. See Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 Lindley, Mines § 861 (3d ed. 1914).

Sections 1951-1952.6 are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 1953 limits these sections to their intended purpose. Of course, some of the principles expressed in these sections may be applicable to natural resources agreements. Section 1953 does not prohibit application to such agreements of any of the principles expressed in this article; it merely provides that the statutes found here do not require such application.

Section 1953.2. Lease purchase agreements of public entities

1953.2. Where an agreement for a lease of real property from or to any public entity or any nonprofit corporation whose title or interest in the property is subject to reversion to a public entity would be made invalid if any provision of Sections 1951 to 1952.6, inclusive, were applicable, such provision shall not be applicable to such a lease. As used in this section, "public entity" includes the state, a county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

§ 1953.2

Section 1953.2

Comment. Section 1953.2 is included to prevent the application of any provision of Sections 1951 to 1952.6 to lease-purchase agreements by public entities if such application would make the agreement invalid.

CONFORMING AMENDMENT OF CIVIL CODE

SECTION 3308

3308. (a) ~~The parties to any lease of real or personal property may agree therein that if such~~ Unless the lease otherwise provides, if a lease shall be of personal property is terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee (1) the worth at the time of such termination, of the excess, if any, of the amount of by which the present worth of the unpaid rent , and including 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 exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided and (2) any other damages proximately caused by the lessee's breach .

~~The rights of the lessor under such agreement shall be cumulative to all~~

(b) Nothing in this section precludes the lessor from resorting to any other rights or remedies now or hereafter given to the lessor him by law or by the terms of the lease .

~~it 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.~~

Section 3308 (amended)

Comment. The reference to leases of real property has been deleted from Section 3308 because, insofar as the section relates to real property, it has been superseded by Sections 1951-1953.2.

Section 3308 has also been revised to eliminate the implication that, unless the lease so provides, a lessor of personal property is not entitled to recover damages for prospective detriment upon termination of the lease by reason of the breach thereof by the lessee. No California case has so held, and the cases involving leases of real property that have held that a lessor cannot immediately recover all of his future damages have been based on feudal real property concepts that are irrelevant when personal property is involved. See Harvey, A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised, 54 Cal. L. Rev. 1141 (1966), reprinted with permission in 8 Cal. Law Revision Comm'n Reports at 731 (1967). The revision of Section 3308 also incorporates the substance of Civil Code Section 3300 which specifies the measure of damages for breach of contract.

SECTIONS TO BE ADDED TO CODE OF CIVIL PROCEDURE

Section 337.5. Damages recoverable upon abandonment or termination
of written lease of real property

337.5. Where a lease of real property is in writing, no action shall be brought under Civil Code Section 1951 more than four years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Section 337.5

Comment. The four-year period provided in Section 337.5 is consistent with the normal statute of limitations applicable to written contracts. See Code of Civil Procedure Section 337. Although the prior law was not clear, it appears that, if the lessor terminated a lease because of the lessee's breach and evicted the lessee, his cause of action for the damages resulting from the loss of the rentals due under the lease did not accrue until the end of the original lease term. See De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945); Treff v. Gulko, 214 Cal. 591, 7 P.2d 697 (1932). Under Civil Code Section 1951, 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.

§ 339.5

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

339.5. Where a lease of real property is not in writing, no action shall be brought under Civil Code Section 1951 more than two years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

§ 339.5

Section 339.5

Comment. The two-year period provided in Section 339.5 is consistent with the normal statute of limitations applicable to contracts not in writing. See Code of Civil Procedure Section 339. See also the Comment to Code of Civil Procedure Section 337.5.

ALTERNATIVE 2

1. Amend Civil Code Section 3308 to limit its application to leases of personal property and to otherwise improve the wording of the section.

Section 3308 could be amended to read:

3308. (a) The parties to any lease of real or personal property may agree therein that if such Unless the lease otherwise provides, if a lease shall be of personal property is terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee (1) the worth at the time of such termination, of the excess, if any, of the amount of by which the present worth of the unpaid rent , and including 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 exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided and (2) any other damages proximately caused by the lessee's breach .

The rights of the lesser under such agreement shall be cumulative to all

(b) Nothing in this section precludes the lessor from resorting to any other rights or remedies now or hereafter given to the lessor him by law or by the terms of the lease .

it 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.

2. Add a new section, to be numbered Section 3309, to the Civil Code, to read as follows:

3309. Unless the lease otherwise provides, if a lessee of real property breaches the lease and abandons the property before the end of the term, or if his right to possession is terminated by the lessor because of a breach of the lease, the amount that the lessor may recover from the lessee is limited to (a) the amount by which the present worth of the unpaid rent, including charges equivalent to rent, exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided and (b) any other damages proximately caused by the lessee's breach.

3. Add two new sections to the Code of Civil Procedure to provide a statute of limitations on recovery under new Section 3309, such new sections to read:

337.5. Where the lease is in writing, no action shall be brought under Civil Code Section 3309 more than four years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

339.5. Where the lease is not in writing, no action shall be brought under Civil Code Section 3309 more than two years after the breach of the lease and abandonment of the property, or after the termination of the right of the lessee to possession of the property, whichever is the earlier time.