

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION AND STUDY

relating to

Abandonment or Termination of a Lease

October 1966

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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NOTE

This pamphlet begins on page 701. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

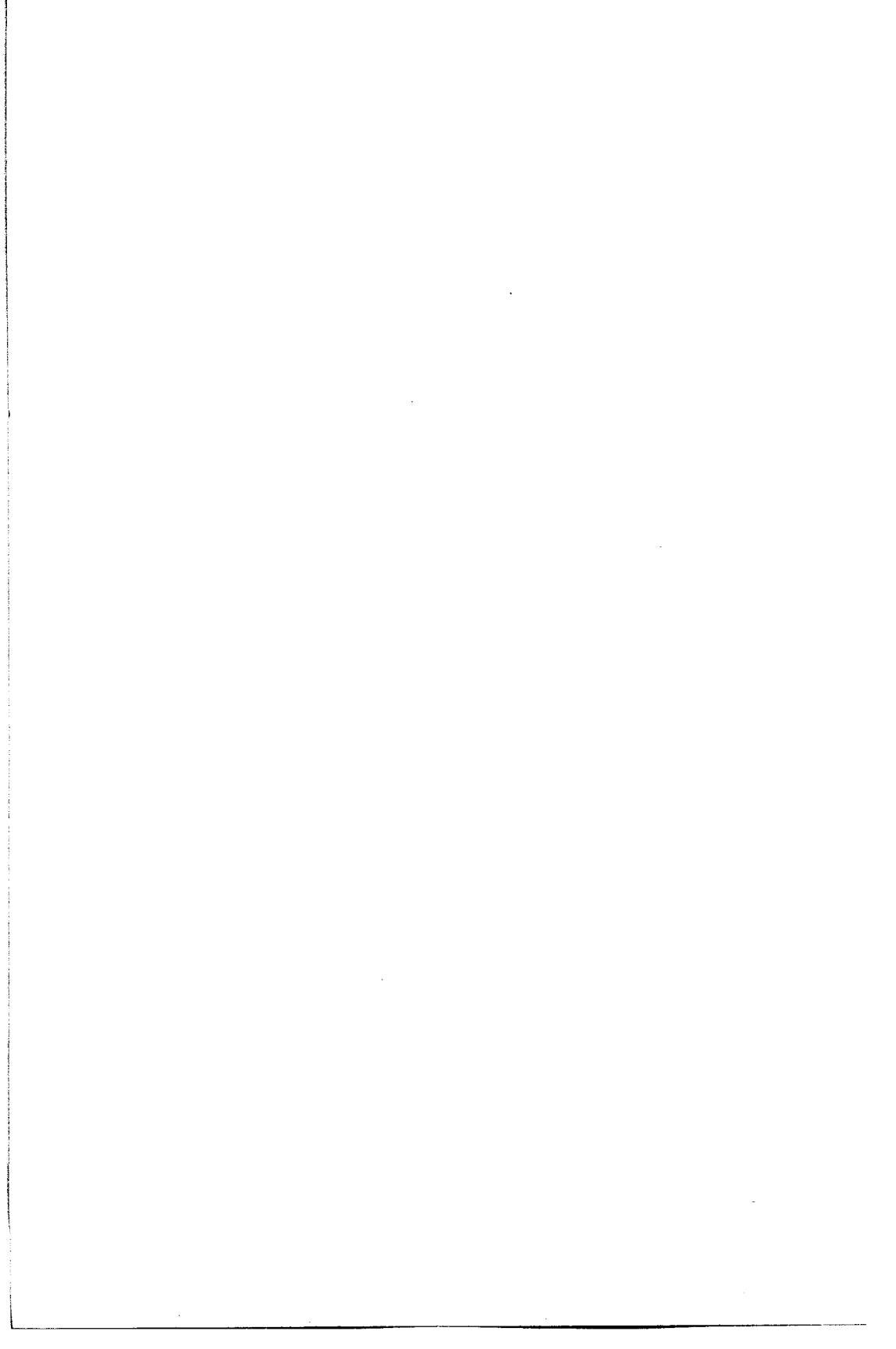
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October 4, 1966

To His EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 130 of the Statutes of 1965 to make a study to determine whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised. The Commission submits herewith its recommendation relating to this topic.

The study that accompanies this recommendation was prepared by Mr. Joseph B. Harvey of the Commission's staff. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,
RICHARD H. KEATINGE
Chairman

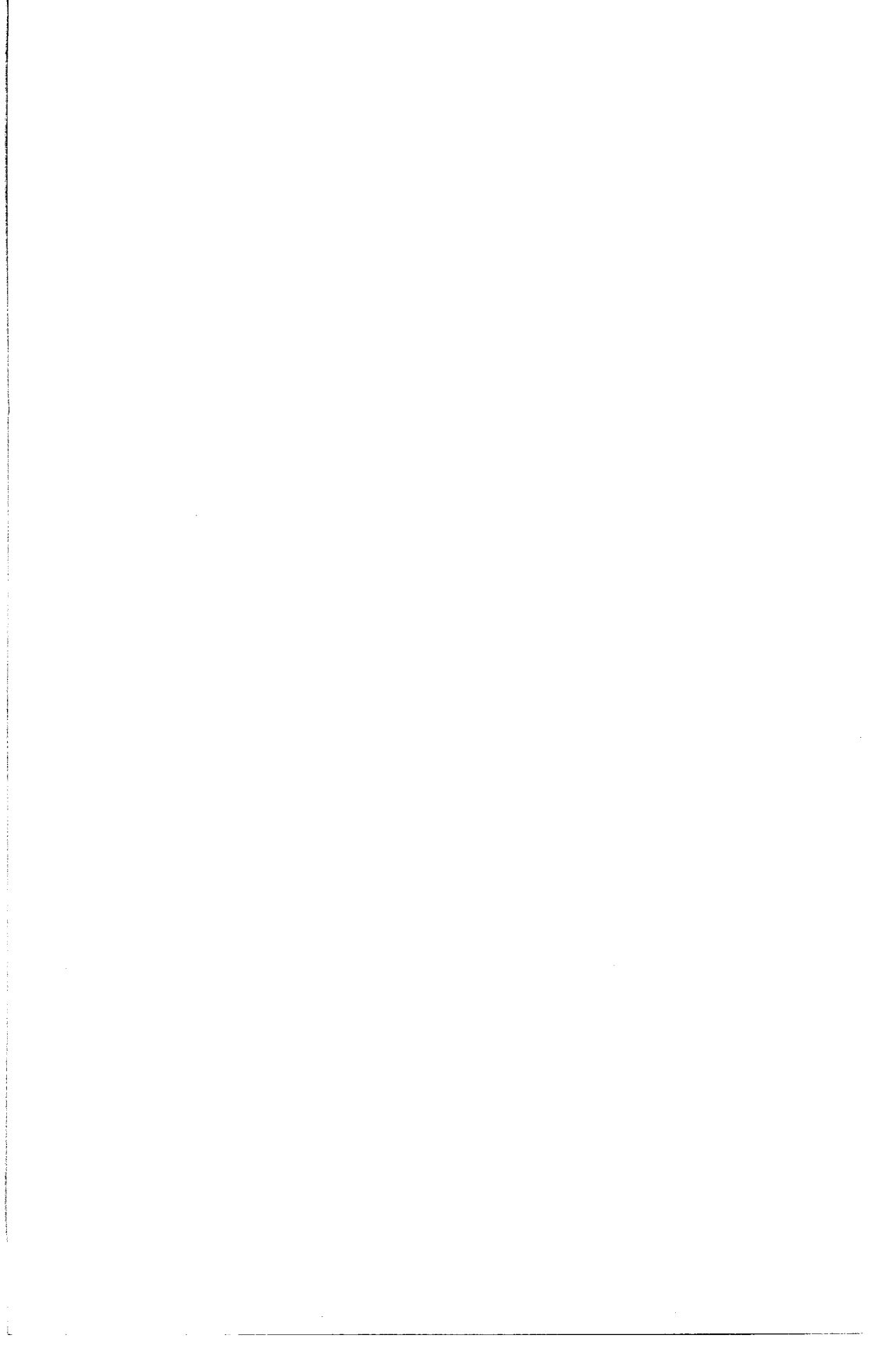


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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

ABANDONMENT OR TERMINATION OF A LEASE

BACKGROUND

Section 1925 of the Civil Code provides that a lease is a contract. Historically, however, a lease of real property has been regarded as a conveyance of an interest in land. Although the trend of the law within recent years has been to divorce the law of leases from its medieval setting of real property law and adapt it to modern conditions by means of contract principles, the influence of the common law of real property remains strong. The California courts state that a lease is both a contract and a conveyance and apply a blend of contract and conveyance law to lease cases. This blend, however, is frequently unsatisfactory and harsh, whether viewed from the standpoint of the lessor or the lessee.

Under existing law, when a lessee abandons the leased property and repudiates his remaining obligations under the lease, his conduct does not—in the absence of a provision in the lease—give rise to an immediate action for damages as it would in the case of an ordinary contract. Such conduct merely amounts to an offer to surrender the remainder of the term. Confronted with such an offer, the lessor has three alternative courses of action:

(1) He may refuse to accept the offered surrender and sue for the accruing rent as it becomes due for the remainder of the term. From the landlord's standpoint, this remedy is seldom satisfactory because he must rely on the continued availability and solvency of a lessee who has already demonstrated his unreliability. Moreover, he must let his property remain vacant, for it still belongs to the lessee for the duration of the lease. In addition, repeated actions may be necessary to recover all of the rent due under the lease. This remedy is also unsatisfactory from the lessee's standpoint, for it permits the lessor to refuse to make any effort to mitigate or minimize the injury caused by the lessee's default.

(2) He may accept the lessee's abandonment as a surrender of the remainder of the term and regard the lease as terminated. This amounts to a cancellation of the lease or a rescission of the unexecuted portion of the lease. Because in common law theory the lessee's rental obligation is dependent on the continuation of his estate in the land, the termination of the lease in this manner has the effect of terminating the remaining rental obligation. The lessor can recover neither the unpaid rent nor damages for its loss. Moreover, the courts construe any conduct by the lessor that is inconsistent with the lessee's con-

tinued ownership of an estate in the leased property as an acceptance of the lessee's offer of surrender, whether or not such an acceptance is intended. Hence, efforts by a lessor to minimize his damages frequently result in the loss of all right to the unpaid future rentals as well as of all right to any damages for the loss of the future rentals.

(3) He may notify the lessee that the leased property will be relet for the benefit of the lessee, relet the property, and sue for the damages caused by the lessee's default. This remedy, too, is unsatisfactory because the courts have held that the cause of action for damages does not accrue until the *end* of the original lease term. Hence, an action to recover any portion of the damages will be dismissed as premature if brought before the end of the original term.

Where the lessee breaches the lease in a material respect so that eviction would be warranted, the lessor has a similar choice of remedies: (1) He may decline to terminate the lease and sue for damages.

(2) He may cancel or rescind the lease, evict the lessee, and give up any right to damages for the loss of future rentals. (3) He may evict the lessee without terminating the lease, relet for the benefit of the lessee, and then sue for damages at the end of the term.

To provide some protection against the possibility of a lessee's breach or repudiation of a lease, lessors sometimes require lessees to make an advance payment to the lessor at the time of the execution of the lease. If he has sufficient foresight to label this payment as an advance payment of rent or as consideration for the execution of the lease, the lessor may retain the entire amount of the payment when the lease is terminated because of the lessee's breach regardless of the actual damage caused by the breach. If the payment is labeled security for the lessee's performance, however, the lessor is entitled to keep only the amount of his actual damages. And, if the payment is labeled as liquidated damages, the courts hold that a provision for its retention is a forfeiture and therefore void.

RECOMMENDATIONS

The Law Revision Commission has concluded that the rules generally applicable under contract law 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, whether by word or by act, should be regarded as a total breach of the lease, giving rise immediately to remedial rights on the part of the aggrieved party, just as repudiation of any other contract gives rise immediately to such remedial rights.

2. When a lease has been repudiated, the aggrieved party should have the right to resort to the same remedies that are available upon the repudiation of a contract. Thus, the aggrieved party should have the right (1) to rescind the lease, (2) to treat the lease as ended for purposes of his own performance and to sue immediately for all damages caused by the repudiation and termination of the lease, or (3) to sue for specific or preventive relief if he has no adequate remedy at law.

3. When a lease has not been repudiated but has been breached in a sufficiently material respect to justify the termination of the lease, the aggrieved party should have the right to resort to the same remedies that are available upon a material breach of a contract: (1) He should be entitled to treat the breach as a partial breach, regard the lease as continuing in force, recover damages for the detriment caused by the breach, and resort to a subsequent action in case a further breach occurs; (2) in appropriate cases, he should be entitled to specific or preventive relief to assure the continued performance of the lease; (3) he should be entitled to rescind the lease; and (4) he should be entitled to treat the lease as ended for purposes of performance and to sue immediately for all damages, both past and prospective, caused by the breach and termination of the lease.

4. Except where a lessor is entitled to specific enforcement of the lease, he should not be able to treat a repudiated lease as still in existence and enforce the payment of the rents as they accrue. Moreover, the eviction of the lessee from the leased property following the lessee's breach should terminate the lease. In each of these cases, the lessor should have a right to recover damages that is independent of the continuance of the lease, and the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property should be abandoned.

5. The party repudiating his obligations under a lease should have the right, as he generally does under other kinds of contracts, 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. The basic measure of damages when a lease has been repudiated or terminated because of a material breach 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—as he is under existing law—to recover from the lessee the entire remaining rental obligation.

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

8. A liquidated damages provision in a lease should be treated like such a provision in any other contract. When the amount of the prospective damage that may be caused by a breach of the lease cannot be readily ascertained, a fair liquidated damages provision should be enforceable.

9. A defaulting lessee should be entitled to relief from the forfeiture of an advance payment that exceeds the damages caused by his default, regardless of the label attached to the payment by the provisions of the lease. A lessor should not have the right to exact forfeitures by the artful use of language in a lease.

10. 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.

11. Section 3308 of the Civil Code should be revised to limit its application to personal property. Section 3308 provides, in effect, that a lessor of real or personal property may recover the measure of damages recommended above *if* the lease so provides and the lessor chooses to pursue that remedy. Enactment of legislation effectuating the other recommendations of the Commission would make Section 3308 superfluous insofar as real property is concerned. Section 3308 should also be revised to eliminate the implication that arises from its terms that a lessor of personal property cannot sue for all of his prospective damages unless the lease so provides.

12. 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 proposed legislation, the lessor's right to damages does not depend upon the continuance of the lessor's estate; therefore, the provisions of Section 1174 that provide for such continuance are no longer necessary.

13. If a lease is actually a means for financing the acquisition or improvement of the leased property, 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. It is frequently intended that the rental specified in lease-purchase agreements will also compensate the lessor for an improvement that he has agreed to construct for the benefit of the lessee. 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 the enactment of the following measure:

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.

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

RIGHTS UPON REPUDIATION OR TERMINATION OF LEASE OF REAL PROPERTY

§ 1951. Repudiation of lease

SECTION 1. Section 1951 is added to the Civil Code, to read:

1951. A lease of real property is repudiated when, without justification:

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

(b) Either party by voluntary act, or by voluntarily engaging in a course of conduct, renders substantial performance of his remaining obligations under the lease impossible or apparently impossible; or

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

Comment. Section 1951 is definitional. The substantive effect of a repudiation as defined in Section 1951 is described in the sections that follow in this chapter.

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

Under the preliminary language of Section 1951, subdivision (c) applies only when the eviction is "without justification." Such an eviction is one 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 would be terminated by the eviction under the provisions of Section 1951.5(a). But if the lessor did not have the right to evict, the eviction would not terminate the lease if the lessee sought and obtained specific enforcement of the lease. See Section 1951.5(c). Subdivision (c) refers only to actual eviction, not "con-

structive 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 or preventive relief. For wrongful conduct not amounting to an actual eviction (sometimes referred to as "constructive eviction"), the lessee may elect to treat the lease as continuing and recover damages for the detriment caused by the wrongful conduct. See Section 1954.

§ 1951.5. Termination of lease

SEC. 2. Section 1951.5 is added to the Civil Code, 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 quits 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 by the lessor to quit the property; or

(c) The lease is repudiated by either party thereto and (1) the aggrieved party is not entitled to or does not seek specific or preventive relief to enforce the provisions of the lease as provided in subdivision (c) of Section 1953, or (2) the aggrieved party gives the other party written notice of his election not to seek such specific or preventive relief.

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) refer both to the situation where a condition has occurred warranting a termination of the lease and to the situation where a breach of the lessee's obligations warrants a termination of the lease. Under Sections 1953 and 1954, however, the lessor would be entitled to damages following the eviction of the lessee only in the case of an eviction following a breach.

To the extent that subdivisions (a) and (b) provide that an eviction following a breach of the lease by the lessee is a termination of the lease, they change the California law. Under Code of Civil Procedure Section 1174 (as amended by Chapter 259 of the Statutes of 1931), a lessee could be evicted from the leased property following a material breach 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 1953 and 1954 provide for the recovery of damages despite the termination of the lease and the eviction of the lessee, there is no further need to perpetuate the fiction that the leasehold estate continues when the lessee has no right to the possession of the leased property.

Subdivision (c) changes the prior California law in part. Under the prior law, repudiation of a lease and abandonment of the property by the lessee did not terminate the lease. The courts stated that the lessor could regard the lease as continuing in existence and could recover the rents as they became due. See *Kulawitz v. Pacific Woodware & 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 regard the repudiated lease as continuing and enforce the payment of rental as it falls due unless the repudiation is nullified as provided in Section 1952 or unless the lessor is entitled to and obtains a decree requiring specific performance of the lease as provided in subdivision (c) of Section 1953. Instead, Section 1953 permits the lessor to recover all of the damages caused by the lessee's repudiation.

Subdivision (c) is consistent with the prior California law relating to a lessee's remedies. Under subdivision (c), as under the prior law, a lessee may regard the lease as terminated by the lessor's repudiation and either sue for his damages under Section 1953 or rescind the lease. Under some circumstances, the lessee may also seek specific performance of the lease under subdivision (c) of Section 1953. Cf. 30 CAL. JUR.2d *Landlord and Tenant* § 314 (1956).

§ 1952. Retraction of repudiation

SEC. 3. Section 1952 is added to the Civil Code, 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 becomes ready, willing, and able to perform his remaining obligations under the lease and the other party is so informed.

Comment. Section 1952 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 (1932); 4 CORBIN, CONTRACTS § 980 (1951).

§ 1953. Remedies upon repudiation

SEC. 4. Section 1953 is added to the Civil Code, to read:
1953. When a party repudiates a lease of real property, the other party may do any one of the following:

(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.

(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 such relief is 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 1953 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 the amount that the lessor could in good faith procure by reletting. *Kulawitz v. Pacific Woodware & 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 1953, a lessor may still terminate the lease and retake possession for his own account by rescinding the lease under subdivision (a). But a lessor cannot permit the property to 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 1953, 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 bargain represented by the original lease—i.e., the difference between the rent reserved in the lease and the fair rental value of the property together with all other detriment proximately caused by the repudiation. See Section 3320. 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 1953 may also be used by a lessee when the lessor breaches the lease, but in this respect Section 1953 merely continues the preexisting law without significant change. See 30 CAL. JUR.2d *Landlord and Tenant* § 314 (1956).

§ 1953.5. Time for commencing action upon repudiation

SEC. 5. Section 1953.5 is added to the Civil Code, 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* and is consistent with the California law applicable to repudiation of contracts generally. See *Brewer v. Simpson*, 53 Cal.2d 567, 593, 2 Cal. Rptr. 609, 622-623, 349 P.2d 289, 302-303 (1960). Cf. *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal.2d 834, 36 Cal. Rptr. 741, 389 P.2d 133 (1964). Under the preexisting California law, the statute of limitations did not begin to run upon a cause of action for repudiation of a lease 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.

§ 1954. Remedies for material breach of lease

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

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

(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.

(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 such relief is 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 1953. Section 1954 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).

Under Section 1954, the aggrieved party may simply rescind or cancel the lease without seeking affirmative relief. He may regard the lease as ended for purposes of performance and seek recovery of all damages resulting from such termination, including damages for both past and prospective detriment. He may regard the lease as continuing

in force and seek damages for the detriment caused by the breach, resorting to a subsequent action in case a further breach occurs. And, finally, in appropriate cases the aggrieved party may seek specific performance of the other party's obligations under the lease, or he may seek injunctive relief to prevent the other party from interfering with his rights under the lease.

Section 1954 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.

§ 1954.5. Contractual control of remedies

SEC. 7. Section 1954.5 is added to the Civil Code, to read:
 1954.5. (a) Except as provided in subdivision (b), the legal consequences of the actions of the parties to a lease of real property as provided in Sections 1951, 1951.5, and 1952, and the legal remedies available upon breach of a lease of real property as provided in Sections 1953 and 1954, are not subject to modification by the prior agreement of the parties.

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

(c) This section does not affect any agreement for the arbitration of any dispute that has arisen or may arise under a lease of real property.

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

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.

§ 1954.7. Agreements for exploration for or removal of natural resources

SEC. 8. Section 1954.7 is added to the Civil Code, to read:
1954.7. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

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 à 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).

The sections in this chapter dealing with leases of real property 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 1954.7 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to natural resources agreements. Section 1954.7 does not prohibit application to such agreements of any of the principles expressed in this chapter; it merely provides that the statutes found here do not require such application.

RIGHTS UPON TERMINATION OF LEASE OF
PERSONAL PROPERTY

§ 3308 (Amended)

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

3308. ~~The parties to any lease of real or personal property may agree therein that if such~~ *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 the *present 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~~ *property* for the same period.

The rights of the lessor under *this section are 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~~ *but* the election of the lessor to exercise the remedy *provided by this section is hereinabove permitted shall be* binding upon him and *shall* 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. 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 1951-1954.5 and 3320-3326.

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, REP., REC. & STUDIES at 731 (1967).

DAMAGES FOR BREACH OF LEASE OF REAL PROPERTY

SEC. 10. 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 for Breach of Lease of Real Property

Comment. This article sets forth in some detail the damages that may be recovered upon a total breach of a lease of real property. Some of the rules stated are also applicable in cases involving a partial 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 present 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 3324, 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 a lease is terminated because of the lessee's breach.

Under subdivision (a), the basic measure of the lessor's damages is 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, the phrase "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 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 Section 3320.

The measure of damages described in subdivision (a) 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. The measure of damages described in Section 3320 is applicable in all cases in which a lessor seeks damages upon termination of a lease of real property because of a lessee's breach.

Subdivision (b) is included in this section in order to make it clear that the basic measure of damages described in subdivision (a) 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 those expenses in caring for the property during this time 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, making repairs that the lessee was obligated to make, 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; 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 made "subject to Section 3324" in order to make it clear that any attorney's fees incurred by the lessor in enforcing his rights under the lease are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or the lessee.

Section 3320 also is made subject to Section 3322 in order to make it clear that, as under the law relating to contracts generally, the defaulting lessee is not liable under Section 3320 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. See Section 3322.

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

(b) Subject to Section 3324, any other damages necessary to compensate the lessee for all the detriment proximately caused by the lessor'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 a lease is terminated because of the lessor's breach. It is consistent with the prior 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 Inv. 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 3324 in order to make clear that attorney's fees incurred by the lessee in enforcing his rights under the lease are not recoverable as incidental damages unless the lease specifically provides for the recovery of such fees by either the lessor or the 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 profits made on the reletting, but any such profit shall be set off against the damages to which the lessor is otherwise entitled.

Comment. Under prior California law, a lessor could decline to retake possession of leased property after it had been abandoned by the lessee and could recover the rent as it became 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 (1932).

Under prior law, a lessor could relet property after the original lessee had abandoned the lease if he did so either on his own account (in which case the lessee's rental obligation was 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, 15 (1951). Although no deci-

sion 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.

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. The net 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 *Com. Code* § 2706(6).

§ 3323. Liquidated damages

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

Comment. Section 3323 does not create a right to recover liquidated damages; it merely recognizes that such a right may exist if the conditions specified in Civil Code Sections 1670 and 1671 are met. 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 became 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 1953 and this article, however, the lessor's right to damages accrues at the time of the repudiation; and because they must be determined before the end of the term, they may be difficult to calculate in some cases. This will frequently be the case, for example, 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 3323 is included as a reminder that the prior decisions holding liquidated damages provisions in leases to be void are no longer authoritative and that such provisions are valid in appropriate cases.

So far as provisions for liquidated damages upon a lessor's breach are concerned, Section 3323 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).

§ 3324. Attorney's fees

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

(b) If a lease of real property provides that one party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the

lease may also recover reasonable attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. If a lease of real property provides that one party to the lease may recover attorney's fees incurred in successfully defending his rights under the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in successfully defending his rights under the lease. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

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 3324 makes it clear that the other sections in this article do not impair a party's rights under such a provision.

Subdivision (b) is included in the section to equalize the operation of leases that provide for the recovery of attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other party seldom has sufficient bargaining power to require the inclusion of a provision for attorney's fees that works in his favor. Under Section 3324, if either party is entitled by a provision in the lease to recover attorney's fees, the other party may recover such fees under similar circumstances. To prevent the provisions of subdivision (b) from being nullified by standard waiver provisions in leases, the third sentence of subdivision (b) prohibits the waiver of a party's right to recover attorney's fees under this subdivision until the right actually accrues.

§ 3325. Lessee's relief from forfeiture

3325. (a) 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, 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 the sum of:

(1) The portion of the total amount required to be paid to or for the benefit of the lessor pursuant to the lease that is fairly allocable to the portion of the term prior to the termination of the lease; and

(2) Any damages, including liquidated damages as provided in Section 3323, to which the lessor is entitled by reason of such breach.

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

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

Similarly, Section 3325 will permit a lessee to recover advance payments, regardless of how they are designated in the lease, if the court finds that such payments are in fact in consideration for the lease and are in excess of the amount due to the lessor as compensation for the use and occupation of the property and as damages for the detriment caused by the lessee's breach. Section 3325 does not require a pro rata allocation of the total consideration. The court must consider the entire agreement, the circumstances under which it was made, and the understanding of the parties. For example, the parties may have understood that the rental value of the property would rise during the term of the lease. The parties may have contemplated some initial compensation for special preparation of the property or to compensate for the surrender of a now-vanished opportunity to lease to someone else. In each case, the court must determine the consideration fairly allocable to the portion of the lease term prior to termination and, in addition, the lessor's damages so that the lessor can retain the full amount necessary to place him in the financial position he would have enjoyed had the lessee fully performed. Since any sum paid by the lessee in excess of this amount is a forfeiture insofar as the lessee is concerned and a windfall to the lessor, it is recoverable under Section 3325.

Subdivision (b) of Section 3325 is probably unnecessary. The *Freedman* and *Caplan* cases are based on the provisions of the Civil Code prohibiting forfeitures. These rules are applied despite contrary provisions in contracts. Nonetheless, subdivision (b) 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 3325 changes the prior California law. Under the prior California law, the right of a lessee to recover an advance payment depended on whether the advance payment was designated a security deposit (lessee could recover), liquidated damages (lessee could recover), an advance payment of rental (lessee could not recover), or a bonus or consideration for the execution of the lease (lessee could 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 discussion in Joffe, *Remedies of California Landlord upon Abandonment by Lessee*, 35 So. CAL. L. REV. 34, 44 (1961), and 26 CAL. L. REV. 385 (1938). See also Section 3323 and the Comment to that section.

§ 3326. Unlawful detainer actions

3326. (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 3326 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 3326 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 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 in this article. Under Section 3326, 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.

§ 3327. **Agreements for exploration for or removal of natural resources**

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

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 à 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).

The previous sections in this article 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 3327 limits these sections to their intended purpose. Of course, some of the principles expressed in this article may be applicable to natural resources agreements. Section 3327 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.

§ 3387.5. Specific enforcement of real property lease

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

3387.5. (a) A lease of real property may be specifically enforced by any party, or assignee of a party, to the lease when a purpose of the lease is (1) to provide a means for financing the acquisition of the leased property, or any improvement thereon, by the lessee or (2) to finance the improvement of the property for the use of the lessee during the term of the lease.

(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 prior California law, if a lessee defaulted in the payment of rent, abandoned the property, or otherwise breached the lease, the lessor could refuse to terminate the lease and sue to collect the rental installments as they accrued. Because the lessee's obligation under a lease was, 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); *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 specifically enforceable nature of the lessee's rental obligation gives the lessor, in effect, security for the repayment of the cost of the improvement.

These systems of financing the purchase or improvement of real property would be seriously jeopardized if the lessor's only right upon repudiation of the lease by the lessee 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 clear that a lease is specifically enforceable if it is actually a means for financing the acquisition by the lessee of the leased property or improvements thereon, or for financing the construction of improvements to be used by the lessee during the term of the lease. Because of 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.

CONFORMING AMENDMENT

Code of Civil Procedure Section 1174 (Amended)

SEC. 12. 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 by prior amendment to permit a lessor to evict a defaulting lessee and relet the premises without forfeiting his right to look to the lessee

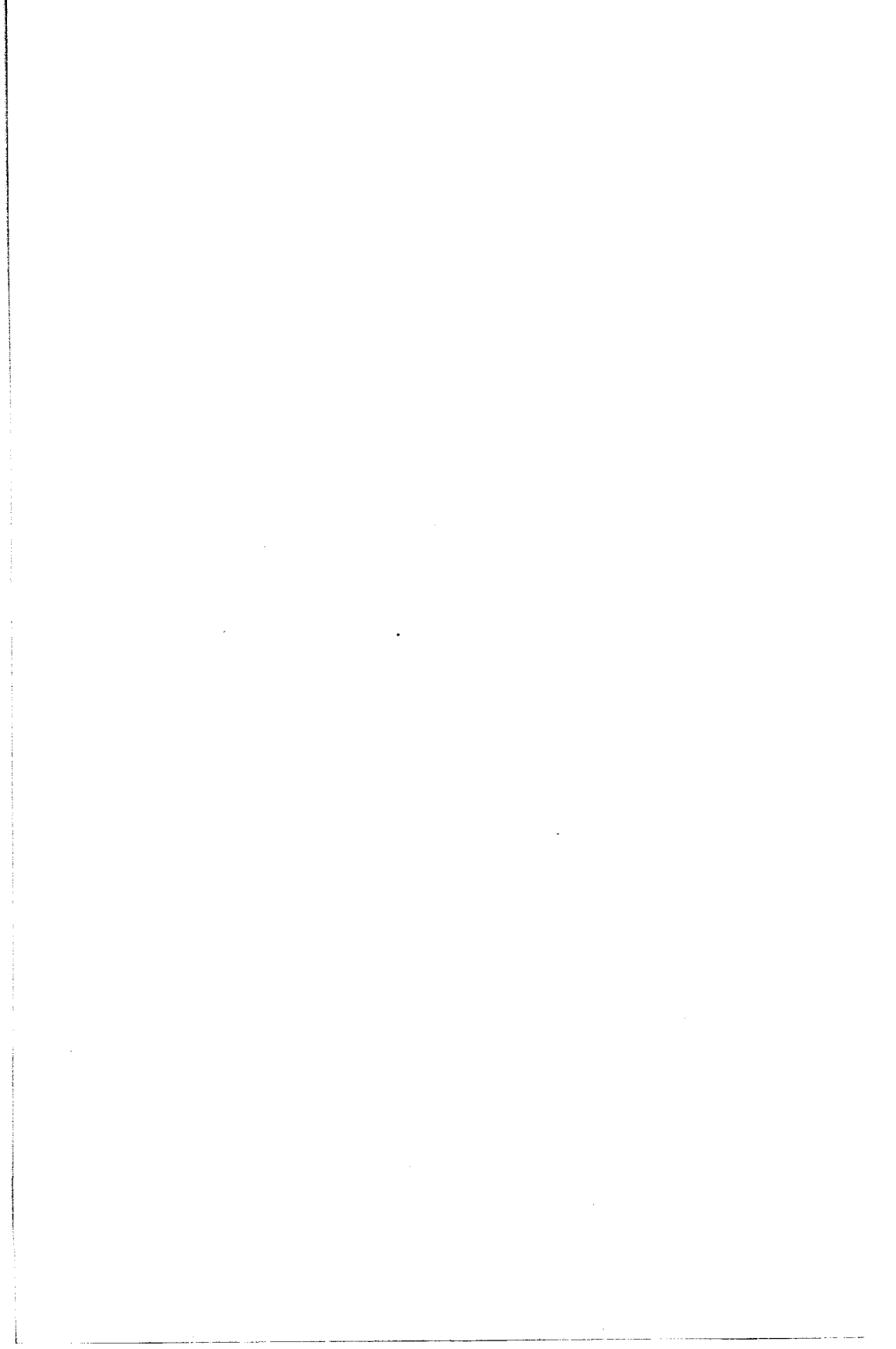
for any resulting deficiencies in the accruing rentals. Prior to that amendment, a lessor whose lessee defaulted in the payment of rent had to choose between (a) suing the lessee from time to time to collect the accruing rentals and (b) completely terminating the lease and the lessee's obligation to pay any more rent. *Costello v. Martin Bros.*, 74 Cal. App. 782, 786, 241 Pac. 588, 589 (1925).

Inasmuch as Civil Code Sections 1953 and 1954 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.

APPLICATION OF ACT

SEC. 13. This act applies to all leases, whether executed, renewed, or entered into before or after the effective date of this act, to the full extent that it constitutionally can be so applied.

Comment. Section 13 provides that this act is to be applied to leases executed before as well as after its effective date. The purpose of Section 13 is to permit, insofar as it is possible to do so, the courts to develop and apply a uniform body of law applicable to all cases involving a repudiation or material breach of a lease that arise after the effective date of the act. The section recognizes that the constitutional prohibition against the impairment of the obligation of contracts may limit the extent to which this act can be applied to leases executed before its effective date. Whether there is such a constitutional limitation on the retroactive application of this act, and the extent of such possible limitation, must be determined by the courts.

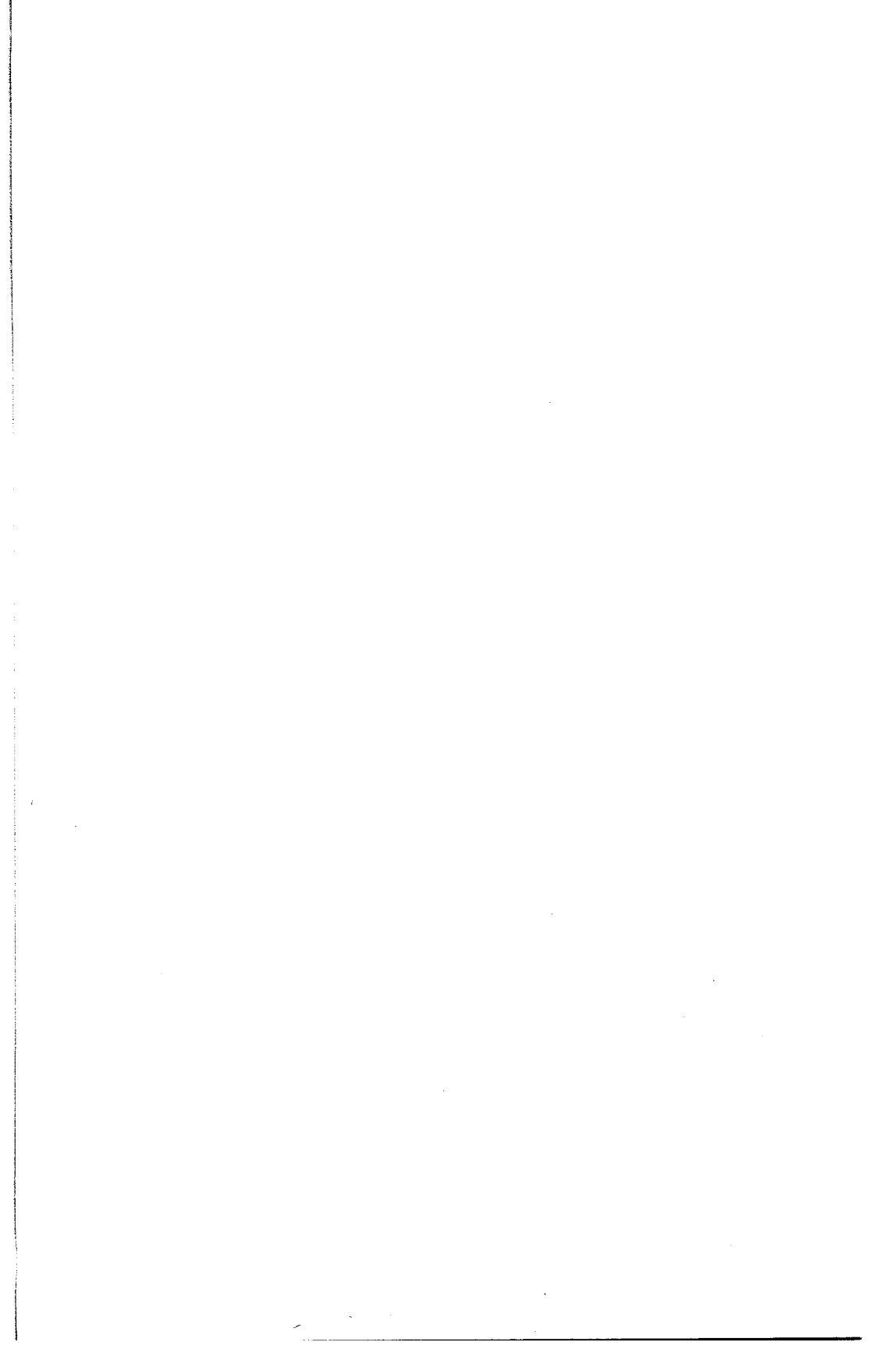


**A STUDY TO DETERMINE WHETHER THE RIGHTS AND
DUTIES ATTENDANT UPON THE TERMINATION
OF A LEASE SHOULD BE REVISED ***

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* This study, beginning on page 733, is reprinted with permission from the *California Law Review*, Volume 54, page 1141 (1966).



A Study To Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised

Joseph B. Harvey*

The task of modern courts has been to divorce the law of leases from its medieval setting of real property law, and adapt it to present-day conditions and necessities by means of contract principles, which were only emerging when the law of landlord and tenant first developed.¹

THE UNSATISFACTORY NATURE of the California law of landlord and tenant has occupied the attention of commentators for a number of years. It has been pointed out that "the remedies available to the landlord upon the tenant's default and subsequent vacation of the premises, are far from satisfactory from the landlord's standpoint."² Moreover, by the use of particular language in a lease coupled with an advance payment by the lessee, a lessor may successfully subject a lessee to a forfeiture—a loss unrelated to the damages caused—that is "harsher than would follow from holding [the provision for advance payment] a provision for liquidated damages."³

The problems in California landlord and tenant law are mainly due to the development of the law of landlord and tenant as part of the law of real property before bilateral contracts were considered enforceable.⁴

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¹ Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47, 48 (1937).

² Joffe, *Remedies of California Landlord Upon Abandonment by Lessee*, 35 SO. CAL. L. REV. 34 (1961). See also Note, 43 CALIF. L. REV. 344 (1955): "The remedies available to a California landlord, following a default or repudiation by his tenant, are ordinarily unsatisfactory."

³ 26 CALIF. L. REV. 385, 388 (1938).

⁴ Professor Powell reports that the concept of a lease as a conveyance was firmly

Yet, the modern lease looks more like an ordinary bilateral contract than a conveyance.⁵ The courts, in the development of the modern lease, have increasingly applied contractual principles.⁶ Although these principles have sometimes been disguised in the medieval language of landlord and tenant law,⁷ occasionally they are frankly and openly applied.⁸ But courts apply contract principles inconsistently, and sometimes just as a forward approach is being welcomed,⁹ they retreat to more anciently held positions.¹⁰ As a result, the existing law of landlord and tenant is "a blend of property concepts and of contractual doctrines,"¹¹ which, in many instances, has proven to be an unpalatable mixture, giving rise to complaints and to cries for reform in varying degrees of intensity.¹²

established by the year 1500. 2 POWELL, REAL PROPERTY ¶ 221 (1966). The first recognition of bilateral contracts, on the other hand, seems to have been about the end of the 16th century. 1 WILLISTON, CONTRACTS § 103, at 385 (3d ed. 1957).

⁵ 2 POWELL, REAL PROPERTY ¶ 221, at 179 (1966); *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952); Bennett, *supra* note 1.

⁶ 6 WILLISTON, CONTRACTS §§ 890, 890A (3d ed. 1962); Note, 31 CALIF. L. REV. 338 (1943). Professor Williston notes that "decisions may be found where a lease is treated like an ordinary bilateral contract, and as an original question this method of treatment has much to commend it." 6 WILLISTON, CONTRACTS § 890, at 585 n.3 (3d ed. 1962).

⁷ 3A CORBIN, CONTRACTS § 686, at 242-44 (rev. ed. 1960); 6 WILLISTON, CONTRACTS § 891 (3d ed. 1962); Bennett, *supra* note 1, at 65-69.

⁸ See discussion in 31 CALIF. L. REV. 338 (1943) of *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 132 P.2d 457 (1942). See also Bennett, *supra* note 1, at 69-71.

⁹ Note, 31 CALIF. L. REV. 338 (1943).

¹⁰ See the discussion in *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 252-56 (1952), of *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944).

¹¹ 2 POWELL, REAL PROPERTY ¶ 221, at 184 (1966).

¹² See the quotation in text accompanying note 1 *supra*. Professor Corbin states: "The word 'constructive' [in the term 'constructive eviction'] shows that it is not the law of property that the court is applying, but the law of mutual dependency in contracts; it is believed that the time has come to recognize this fact openly and to apply the flexible rules of contract law in determining whether a breach by either party is so material as to discharge the other from further duty." 3A CORBIN, CONTRACTS § 686 at 242-43 (rev. ed. 1960).

In 31 CALIF. L. REV. 338, 339 (1943), the following statement appears: "The presence of special rules which are applied to determine the effect of breaches of covenant by one party to a lease on the duties of the other is explained by the *Restatement of Contracts* as existing 'partly for historical reasons and partly because the grantor of a lease . . . has performed the major part of his side of the transaction.' In the light of changing conditions surrounding the uses to which land is put, the former reason is not very persuasive; the latter no longer based upon fact. It is true that a lease is regarded primarily as a conveyance of an interest in land and that the law of real property grew up before the doctrine of mutually dependent promises had developed. However, the historical approach seems unsound, particularly since the feudal tenancy, with its emphasis on farm land from which the rent was said to 'issue' has given way to a large extent to the 'business lease' containing covenants of both parties relating to the use of the buildings on the land, which frequently is the chief consideration. This economic change which has led to the modern lease-contract not only invalidates the argument against interdependency of covenants based

The purpose of this article is to point out those deficiencies in California landlord and tenant law which have provoked complaints that the law governing the lessor's remedies upon the lessee's default is "far from satisfactory"¹³ to the lessor and, at times, "harsh"¹⁴ to the lessee. The article will also suggest means by which these deficiencies may be corrected legislatively.

I

BACKGROUND OF THE CALIFORNIA LAW OF LEASES

Much of the California law relating to the rights and obligations of lessors and lessees derives from common law property concepts. The California law relating to leases is also grounded upon certain statutes that were enacted as part of the Civil Code in 1872. These statutes seem to be based to a considerable extent upon provisions and concepts contained in the Code Napoleon and French Civil Code, which depart considerably from the preexisting common law concepts concerning the nature of a lease. Accordingly, it will be helpful to an understanding of existing California landlord and tenant law to be familiar with the common law and civil law backgrounds of the modern law of leases.

A. Leases Under the Common Law

At common law, a lease was a conveyance of an estate in real property for a term less than that for which the lessor was entitled to the property.¹⁵ The lessee or tenant became the holder of the title to the property for the term specified in the lease,¹⁶ and not merely the holder of a contractual right based on the covenant of the lessor to let him use the property.¹⁷ The tenant's title came to an end at the expiration of the term for which the tenancy was created.¹⁸ But for so long as the term continued, the tenant was considered the holder of the title, which he could not abandon.¹⁹

An estate for years, like any other estate, could be terminated prior to its normal expiration by a forfeiture of the tenant's estate for breach of an express condition.²⁰ It could also be terminated by a surrender, which

upon traditional notions, but also explains why execution of the lease cannot properly be held to constitute substantial performance on the part of the lessor." [Footnotes omitted.] See also the articles and notes cited in notes 1, 2, and 3 *supra*.

¹³ See text accompanying note 2 *supra*.

¹⁴ See text accompanying note 3 *supra*.

¹⁵ 1 *TIFFANY, REAL PROPERTY* § 74 (3d ed. 1939) [hereinafter cited as *TIFFANY*]. See *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 516 (1911).

¹⁶ *Welcome v. Hess*, 90 Cal. 507, 513, 27 Pac. 369, 371 (1891).

¹⁷ 1 *TIFFANY* § 73; 2 *POWELL, REAL PROPERTY* ¶ 221 (1966).

¹⁸ 1 *TIFFANY* § 147.

¹⁹ *Welcome v. Hess*, 90 Cal. 507, 513, 27 Pac. 369, 371 (1891).

²⁰ 1 *TIFFANY* § 152.

was a yielding up of the estate to the owner of the reversion or remainder.²¹ But rescission of the lease did not effect a transfer of the lessee's title back to the lessor,²² just as a rescission of a deed in fee simple does not divest the grantee of his title.²³

A surrender could be accomplished orally at common law.²⁴ Under the statute of frauds, a surrender could be effected only by a writing or "by operation of law."²⁵ A surrender "by operation of law" occurred when both the landlord and the tenant acted in a manner that was inconsistent with the continuance of the tenant's estate,²⁶ and an intent to terminate the estate was not necessary.²⁷ Surrender by operation of law resulted from acts

such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord if the tenant acquiesces, or the giving of a lease to another; and any act which will amount to eviction will estop the landlord, and make a formal surrender unnecessary. And while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel.²⁸

A lease also created a tenurial relationship between the lessor (or landlord) and the lessee (or tenant); and, as an incident of this tenurial relationship, the tenant owed certain services to his lord.²⁹ Originally, rent

²¹ 1 TIFFANY § 150.

²² In other words, a rescission of the lease, unlike a surrender, was not sufficient to terminate the leasehold. "The parties to a contract can rescind or cancel the contract, that is, they can make a new contract by which each agrees to forego his rights under the previous contract, but the mere making of a new contract can never transform property rights even to a person in whom they were formerly vested. Any rescission or cancellation, so-called, of a lease, by the parties thereto, must consequently, in order to terminate the tenancy, constitute in legal effect a surrender, and must satisfy the requirements existing with reference to such a mode of conveyance." 4 TIFFANY § 960.

²³ "The courts occasionally refer to the 'rescission' or 'cancellation' of the lease by the parties to the tenancy, without apparently recognizing that a termination of the tenancy as a result of an agreement of the parties, made subsequently to its creation, necessarily involves the divesting of a leasehold estate out of the lessee, or his assignee, and a reversion thereof in the landlord. After an estate, whether in fee simple or for life or for years, has been conveyed, the grantor and grantee in the conveyance cannot effect a reconveyance of the estate to the former by undertaking to 'rescind' or 'cancel' the original conveyance." 4 TIFFANY § 960.

²⁴ 4 TIFFANY § 96.

²⁵ *Ibid.* See CAL. CIV. CODE § 1091; CAL. CODE CIV. PROC. § 1971.

²⁶ 4 TIFFANY § 962.

²⁷ *Ibid.*

²⁸ *Welcome v. Hess*, 90 Cal. 507, 512, 27 Pac. 369, 370 (1891).

²⁹ 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 232-34, 236-40 (2d ed. 1898).

was a form of feudal service owed by a tenant to his lord as an incident of the tenant's estate and of the tenurial relationship.³⁰ It was regarded as a tribute or return to the landlord of a portion of the actual or possible profits issuing out of the land.³¹ Although rent, like any other feudal service, was considered to issue from and be owed by the land itself,³² the rent was to be paid or rendered by the tenant, and the landlord was under no obligation to take it as in the case of a profit à prendre.³³

At common law the obligation to pay rent did not accrue from day to day over the period of the tenancy but each rental installment became due only on the dates stipulated in the lease. Prior to the due date, the lessor had no claim to a rental installment. If rent was payable in advance, the lessee was not entitled to any apportionment if the lease was terminated before the end of the period for which the rent was paid.³⁴

Because the rent was an obligation owed to the landlord from and during the existence of the servient estate, the tenant's duty to pay and the landlord's right to receive rent terminated upon the extinction of the tenant's estate.³⁵ Abandonment of the property did not affect the tenant's obligation for rent because—unless a surrender resulted from the landlord's retaking of possession—it did not terminate the tenant's estate. The lessor could permit the property to remain vacant and recover the rental installments as they accrued.³⁶ Because a covenant by the tenant to pay the rent was merely a covenant to render the feudal service that was based on the tenant's estate in the land, termination of the tenant's estate, whether by surrender or forfeiture, terminated not only the tenurial obligation to pay rent, but also liability on the covenant to pay rent.³⁷

The tenant's liability for rent was in no way affected by the whole or partial destruction of the improvements upon the leased property, even though the improvements may have been the principal inducement for entering into the lease.³⁸ The theory was simply that the tenant's estate in the land continued despite the destruction, and from that estate the rent issued and ought to be paid to the landlord.³⁹ Eviction by the landlord did not terminate the tenant's rental obligation, but it suspended

³⁰ *Ibid.* See also *id.* at 291-96.

³¹ 3 TIFFANY § 877.

³² 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 237 (2d ed. 1898).

³³ 3 TIFFANY § 876.

³⁴ 2 POWELL, REAL PROPERTY ¶ 230, at 267 (1966); 3 TIFFANY §§ 886, 888.

³⁵ 3 TIFFANY § 901.

³⁶ 3 TIFFANY § 902.

³⁷ 3 TIFFANY §§ 902, 903; 4 TIFFANY § 963.

³⁸ 3 TIFFANY § 905.

³⁹ *Ibid.*

that obligation during the time that the tenant was out of possession.⁴⁰

Because the tenant's rental obligation depended on the continued existence of his estate in the land, and not upon the landlord's performance of any covenants that may have been made in the lease, the common law did not excuse the tenant from his rental obligation merely because the landlord had not performed some promise he had made in the lease. Similarly, the lessor was not excused from performance of his obligations under the lease merely because the lessee was in default. The lease covenants were regarded as independent unless expressly made dependent.⁴¹ Hence, each party, though in default, could recover damages for the other's breach, but could not rely on that breach as an excuse for failure to perform his own obligations.⁴²

B. Leases Under the Civil Law

The Civil Code of California, enacted in 1872, contains a number of provisions—specifically, those in sections 1925 to 1950—relating to leases that seem totally out of harmony with the common law summarized above. Professor Powell has speculated that at least some of these provisions may have had their roots in the civil law.⁴³ And the language of the sections suggests that they were based, at least in part, upon the civil law, particularly upon the Code Napoleon (or French Civil Code).

Both the California Civil Code and the Code Napoleon refer to a lease as a contract for the "hiring" of property: The caption of Title V, Part 4 of Division 3 of the California Civil Code, which is the title relating to leases, is "Hiring," and the caption of Title VIII of Book III of the Code Napoleon, which also relates to leases, is "Of the Contract of Hiring."⁴⁴ Also, section 1925 of the California Civil Code describes a

⁴⁰ 3 TIFFANY § 906.

⁴¹ This common law rule of independency of covenants has been adopted by the *Restatement of Contracts*. RESTATEMENT, CONTRACTS § 290 (1932). See 3A CORBIN, CONTRACTS § 686, at 238 and n.58 (rev. ed. 1960).

⁴² 3A CORBIN, CONTRACTS § 686, at 238-39 (rev. ed. 1960); 6 WILLISTON, CONTRACTS §§ 890, 890A (3d ed. 1962).

⁴³ 2 POWELL, REAL PROPERTY ¶ 217 (1966).

⁴⁴ All references to the Code Napoleon contained in this study, unless otherwise indicated, are to a 1960 Reprint of a translation "By a Barrister of the Inner Temple," published by Claitor's Book Store, Baton Rouge, Louisiana.

The French word that is translated "hiring" in the Claitor edition is "louage." The word has also been translated as "letting." CACHARD, THE FRENCH CIVIL CODE (rev. ed. 1930). Blackwood Wright's annotated translation of 1908 uses both "hiring" and "letting" as English equivalents of the word. WRIGHT, FRENCH CIVIL CODE, Arts. 1708, 1714 (1908). Inasmuch as the Code Napoleon used the word to refer to contracts for labor or services as well as in reference to contracts for the use of property (Art. 1708), "hiring" is probably the most accurate English equivalent because "letting" cannot accurately be applied to contracts for labor or services. See "let," "letting," and "lease" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1965).

lease, not as a conveyance, but as a contract:

1925. Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.

This definition bears a remarkable resemblance to Article 1709 of the Code Napoleon:

1709. The hiring of things is a contract by which one of the parties binds himself to give up to another the enjoyment of a thing during a certain time, and for a certain price, which the latter binds himself to pay him.

Sections 1928-1930 of the California Civil Code prescribe the basic duties of a lessee as follows:

1928. The hirer of a thing must use ordinary care for its preservation in safety and in good condition.

1929. The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care.

1930. When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded.

The following comparable articles may be found in the Code Napoleon:

1728. The lessee is subject to two principal obligations:

1st. To use the thing hired in a careful manner, and according to the destination which was given to it by the lease, or according to that which may be presumed from circumstances, in default of agreement;

2d. To pay the price of the lease in the terms agreed upon.

1729. If the lessee employ the thing hired for another purpose than that to which it has been destined, or from which may result a damage to the lessor, the latter may, according to circumstances, cause the lease to be rescinded.

1732. He is responsible for deteriorations or losses which happen during his enjoyment, unless he can prove that they occurred without his fault.

Article 1720 of the Code Napoleon requires the lessor "to deliver the thing in a good state of complete repair." Article 1719 of that code provides:

1719. The lessor is bound by the nature of the contract, and without the necessity of any particular stipulation,

1st. To deliver to the hirer the thing hired;

2d. To maintain such thing in a state to be employed for the use for which it was hired;

3d. To put the hirer in peaceable possession thereof during the continuance of the lease.

By way of comparison, the lessor's implied covenant of quiet possession, which was also known at common law, appears in California Civil Code section 1927. And section 1932 of the California Civil Code permits "the hirer of a thing" to terminate the hiring before the end of the term agreed upon "when the letter does not, within a reasonable time after request, fulfill his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing."

The contractual doctrine of frustration appears in the California Civil Code in sections 1932 and 1933:

1932. The hirer of a thing may terminate the hiring before the end of the term agreed upon:

. . . .

2. When the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care of the hirer.

1933. The hiring of a thing terminates:

. . . .

4. By the destruction of the thing hired.

The Code Napoleon expresses a similar principle as follows:

1722. If, during the continuance of the lease, the thing hired is destroyed in entirety by fortuitous events, the lease is rescinded absolutely; if it be only in part destroyed, the lessee may, according to circumstances, demand either a diminution of the price, or the rescinding of the lease itself. In neither case is there any ground for indemnification.

Sections 1941 and 1942 of the California Civil Code permit a lessee of property intended for human habitation to vacate the property and stop payment of rent if the lessor does not maintain the property in a condition fit for human occupation. The same principle appears in articles 1719 (quoted above) and 1724 of the Code Napoleon:

1724. If, during the lease, the thing hired have urgent need of reparations, such as cannot be deferred to the end thereof, the lessee must sustain them whatever inconvenience they may cause him, and though he should be deprived, while they are going on, of one part of the thing hired.

But if such reparations endure more than forty days, the price of the lease shall be diminished in proportion to the time and to the part of the thing hired of which he shall have been deprived.

If the reparations are of such a nature that they render that uninhabitable which is necessary for the lodging of the lessee and his family, the latter may cause the lease to be rescinded.

Although the California Civil Code provisions on leases were not copied directly from the Code Napoleon, it is apparent that many of the California Civil Code provisions bear a stronger resemblance—both in language and in substance—to the French Code provisions than they do to the common law rules. And it is at least possible that the French Code was before the draftsman of the California Civil Code and influenced both the language and the content of that code. Accordingly, it is instructive to examine briefly the civil law concept of a lease.

Professor Williston has said, "As an original question, a lease might well have been regarded as a wholly bilateral agreement by which the lessor instead of making a conveyance, promises a continuing permission to occupy the premises."⁴⁵ And he has asserted in a note to this statement, "This is the way in which a lease is regarded in the civil law . . ."⁴⁶ The United States Supreme Court has summarized the civil law conception of a lease and how it differs from that of the common law as follows:

The common law and the civil law concur in holding that in the case of an executed sale a subsequent destruction of the property by any cause is the loss of the buyer. . . . They also concur in holding that performance of an executory obligation to convey a specific thing is excused by the accidental destruction of the thing, without the fault of the obligor, before the conveyance is made. . . .

But as to the nature and effect of a lease for years, at a certain rent which the lessee agrees to pay, and containing no express covenant on the part of the lessor, the two systems differ materially. The common law regards such a lease as the grant of an estate for years, which the lessee takes a title in, and is bound to pay the stipulated rent for, notwithstanding any injury by flood, fire or external violence, at least unless the injury is such a destruction of the land as to amount to an eviction; and by that law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are leased. . . .

The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property; and holds

⁴⁵ 6 WILLISTON, CONTRACTS § 890, at 585 (3d ed. 1962) (footnotes omitted).

⁴⁶ *Id.* n.4. The civil law considered a lease as fundamentally the same kind of contract as an employment contract. Thus, article 1708 of the Code Napoleon divided all "contracts of hiring" into two kinds: contracts for the hiring of things and contracts for the hiring of services or work.

the landlord bound, without any express covenant, to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident; and if he does not do so, the tenant may have the lease annulled, or the rent abated.⁴⁷

Under the French Civil Code, if a party to a bilateral contract fails to perform his obligations, the other party may either compel specific performance (if possible) and recover damages, or apply to the court for dissolution of the contract and for damages.⁴⁸ Damages are awarded both for the loss a party has sustained and for the gain of which he has been deprived by the breach of contract.⁴⁹ However, damages are not recoverable if the nonperformance results from "*vis major* or inevitable accident."⁵⁰ And, in the case of a lease, the French Code specifically provides that the lessee is entitled to either a cancellation of the lease or a reduction of the rent—but not damages—if the property is materially damaged by unforeseen and fortuitous events⁵¹ or if part of the leasehold is taken as a result of an action brought against the lessee.⁵²

⁴⁷ *Viterbo v. Friedlander*, 120 U.S. 707, 712-13 (1887) (citations omitted).

⁴⁸ "Art. 1184. The law always implies a condition dissolving the contract in the case of bilateral contracts when one of the parties does not fulfill his engagement. In such a case the contract is not dissolved *ipso facto*. The party who complains that the other party has not fulfilled his engagement to him has the option of either forcing him to fulfill his contract (when that is possible) or of insisting upon the contract being dissolved with damages and interest. The dissolution of the contract must be claimed from the Court. The Court may give the defendant time if it thinks the circumstances warrant it." WRIGHT, FRENCH CIVIL CODE 213 (1908).

⁴⁹ "Art. 1149. Damages and interest are due, as a rule, to the creditor for the loss which he has suffered and the gain of which he has been deprived (in consequence of the breach of contract), subject to the exceptions and modifications of this rule to be given hereafter." *Id.* at 207.

⁵⁰ "Art. 1148. Damages or interest are not payable if *vis major* or inevitable accident has prevented the debtor giving or doing what he contracted to give or do, or has forced him to do what he contracted not to do." *Id.* at 206-07.

⁵¹ "Art. 1722. If the property let is totally destroyed during the subsistence of the lease by an act of God, the lease, *ipso facto*, comes to an end. If the property is only partly destroyed the lessee may, according to the nature of the circumstances, either ask that the rent should be reduced or that the lease itself should be cancelled. In either case he is entitled to no compensation." *Id.* at 325.

⁵² "Art. 1726. Should, on the other hand, the tenant's quiet enjoyment be disturbed owing to an action brought against him which affects the title to the property, he is entitled to a diminution in the rent corresponding to the amount of land affected thereby, provided always that he has given the owner notice that his quiet enjoyment has been disturbed or interfered with." *Id.* at 326. The United States Supreme Court in *Viterbo v. Friedlander*, 120 U.S. 707 (1887), held that these provisions permitted a lessee to claim an abatement in the rent when his property was partially taken by eminent domain. The Court noted that article 1722 of the French Code was adopted almost verbatim in the Louisiana Code. *Id.* at 718. In Louisiana, however, the article was revised by the addition of the italicized words indicated: "If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only

II

LEASES UNDER CALIFORNIA LAW

The California lease is both a contract, as under the civil law, and a conveyance as under the common law.⁵³ The courts, however, have rejected the invitation offered by the language of the California Civil Code to treat a lease primarily as a contract, and have instead treated it primarily as a common law conveyance that creates an estate in the lessee.⁵⁴ The cases are accordingly replete with language concerning "forfeiture"⁵⁵ of the lessee's estate, "surrender,"⁵⁶ or "eviction,"⁵⁷ which is the language of conveyancing and feudal tenure, not that of contract.⁵⁸ And, as will be discussed below, the courts have frequently refused to apply to leases well-established principles of contract law.

We shall discuss in this part the rights of a landlord upon abandonment of the leased property by the tenant, the rights of the landlord upon breach of the lease by the tenant, and the rights of the tenant upon his own breach of the lease or abandonment of the leased property. These are the main areas where the classification of a lease as a conveyance instead of a contract has resulted in the most unsatisfactory solutions to the problems presented. To complete the discussion of the parties' rights upon abandonment or termination, we shall also discuss the rights of a lessee upon breach by the lessor; however, application of contractual principles by the courts has obviated most problems in this area.⁵⁹

destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease. In neither case has he any claim for damages." [Italics added.] The Supreme Court commented that, although the words shown here in italics were not in the Code Napoleon, they would "doubtless be implied, for a taking of property for the public use was always deemed a species of destruction by *vis major*." *Id.* at 718-19. The Supreme Court's view is supported by 2 *PLANIOL, CIVIL LAW TREATISE* Part 2, Nos. 1733-35 (La. State Law Institute transl. 1959).

⁵³ *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942).

⁵⁴ See *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942) ("a lease is primarily a conveyance"). See also *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891) (holding that the tenant's title could not be abandoned, but only surrendered).

⁵⁵ See the cases collected and discussed in 30 CAL. JUR. 2d *Landlord and Tenant* §§ 275-82 (1956). It is interesting to note that while the Civil Code speaks of leases in contractual terms (using "contract" and "rescission"), the Code of Civil Procedure uses "forfeiture" and similar terms that are identified with common law real property concepts. Compare CAL. CIV. CODE sections 1925 and 1930 with CAL. CODE OF CIV. PROC. sections 1161, 1174, and 1179.

⁵⁶ See the cases collected in 30 CAL. JUR. 2d *Landlord and Tenant* §§ 263-68 (1956).

⁵⁷ See the cases collected in 30 CAL. JUR. 2d *Landlord and Tenant* § 316 (1956).

⁵⁸ See BLACK, LAW DICTIONARY (4th ed. 1951). See also Bennett, *supra* note 1 *passim*; Note, 31 CALIF. L. REV. 338 (1943).

⁵⁹ Professor Powell has identified four topics upon which the classification of a lease

A. Landlord's Rights in the Absence of Lease Provisions

1. Landlord's Rights Upon Abandonment by the Tenant

A frequently cited statement of the rights of a landlord upon abandonment of the leased property by the tenant is that of the California Supreme Court in *Kulawitz v. Pacific Woodeware & Paper Co.*:

Upon surrender of possession by the lessee before the expiration of the lease term, the lessor had three 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 treat the lease as terminated and retake possession for its own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what it was able in good faith to procure by reletting.⁶⁰

(a) *Recovery of Rent as It Accrues.*—Although the California Supreme Court held that the lessor had resorted to this remedy in *Kulawitz*,⁶¹ its use rarely appears in the cases. The theory underlying this remedy is that the lessee is the owner of the property for the duration of the term of the lease. As the owner of the estate he cannot abandon his title, and the title continues in him until terminated in some mode recognized by the law, such as forfeiture or surrender.⁶² Since the lessee's estate continues, the lessee's liability for the rent issuing therefrom also continues and is recoverable from time to time in an action or actions brought for that purpose.⁶³ If the lessor relies on this remedy, the action must be limited to accrued rental installments; there can be no recovery for future installments because the lease is still in existence and no obligation to pay the rent arises until each installment falls due.⁶⁴

as a contract or a conveyance has particular importance in present day law, "namely (1) the location (as between the lessor and lessee) of the risk of casualty during the continuance of the term; (2) the applicability to leases of the contractual doctrine of anticipatory breach; (3) the applicability to leases of the contractual doctrine of 'frustration'; and (4) the dependency of covenants made respectively by lessor and lessee." 2 POWELL, REAL PROPERTY ¶ 221, at 179-82 (1966). The significant problems discussed in Bennett, *supra* note 1, are: the doctrine of anticipatory breach, the right to future damages, and the mutuality of covenants. *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952), discusses the remedies of the landlord when the tenant abandons and the dependency of covenants in leases.

The organizational approach taken here is somewhat at variance with that taken by the foregoing authors. We shall, nevertheless, cover in the ensuing discussion each of the foregoing topics insofar as it relates to the rights of the parties upon abandonment or termination of a lease.

⁶⁰ 25 Cal. 2d 664, 671, 155 P.2d 24, 28 (1944).

⁶¹ *Ibid.*

⁶² *Welcome v. Hess*, 90 Cal. 507, 513, 27 Pac. 369, 371 (1891).

⁶³ *Kulawitz v. Pacific Woodeware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944); *Treff v. Gulko*, 214 Cal. 591, 598, 7 P.2d 697, 700 (1932) (dictum).

⁶⁴ *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*, 210 Cal. 253, 258, 291 Pac. 178, 180 (1930). See also *In re Bell*, 85 Cal. 119, 24 Pac. 633 (1890).

One commentator has pointed out that this remedy, "taken from the standpoint of society in general, is wasteful since the property, which apparently has a utility to individuals and society in general, will lie idle during the entire remaining term of the lease."⁶⁵ Moreover, since the statute of limitations runs on each rental installment as it becomes due,⁶⁶ repeated actions for the recovery of rent are necessary if the full amount of the rental is to be collected from a lease of more than two⁶⁷ or four⁶⁸ years' duration. Where the lessee will probably not remain available for repeated suits, or will be able to dispose of his assets, the remedy is worthless.

A further defect is illustrated by the *Kulawitz*⁶⁹ case. Inasmuch as the lease theoretically continues in existence, the lessor remains bound by his obligations under the lease even though no one receives any benefit from his performance. In *Kulawitz*, the lessor had promised in the lease to refrain from leasing any adjoining property to a competitor of the lessee. After the lessee had held a "retirement" sale, ceased doing business on the leased property, vacated the premises, and failed to pay the rent for five months, the lessor rented adjoining property on a month to month basis to a business that would have competed with the lessee if the lessee had still been in business. The court held that the lessor's violation of his covenant was not excused by the lessee's breach of the lease, that the lessor's breach amounted to a constructive eviction of the lessee from the property the lessee had already vacated, and that the constructive eviction released the lessee from all further obligation to pay rent under the lease. The lessor was able to recover the rentals due until the time of the constructive eviction, but he was held entitled to no further relief. Hence the teaching of *Kulawitz* is that if the lessor chooses to rest on the lease and sue for the rental installments as they become due, he must perform all of his own obligations under the lease.

It has also been argued that to permit the lessor to disregard the lessee's repudiation of the lease and to recover the full amount of the rentals as they become due "ignores a fundamental principle, mitigation of damages. The social utility in not increasing the cost to one party without commensurate gain to the other is as present here as in any other

⁶⁵ Joffe, *Remedies of California Landlord Upon Abandonment by Lessee*, 35 So. CAL. L. REV. 34, 38 (1961).

⁶⁶ *Tillson v. Peters*, 41 Cal. App. 2d 671, 107 P.2d 434 (1940).

⁶⁷ CAL. CODE OF CIV. PROC. § 339; *Tillson v. Peters*, 41 Cal. App. 2d 671, 107 P.2d 434 (1940) (oral lease).

⁶⁸ CAL. CODE OF CIV. PROC. § 337 (written lease).

⁶⁹ *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944). See the discussion of this case in *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 251-256 (1952).

field of the law. The operation of the principle would only require the landlord to make a reasonable effort to relet."⁷⁰

In summary, this remedy is not very satisfactory from the viewpoint of either the lessor or the lessee. The lessor must permit his property to remain vacant, comply with covenants that serve no purpose, and hope for the continued availability and solvency of the lessee. The lessee, on the other hand, finds that the lessor can refuse to make any effort to mitigate his damages and still recover the full amount of the rental from the lessee.

(b) *Termination of the Lease.*—California regards the tenant's abandonment and repudiation of the lease as an offer to surrender his term to the landlord.⁷¹ If the landlord thereafter does anything to interfere with the "right of the tenant to the absolute dominion of the premises, there is an eviction and the tenant is released. That operates as a surrender by operation of law."⁷² Hence, if the lessor retakes possession in his own right, whether with or without the intention to terminate the lessee's interest, the lessee's estate is terminated by surrender. In the 1891 case of *Welcome v. Hess*,⁷³ the California Supreme Court asserted that the lessor's only right to enter the property was to "take such care of the property as will prevent waste." The court has since retreated from that extreme position. But the basic holding of the *Welcome* case—that any act by the lessor suggesting an assertion of ownership over the property results in a surrender of the lessee's estate and terminates the corresponding rental obligation—remains a vigorous part of California law.⁷⁴

There can be little ground for dissatisfaction with this remedy if the lessor wishes merely to cancel the lease without recovery of damages. A party should have the right to cancel a continuing contract without seeking damages after a material breach by the other party. He may have suffered no damage or for some reason he may desire to waive his right to damages.

The hardships created by this remedy result from its application to cases where the lessor has suffered serious detriment for which he seeks to recover damages. In such cases, the lessor's efforts to minimize his losses by seeking a new tenant have been held to result in a surrender and thus in the loss of the lessor's right to recover his damages from the original

⁷⁰ *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 246 (1952).

⁷¹ *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891); *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 230 P.2d 10 (1951).

⁷² *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 683, 230 P.2d 10, 13 (1951).

⁷³ 90 Cal. 507, 513, 27 Pac. 369, 371 (1891).

⁷⁴ *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 230 P.2d 10 (1951) and the cases collected therein; *Rognier v. Harnett*, 45 Cal. App. 2d 570, 114 P.2d 654 (1941).

tenant. In *Dorcich v. Time Oil Co.*,⁷⁵ for example, the lessor had leased certain property for use as a gasoline service station. The lessee sublet to a series of sublessees who paid rent directly to the lessee. The lessor leveled off some high places, filled some chuckholes on the property, and blacktopped the driveways at the request of the sublessees. The original lessee then claimed that the activities of the lessor amounted to a constructive eviction and ceased paying rent. The lessor notified the lessee that the proffered surrender of the property was not accepted, but then negotiated a new lease with the sublessee who was then occupying the property. Despite the trial court's holding that the claimed eviction was "a clear subterfuge and such claim [had] no basis in fact,"⁷⁶ and the appellate court's finding that the lessee "deliberately tried to abandon its lease without cause or legal justification,"⁷⁷ the lessor's negotiation of the new lease with the subtenant was held to be an acceptance of the proffered surrender which absolved the original lessee of all liability for the damage he had caused.

*Kulawitz v. Pacific Woodemware & Paper Co.*⁷⁸ is somewhat similar. The property involved there was originally leased for use as a furniture store, the lessee agreeing to hold no auctions on the property except upon retiring from business. The lessee auctioned off his stock, vacated the property, and stopped paying rent. The lessor attempted repeatedly but unsuccessfully to relet the property to another tenant. These attempts were not held to be a surrender of the lessee's estate because they were made pursuant to an authority granted to the lessor in the lease to relet the property on behalf of the lessee in the event of an abandonment. But when the efforts to relet proved unsuccessful, the lessor leased adjoining property to a competing business in violation of one of the covenants of the lease. This final action was held to be a sufficient derogation of the lessee's rights under the lease to amount to a constructive eviction; the lessee was thereupon authorized to surrender the leasehold. The lease was thus terminated and the lessee was absolved from any further liability.

Welcome v. Hess,⁷⁹ the leading California case involving this remedy, dramatically illustrates its deficiencies. The plaintiff was the owner of a profitable bakery business. The defendant proposed to lease the business from him for five years and represented that he would be able to enlarge the business substantially in that time. After entering into the lease and

⁷⁵ 103 Cal. App. 2d 677, 230 P.2d 10 (1951).

⁷⁶ *Id.* at 688, 230 P.2d at 16.

⁷⁷ *Ibid.*

⁷⁸ 25 Cal. 2d 664, 155 P.2d 24 (1944).

⁷⁹ 90 Cal. 507, 27 Pac. 369 (1891). See text accompanying notes 73-74 *supra*.

paying rent for a while, the defendant moved the bakery business to another location in the city, abandoned the leased property, and stopped paying rent. The plaintiff relet the property for the best rental he could obtain, and then sued the defendant for the damages caused by the abandonment of the lease and the diversion of business. The court held that the plaintiff's efforts to mitigate were an interference "with the right of the tenant to the absolute dominion and control" over the property for the duration of the term and resulted in a surrender of the leasehold estate by operation of law. Because of the surrender, no rents were due for the remainder of the original term and the lessor suffered no legally recoverable damages.

There are no policy reasons supporting the rule that a lessor's efforts to mitigate the damages caused by a defaulting lessee terminate the lessor's right of recovery. The only explanation for the continuance of the rule is "a matter of history that has not forgotten Lord Coke."⁸⁰

(c) *Retaking of Possession and Suit for Damages.*—The *Kulawitz* case declared that the lessor could "retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what it was able in good faith to procure by reletting."⁸¹ The statement was dictum, for the *Kulawitz* case involved the other alternatives available to a lessor. Nevertheless, the principle has been recognized in at least two holdings⁸² and numerous dicta.⁸³

To utilize this remedy effectively, it is essential that the lessor notify the lessee that he is retaking possession of the property "on behalf of the tenant, and that he intends to sublet to another on behalf of the tenant to mitigate damages."⁸⁴ Most of the dicta that assert the availability

⁸⁰ *Gardiner v. Butler & Co.*, 245 U.S. 603, 605 (1918). The phrase was used by Justice Holmes in reference to the Massachusetts rule that a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee for the damages suffered as a result of the loss of the bargain.

⁸¹ *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 671, 155 P.2d 24, 28 (1944).

⁸² *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945); *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932). Apparently there was a provision in the lease authorizing the lessor's reentry in *De Hart* (Brief for Respondent, p. 2), but the court's opinion was based on the general right of a lessor to retake possession, relet the property, and hold the lessee accountable for any deficiencies. *Treff* held that the lessor had the right to resort to this form of relief but that the relief was sought prematurely in the particular case.

⁸³ *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*, 210 Cal. 253, 258, 291 Pac. 178, 180 (1930); *Oliver v. Loydon*, 163 Cal. 124, 126, 124 Pac. 731, 732 (1912); *Bradbury v. Higginson*, 162 Cal. 602, 604, 123 Pac. 797, 798 (1912); *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603, 612, 41 Cal. Rptr. 918, 923 (1965); *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 683, 230 P.2d 10, 13 (1951); *Siller v. Dunn*, 103 Cal. App. 154, 158, 284 Pac. 232, 234 (1930).

⁸⁴ *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 684, 230 P.2d 10, 14 (1951) and cases collected therein.

of this remedy appear in cases where the notice to the lessee was not properly given and the retaking was, accordingly, held to constitute a surrender and terminate the lessor's right to damages.⁸⁵

If the lessor chooses to notify the lessee of his intent to retake possession and hold the lessee for any deficiencies that may result from reletting the property, the lessor's cause of action for the rental deficiencies accrues only at the *end* of the term of the original lease.⁸⁶ Any action to recover rental deficiencies brought prior to that time is premature and must be dismissed.⁸⁷ The reason given for this rule is that until the end of the term the lessor's damages are speculative and uncertain.⁸⁸ Yet, in the case where this reason was advanced, the damages could have been readily ascertained since at the time of the action the property had been relet for a term longer than the term of the original lease.⁸⁹

The theory under which the lessor is permitted to recover rental deficiencies after reletting the property seems to be a "blend"⁹⁰ of common law property doctrines and contractual principles that is inconsistent with both the underlying property and contract theories. To determine the theory now underlying this remedy it is necessary to state the relevant contract principles and then trace the case law development of this remedy.

An unequivocal repudiation of a contract by one party thereto before the time for performance of the contract is a breach for which general contract law allows an action to be maintained without awaiting the performance date specified in the contract.⁹¹ If an ordinary bilateral contract is breached in an immaterial way and the breach is accompanied or followed by an unequivocal repudiation of the contract, the courts regard the breach as a total breach of the contract for which the aggrieved party may recover all of his damages, both past and prospective.⁹² Where there has been a material breach without an accompanying repudiation, the aggrieved party may, under some circumstances, elect to treat the breach as a partial breach, tender performance of his part of the contract, sue for the partial injury, and maintain a second suit in case another

⁸⁵ See, e.g., *Dorcich v. Time Oil Co.*, 103 Cal. App. 2d 677, 230 P.2d 10 (1951); *Boswell v. Merrill*, 121 Cal. App. 476, 9 P.2d 341 (1932); *Siller v. Dunn*, 103 Cal. App. 154, 284 Pac. 232 (1930); *Rehkopf v. Wirz*, 31 Cal. App. 695, 161 Pac. 285 (1916).

⁸⁶ *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945); *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932).

⁸⁷ *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932).

⁸⁸ *Id.* at 593, 7 P.2d at 698.

⁸⁹ Note 87, *supra*. See the comment on this case in *Bennett*, *supra* note 1, at 50.

⁹⁰ See note 11 *supra*, and accompanying text.

⁹¹ 4 CORBIN, CONTRACTS § 959 (1951); RESTATEMENT, CONTRACTS § 318 (1932). See *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355 (1891).

⁹² 4 CORBIN, CONTRACTS § 954 (1951); RESTATEMENT, CONTRACTS § 317 (1932).

breach occurs.⁹³ If there has been a repudiation, the aggrieved party not only is excused from further performance,⁹⁴ but he must refrain from further performance if it will increase the extent of his own injury.⁹⁵ He is not entitled to damages for any part of his loss that he could have avoided by refraining from continued performance or by making reasonable efforts to obtain substitute performance.⁹⁶

The leading case on anticipatory breach is the 1853 English case of *Hochster v. De la Tour*.⁹⁷ The case is of particular interest in the present context because, first, it involved an employment contract, one of the two kinds of contracts referred to as "hiring" contracts in article 1708 of the Code Napoleon⁹⁸—the other kind being contracts for the hiring of things, *i.e.*, leases—and, secondly, because the arguments advanced by the defendant's counsel are based on principles analogous to those that underlie the common law relating to leases.

Hochster was hired as a courier for the defendant, De la Tour, for a period of three months. Prior to the date Hochster was to begin his services, the defendant repudiated the agreement and Hochster sued for damages. After the action was commenced, but before the performance date had arrived, the plaintiff secured equally good employment to begin one month after the date that performance of the agreement with De la Tour was to begin. Counsel for the defendant argued that "an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal: but till then it may be retracted."⁹⁹ Judge Crompton then asked, "May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?"¹⁰⁰ To which the defendant's counsel replied, "If he adopts the defendant's notice, which is in legal effect an offer, to rescind, he must adopt it altogether." Lord Campbell rejoined, "So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle."¹⁰¹

⁹³ 4 CORBIN, CONTRACTS § 946, at 811 (1951); RESTATEMENT, CONTRACTS § 317 (1932).

⁹⁴ 4 CORBIN, CONTRACTS § 975 (1951); RESTATEMENT, CONTRACTS § 280 (1932).

⁹⁵ 4 CORBIN, CONTRACTS § 983 (1951).

⁹⁶ *Ibid.*; RESTATEMENT, CONTRACTS §§ 336, 338 (1932).

⁹⁷ 2 ELL. & BL. 678 (Q.B. 1853).

⁹⁸ See text accompanying notes 43-46 *supra*, discussing the similarity between the provisions of the California Civil Code relating to leases and the provisions of the Code Napoleon.

⁹⁹ 2 ELL. & BL. at 686. California regards a repudiation of a lease as an offer to surrender.

¹⁰⁰ 2 ELL. & BL. at 686.

¹⁰¹ *Ibid.* California frequently has barred a lessor's remedy because he did not permit his property to remain idle. See *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891), holding

The court then held that the plaintiff could recover damages for the breach even though the time for performance had not yet arrived. In the court's opinion Lord Campbell stated: "But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it."¹⁰²

The California contract cases are in accordance with the views expressed by the English court. The leading California case is *Seymour v. Oelrichs*,¹⁰³ decided in 1909. The contract involved there was an employment contract for a term of ten years, and the plaintiff was discharged after two years. The court said:

The gist of the complaint is in the breach of the contract and the injury resulting to plaintiff by reason of such breach. The action is not, in other words, one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed for certain compensation to perform services for the defendants for a stipulated term of years. The measure of damages is, therefore, *prima facie*, the contract price. . . .

"The measure of damages," say the Missouri court of appeals . . . speaking of a contract like the one here, "is the contract price, although the master may recoup the damages by showing that the servant either earned, or by reasonable exertion might have earned money in other employment during the contract period. . . ."¹⁰⁴

The court then answered an argument concerning the speculative nature of the future damages: "It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves."¹⁰⁵

In contrast to the California law on the hiring of services, the California courts, in developing the law of contracts for the hiring¹⁰⁶ of property, have held—subject to one exception pointed out below—that abandonment or repudiation of a lease does not give rise to an immediate action for damages.

in effect that "the plaintiff, to preserve any remedy at all, was bound [to permit his property] to remain idle."

¹⁰² 2 Ell. & Bl. at 690.

¹⁰³ 156 Cal. 782, 106 Pac. 88 (1909).

¹⁰⁴ *Id.* at 801-02, 106 Pac. at 97 (citations omitted).

¹⁰⁵ *Id.* at 803, 106 Pac. at 97.

¹⁰⁶ "Hiring" is the term used in Civil Code section 1925. See the discussion in text accompanying notes 43-46 *supra*, concerning the possible source of the term as applied to leases.

In the 1890 case of *In re Bell*¹⁰⁷ the supreme court held that a lessor was entitled to delinquent rent from a defaulting lessee, but not to damages for the loss of the future rentals. The court stated that the lessee was not absolved by his abandonment and repudiation of his obligations under the lease, which the lessor could enforce by ordinary remedies. In dictum, however, the court stated that the lessor could relet the property "for the benefit of the original tenant."¹⁰⁸

Less than one year later *Respini v. Porta*¹⁰⁹ was decided. The lease there provided for quarterly prepayment of the rental installments. The lessee refused to pay one installment, announced his intention to abandon the lease, and vacated the property. The lessor relet the property within a few days and sued the original lessee for the quarterly rental installment that the lessee had refused to pay. The supreme court held that the plaintiff was not entitled to *rent* but was entitled to *damages*. "In cases of this kind the landlord is not entitled to recover for *rent* of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting."¹¹⁰

Respini was a significant departure from common law theory under which the lessor would have been entitled to the full rental installment without abatement—since the lessee was still in possession on the date that the installment accrued—but would have forfeited all future rights under the lease by entering and reletting.

Welcome v. Hess,¹¹¹ decided less than two months later, is difficult to reconcile with *Respini*. After the lessee repudiated the lease and abandoned the property, the lessor relet the property and sued for his damages. The court stated that the lessor was entitled to recover the delinquent rentals, but the reentry and reletting "evicted" the lessee and completed a surrender by operation of law. Since the lessee's estate was extinguished, the rental obligation dependent thereon was terminated, and no damages were recoverable by the lessor although he in fact suffered substantial loss. To the lessor's contention that he reentered and relet for the benefit of the lessee, the court responded that the assertion was "gratuitous and unwarrantable."¹¹² Since the lessee still owned the estate—until the surrender was completed—the lessor had no more

¹⁰⁷ 85 Cal. 119, 24 Pac. 633 (1890).

¹⁰⁸ *Id.* at 122, 24 Pac. at 634.

¹⁰⁹ 89 Cal. 464, 26 Pac. 967 (1891).

¹¹⁰ *Id.* at 466, 26 Pac. at 967.

¹¹¹ 90 Cal. 507, 27 Pac. 369 (1891).

¹¹² *Id.* at 513, 27 Pac. at 371.

right to enter and relet the lessee's property than a stranger. *Respini v. Porta* was distinguished by the explanation that the lease involved there was really a lease of a dairy business. "It partook more of the nature of an ordinary contract than a grant of a term."¹¹³

In *Bradbury v. Higginson*,¹¹⁴ a 1912 case, the court by dictum again supported the theory advanced in the *Respini* case that a lessor could recover damages from a defaulting lessee.

Where a lease is repudiated and the premises abandoned, the landlord . . . may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or, he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease.¹¹⁵

The court's opinion indicates that the plaintiff's complaint was drafted on the theory, which the court rejected, that the repudiation of the lease by the lessee matured all of the remaining rental installments.¹¹⁶ The doctrine of anticipatory breach was argued but was found untenable under the pleadings, which did not seek damages for breach of the contract but sought recovery of the whole rental for the entire term.

This pleading defect in the *Bradbury* case was avoided by the plaintiff in *Oliver v. Loydon*,¹¹⁷ decided the same year. The plaintiff pleaded that the defendant repudiated the lease, that the property was of such a nature that it was not rentable during the portion of the year covered by the remainder of the repudiated lease, and that his damages from the defendant's repudiation amounted to the full amount of the rent due for the remainder of the lease. The court, however, held that no cause of action was stated. The complaint showed compliance with the lease until the repudiation. The repudiation occurred on April 9; at the time the action was filed—April 10—there were no rental installments due and unpaid because they were payable on the fifteenth of each month. The complaint showed, therefore, "nothing more, in fact, than a mere threat on the part of the defendant that he would not be further bound . . ."¹¹⁸

Oliver v. Loydon may be explained on the ground that the pleadings indicated that the lessee had not abandoned the leased property. The court, therefore, may not have believed that there actually was an unequivocal repudiation of the lease. One can infer, however, that the court thought no action for the recovery of damages resulting from the breach

¹¹³ *Id.* at 515, 27 Pac. at 371.

¹¹⁴ 162 Cal. 602, 123 Pac. 797 (1912).

¹¹⁵ *Id.* at 604, 123 Pac. at 798.

¹¹⁶ *Id.* at 608, 123 Pac. at 800.

¹¹⁷ 163 Cal. 124, 124 Pac. 731 (1912).

¹¹⁸ *Id.* at 126-27, 124 Pac. at 732.

of a lease could be maintained until the time for performance specified in the lease.

In *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*,¹¹⁹ the court in an elaborate dictum set forth the theory that the lessor may reenter the property, relet it, and recover any deficiencies from the original lessee. The court said that ordinarily the reentry and reletting would terminate the lease, but the lessor could nonetheless hold the tenant for damages in the amount of the deficiency. The action to recover these *damages* could be maintained only at the end of the term of the original lease. But if the lease itself permitted the lessor to reenter without terminating the lease and the lessee's duty to pay *rent*, the lessor could sue for the difference between the reletting price and the original lease price as each installment accrued. The entire discussion was dictum, however, for the lease in question had been finally cancelled prior to the commencement of the action, and recovery for rental deficiencies was sought only for the period prior to the cancellation.

In *Treff v. Gulko*¹²⁰ one part of the dictum set forth in the *Phillips-Hollman* case was adopted by the court as part of its holding. The lessee had abandoned a five-year lease after about one and one half years. Approximately one year after the abandonment, the lessor was able to relet the property at a reduced rental for more than the balance of the original term. The lessor sued for the damages that had accrued until the time of the action. The court held that he was entitled to recover damages, but that the action was brought prematurely. The action to recover *damages* for the rental deficiencies resulting from the reletting could not be brought until the end of the term of the original lease. The justification for this holding was that the lessor's damages "for the first time can be ascertained" only at the expiration of the original term, despite the fact that the amount of the rental deficiencies had been virtually fixed by the new lease.¹²¹

The foregoing cases indicate that a lessor's action for rental deficiencies ensuing from a reletting after the original lessee's abandonment is an action for damages. The only feature that distinguishes these cases significantly from the employment contract cases is that in the lease cases the action for damages cannot be brought immediately after the breach. Why, in a lease case, must the aggrieved party wait to recover his damages until the end of the term while in an employment contract case an action can be brought immediately after the breach? The objections

¹¹⁹ 210 Cal. 253, 291 Pac. 178 (1930).

¹²⁰ 214 Cal. 591, 7 P.2d 697 (1932). *Accord De Hart v. Allen*, 26 Cal. 2d 829, 833, 161 P.2d 453, 455 (1945).

¹²¹ 214 Cal. at 599, 7 P.2d at 700.

to an immediate action that are voiced in the *Treff* and *Phillips-Hollman* cases are precisely the same objections that counsel for the defendants raised in *Hochster v. De la Tour*¹²² and *Seymour v. Oelrichs*.¹²³ The consequences of forbidding an immediate action are far more serious in lease cases than they are in employment cases. In *Hermitage Co. v. Levine*,¹²⁴ the New York case upon which the California courts relied, the lease was a 21-year lease, and the practical result of the court's holding was that the lessor could not bring an action to recover any damages for almost 20 years. In *Moore v. McDuffie*,¹²⁵ a federal case applying California law, the court held that the lessor's action for damages was brought prematurely and that he could not recover until the end of the original term—97 years later!

Permitting an aggrieved lessor to recover damages, but requiring him to defer his action until the end of the original term is not contract law; nor is it traditional property law, which was set forth in *Welcome v. Hess*:¹²⁶ the lessor is not entitled to damages, but only to rent for so long as the lessee's estate continues, and any reletting terminates the lessee's estate and rental obligation. *Respini v. Porta* clearly held that the remedy of damages was a contractual remedy.¹²⁷ The courts have thus adopted the contractual remedy only in part. The damages may be recovered—but only at the time the full rent would have been due, not at the time of breach as in other contract cases.

One can only surmise that the courts have been influenced by the common law property concept that the lessee's obligation to pay the rent is dependent upon the continuance of the lessee's estate and its corollary rule that rent is recoverable only as it accrues over the life of the lease. Damages for the loss of a rental obligation cannot be recovered, therefore, until the time the rental obligation would have been due.

That the courts may think they are really enforcing the tenant's rental obligation when they are actually permitting recovery of a contractual measure of damages is indicated by another development that began with a district court of appeal decision rendered in 1916. None of the supreme court cases ending with *Treff v. Gulko*¹²⁸ suggested that the lessor's right to damages depended upon any notice to the lessee. In *Rehkopf v. Wirz*¹²⁹ a district court of appeal attempted to reconcile the

¹²² See note 97 *supra* and accompanying text.

¹²³ See notes 103-05 *supra* and accompanying text.

¹²⁴ 248 N.Y. 333, 162 N.E. 97 (1928).

¹²⁵ 71 F.2d 729 (9th Cir. 1934).

¹²⁶ See note 111 *supra* and accompanying text.

¹²⁷ See note 109 *supra* and accompanying text.

¹²⁸ See note 120 *supra*.

¹²⁹ 31 Cal. App. 695, 161 Pac. 285 (1916).

Welcome holding¹⁸⁰ that the lessor's reletting of the property released the lessee from further liability with the *Bradbury dictum*¹⁸¹ that a lessor may relet and recover damages. The court's reconciliation of these inconsistent statements is as follows:

Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property *for the benefit of the tenant and relet the same*, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. . . . But a lessor who chooses to follow that course must in some manner *give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right* and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. . . . An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is *inconsistent with the continuing force of the original lease*.¹⁸²

The court's theory, that notice is required to preserve the continuing force of the original lease, upon which the lessor's right to damages is dependent, is plainly inconsistent with the theory of damages set forth in *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*¹⁸³ The damages theory of *Phillips-Hollman* is that while the right to *rent*—and to periodic recoveries for rental deficiencies—depends on the continued existence of the lease, the right to *damages* does not. The right to damages is premised on the termination of the lease, although an action for their recovery cannot be maintained until the end of the original lease term. This theory of damages is stated even more clearly in the New York case upon which the California Supreme Court in *Phillips-Hollman* relied:

After the tenant had been ejected in summary proceedings, the lease was at an end. What survived was a liability, not for rent, but for damages. . . .

The provision that the landlord may relet as the agent of the tenant after the termination of the lease does not mean that he is an agent in a strict sense. Plainly, he is not, for after the termination of the lease, what he relets is his own. The privilege to relet as agent for the former tenant means this and nothing more, that the reletting shall be evidence of the damages sustained.¹⁸⁴

Both the notice requirement and the notion that reletting is not in the lessor's own right but is for the benefit or the account of the lessee have

¹⁸⁰ See notes 111-12 *supra* and accompanying text.

¹⁸¹ See notes 114-15 *supra* and accompanying text.

¹⁸² 31 Cal. App. at 696, 161 Pac. at 286. (Emphasis added. Citations omitted.)

¹⁸³ Note 119 *supra* and accompanying text.

¹⁸⁴ *Hermitage Co. v. Levine*, 248 N.Y. 333, 337, 162 N.E. 97, 98 (1928).

been endorsed by the California Supreme Court.¹³⁵ Hence, it is no longer clear that the lessor's action for "damages" is the equivalent of a contractual action for damages with the exception that the action be deferred until the end of the term. The requirement of notice to the lessee makes sense only if the lessee has a continuing interest in the property. Statements that reletting is not in the lessor's own right but is for the benefit of the lessee indicate that the courts, influenced by common law property notions, still think that the lessor can recover the remaining rentals due (or damages for their loss) only if the lessee's estate somehow continues.

The damages approach of *Rehkopf*¹³⁶ is even less recognizable as either a contract or a property remedy than that of *Treff*¹³⁷ and *Phillips-Hollman*.¹³⁸ Under the current *Rehkopf* approach the lessor, if he wishes to recover damages for rental deficiencies, must give notice to the lessee to preserve the lessee's estate. But if the lessee's estate is continuing, how does the lessor have any authority to dispose of that estate by reletting the property?¹³⁹ Must the lessor's action be classified as one for rent because of the continuance of the lessee's estate, or can the lessor's action for rental deficiencies still be classified as one for damages? These rhetorical questions may seem to be of academic interest only. But determination of the correct theory is important if the lessor realizes a profit on the reletting and the lessee sues to recover the profit. If, as stated in *Rehkopf*¹⁴⁰ and subsequent California Supreme Court cases,¹⁴¹ the reletting is not in the lessor's own right but is for the benefit of the lessee, then the profit belongs to the lessee, not the lessor.

A comment by Judge Crompton during the argument in *Hochster v. De la Tour*¹⁴² might well be made concerning leases:

When a party announces his intention not to fulfill the contract [or lease], the other side may take him at his word and rescind the contract [or accept the surrender]. . . . But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty [or property]."¹⁴³

¹³⁵ *De Hart v. Allen*, 26 Cal. 2d 829, 161 P.2d 453 (1945); *Kulawitz v. Pacific Woodware & Paper Co.*, 25 Cal. 2d 664, 155 P.2d 24 (1944); *Bernard v. Renard*, 175 Cal. 230, 165 Pac. 694 (1917).

¹³⁶ See notes 129-32 *supra* and accompanying text.

¹³⁷ See notes 120-21 and 128 *supra* and accompanying text.

¹³⁸ See notes 119 and 133 *supra* and accompanying text.

¹³⁹ See *Welcome v. Hess*, 90 Cal. 507, 513, 27 Pac. 369, 371 (1891).

¹⁴⁰ See note 129 *supra* and accompanying text.

¹⁴¹ See note 135 *supra* and accompanying text.

¹⁴² 2 Ell. & Bl. 678 (Q.B. 1853).

¹⁴³ *Id.* at 685. (Revisions are in brackets.)

The difficulties involving this third remedy—retaking possession and suing for damages—and the losses suffered by lessors because of defective attempts to use it stem from the courts' not fully recognizing that the action is one for damages, not rent. The lease is at an end for performance purposes, and consequently *rent* is no longer due. Since the lessee retains no ownership interest in the property, it is no more necessary for the lessor to notify the lessee of his intention to mitigate damages than it is for a wrongfully discharged employee to notify his former employer before taking another job. And, finally, the lessor should not have to wait until the end of the term to sue for damages since his right to recover them does not depend on the continued existence of an interest of the lessee in the leasehold estate. The difficulties in determining the lessor's damages for prospective losses are no different in kind or degree from those in determining prospective losses under any other kind of contract.

In *Gold Mining & Water Co. v. Swinerton*,¹⁴⁴ an action for damages for wrongful repudiation of a mining lease, the supreme court reviewed the California case law on anticipatory breach of leases, suggested that there might be a right to sue immediately for an anticipatory breach of any lease, and held that the lessor, at least in this case, could sue immediately for the damages caused by the repudiation of a mining lease. The court said: "Whatever may be the correct rule in the case of an ordinary lease, mining leases are in a class by themselves."¹⁴⁵ Extension of the holding of this case to all lease cases would alleviate much of the difficulty and hardship lessors now face when they discover that the leased property has been abandoned by the lessee.

2. *Landlord's Rights Upon Breach of the Lease*

This portion of the article is concerned only with the landlord's rights upon a breach of a lease for which the landlord could justifiably evict the tenant. We are not concerned here with what kind of breaches should be deemed sufficient to warrant eviction, but only with the landlord's remedial rights when, under present law, a particular breach would warrant eviction. Most of the litigation involving a landlord's rights when a provision of the lease itself does not govern those rights has involved tenants who have abandoned. Nonetheless, the few cases, applicable statutes, and underlying theories of landlord and tenant law can provide a fairly accurate picture of the landlord's rights where the tenant's breach does not involve abandonment.

Code of Civil Procedure section 1161 provides that a landlord, when the tenant defaults in the payment of rent or in the performance of any

¹⁴⁴ 23 Cal. 2d 19, 142 P.2d 22 (1943).

¹⁴⁵ *Id.* at 32, 142 P.2d at 29.

of the other covenants or conditions of the lease, may serve upon the tenant a notice demanding performance of his obligations under the lease within three days or surrender of the property to the lessor. The sections following section 1161 provide that if the tenant neither performs his obligations nor surrenders possession within the three-day period, the landlord may recover the possession of the property by an unlawful detainer proceeding.¹⁴⁶ In this proceeding, the landlord may recover any delinquent rental installments but not damages for any future detriment.¹⁴⁷ Damages for future detriment must be recovered, if at all, in a separate proceeding.¹⁴⁸

Section 1161 of the Code of Civil Procedure provides that the three-day notice of the alternatives available to the lessee is unnecessary if the breached condition is one which cannot thereafter be performed. However, section 791 of the Civil Code requires a three-day notice to quit whenever a lessor intends to exercise a right of reentry given him by the lease.

Even though a lease may purport to grant a lessor a right of reentry for breach of the lease, it is settled that the lessor cannot retake possession of the leased property unless the lessee abandons it or chooses to surrender it voluntarily. If the lessor attempts to retake possession by self-help, he may be held liable to the lessee for damages.¹⁴⁹

The foregoing statutes¹⁵⁰ describe the conditions under which a lessor is permitted to evict a lessee before the normal expiration of the term of the lease. To determine the alternative remedies available to a lessor and the consequences of an eviction upon the rights of both lessor and lessee it is necessary to examine the case law.

In *Costello v. Martin Bros.*,¹⁵¹ the lessees defaulted in the payment of rent and were served by the lessor with a three-day notice to pay the rent or vacate the property. The lessees vacated and the lessor sued for the delinquent rentals and damages for the loss of his future rentals. Hence *Costello* was actually an abandonment case since the lessees voluntarily surrendered the premises after receipt of the three-day notice. But in dictum, the court indicated at least two of the courses open to the lessor upon a lessee's breach of the lease:

On the defendants' default in payment of rent, at least two courses were open to plaintiff. He had the option to sue directly for the install-

¹⁴⁶ CAL. CODE OF CIV. PROC. §§ 1161a-74 (1965).

¹⁴⁷ CAL. CODE OF CIV. PROC. § 1174; *Cavanaugh v. High*, 182 Cal. App. 2d 714, 6 Cal. Rptr. 525 (1960).

¹⁴⁸ *Roberts v. Redlich*, 111 Cal. App. 2d 566, 244 P.2d 933 (1952).

¹⁴⁹ *Jordan v. Talbot*, 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

¹⁵⁰ CAL. CODE OF CIV. PROC. §§ 1161a-74 (1965).

¹⁵¹ *Costello v. Martin Brothers*, 74 Cal. App. 782, 241 Pac. 588 (1925).

ments of rent then due, allowing the lease to continue in force, or to terminate the lease in the event of nonpayment after demand and notice. He elected to pursue the latter course and by the foregoing notice he gave the defendants the option of paying the amount due within the time prescribed or surrendering possession. The defendants exercised the option given them by the notice by vacating the premises. Had they failed to avail themselves of either option, it is to be inferred from the contents of the notice that the plaintiff would have commenced an action of unlawful detainer against them. Had he recovered possession of the premises in such an action, he would have been entitled to judgment for rents due up to the time of such recovery, but he would not have been entitled in that action, or in any other action, to a judgment based upon subsequent rents or rental values.¹⁵²

The right of a lessor to treat a breach of the lease as a partial breach and to recover the damages caused thereby is well settled.¹⁵³

There is little reason to doubt that a lessor also has a right to terminate the lease and evict the lessee, waiving all right to further rentals or to damages for their loss. This was the traditional common law remedy of "forfeiture" that the landlord was entitled to exercise for the breach of an express condition of the lease.¹⁵⁴ Recognition of this remedy also appears in portions of Code of Civil Procedure section 1174 which permits a landlord to declare the forfeiture of a lease in the three-day notice served pursuant to section 1161 of the Code of Civil Procedure. The remedy of rescission would give a lessor a comparable right if the lease were regarded as a contract instead of a conveyance.

May a lessor also evict the lessee, relet the property, and recover damages measured by the resulting rental losses? Prior to 1931, it was uncertain whether such a remedy was available to a lessor. Section 1174 of the Code of Civil Procedure, as it then read, required a court to declare the forfeiture of a lease whenever it granted a judgment for unlawful detainer.¹⁵⁵ In the absence of a provision in the lease preserving the lessee's rental obligation, it is likely that this provision of section 1174 merely declared the law that would be applicable anyway. Unless the lease were terminated, the lessor had no right to possession.¹⁵⁶

In *Treff v. Gulko*¹⁵⁷ and *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*¹⁵⁸ the California Supreme Court stated that a lessor could terminate a

¹⁵² *Id.* at 786, 241 Pac. at 589-90.

¹⁵³ See, e.g., *Bank of America v. Moore*, 18 Cal. App. 2d 522, 64 P.2d 460 (1937).

¹⁵⁴ See note 21 *supra*, and accompanying text.

¹⁵⁵ *Wickstrom v. McGrath*, 86 Cal. App. 651, 261 Pac. 326 (1927).

¹⁵⁶ *Cf. Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891).

¹⁵⁷ 214 Cal. 591, 7 P.2d 697 (1932).

¹⁵⁸ 210 Cal. 253, 291 Pac. 178 (1930).

lease on breach by the lessee and recover damages for the resulting loss of rentals. In *Treff* the court held that the action could be brought only at the end of the original term.¹⁵⁹ Although both *Treff* and *Phillips-Hollman* were abandonment cases, they are significant in the present context because they relied upon the New York case of *Hermitage Co. v. Levine*.¹⁶⁰ *Hermitage* was an eviction case, and the California Supreme Court's unqualified approval of that case¹⁶¹ suggests that the court would apply *Treff* and *Phillips-Hollman* to an eviction case.

A refusal to apply the *Hermitage* rule would be extremely difficult to justify. Non-application would mean that the lessor's right to damages for the loss of future rentals following an eviction would depend on whether the lessee complied with the notice to quit—and thus made it an abandonment case—or refused to comply with the notice to quit, forcing the lessor to bring an eviction action. Nevertheless, *Costello*¹⁶² held that a notice of termination not only terminated the lease but forfeited any right the lessor had to damages for the loss of future rentals. The court apparently believed that the lessor's right to damages for the loss of future rentals was in some way dependent upon the lessee's continued interest in the leasehold. This was also the court's theory in *Rehkopf v. Wirz*¹⁶³—an abandonment case—which has been accepted, without discussion or analysis, by the California Supreme Court.¹⁶⁴ Prior to 1931, therefore, a lessor—in the absence of a governing provision in the lease—probably had no means to evict a lessee and still preserve his right to damages for the future rentals lost.

In 1931, the legislature amended section 1174 of the Code of Civil Procedure¹⁶⁵ to provide that a judgment in unlawful detainer shall not operate as a forfeiture of the lease unless the three-day notice served pursuant to section 1161 states the election of the landlord to declare such forfeiture. Thus, in accordance with the theory of *Rehkopf*, a lessor may evict the lessee without terminating the lessee's estate and rental obligation. A lessor may now enter and relet the premises following an eviction and recover damages from the original lessee for any resulting rental deficiencies. If the abandonment cases are followed, however, it seems likely that the cause of action for the damages will not accrue until the end of the original term.

¹⁵⁹ See notes 120-21 *supra* and accompanying text.

¹⁶⁰ 248 N.Y. 333, 162 N.E. 97 (1928). See text accompanying note 134 *supra*.

¹⁶¹ Cited with approval in *Phillips-Hollman, Inc. v. Peerless Stages, Inc.*, 210 Cal. 2d 253, 259-60, 291 Pac. 178, 180-81 (1930).

¹⁶² See note 151 *supra*; *accord*, *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).

¹⁶³ 31 Cal. App. 695, 161 Pac. 285 (1916). See text accompanying notes 129-32 *supra*.

¹⁶⁴ See discussion in text accompanying notes 128-41 *supra*.

¹⁶⁵ Cal. Stat. 1931, ch. 231, § 1 at 447.

There is nothing in any of the applicable statutes or cases indicating that the lessor is under any duty to relet the property after evicting the lessee. A lessor might be able to evict a lessee for breach of the lease, permit the property to remain vacant, and sue the lessee for the rental installments as they accrue. Because there have been no cases presenting the question, it is impossible to determine whether the courts would refuse to permit such recoveries on the ground that they would constitute forfeitures.¹⁶⁶

B. Landlord's Rights Under Provisions of Lease

The unsatisfactory nature of the remedies given lessors by the courts have stimulated a number of efforts by the draftsmen of leases to provide lessors with additional remedies through the use of lease provisions.¹⁶⁷ At times the draftsmen's efforts have been assisted by legislation. The discussion here of lease provisions will not be exhaustive. It is not our purpose to suggest means by which the parties' rights can be better secured through the use of lease provisions, but, rather, to indicate where the existing case law seems to be defective.

1. Liquidated Damages

One of the first protective lease provisions considered by the California courts was a liquidated damages clause. The cases developing the lessor's right to damages discussed above¹⁶⁸ suggest that such a provision would be valid since the reason given for deferring the lessor's right of recovery to the end of the term was the difficulty of determining sooner the lessor's damages. And, under Civil Code section 1671, liquidated damages are appropriate only "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." But, in *Jack v. Sinsheimer* the California Supreme Court held a provision for liquidated damages void because "it does not occur to us that upon the failure of a tenant to pay rent, and upon his eviction after notice and demand, the actual damage would be extremely difficult to fix or impracticable of estimation."¹⁶⁹ Subsequent cases have consistently supported this position.¹⁷⁰

¹⁶⁶ See CAL. CIV. CODE § 3275.

¹⁶⁷ Discussions of lease provisions that may be utilized by lessors appear in Joffe, *Remedies of California Landlord Upon Abandonment by Lessee*, 35 SO. CAL. L. REV. 34 (1961); Smith, *Contractual Controls of Damages in Commercial Transactions*, 12 HASTINGS L.J. 122 (1960); Note, 43 CALIF. L. REV. 344 (1955).

¹⁶⁸ See text accompanying notes 81-145 *supra*.

¹⁶⁹ 125 Cal. 563, 566, 58 Pac. 130, 131 (1899).

¹⁷⁰ *Redmon v. Graham*, 211 Cal. 491, 295 Pac. 1031 (1931); *Green v. Frahm*, 176 Cal. 259, 168 Pac. 114 (1917); *Servais v. Klein*, 112 Cal. App. 26, 296 Pac. 123 (1931); *Rez v. Summers*, 34 Cal. App. 527, 168 Pac. 156 (1917). In *McCarthy v. Tally*, 46 Cal. 2d 577, 297

The *Jack* decision is not out of harmony with the damages cases if those cases stand for the proposition that no action for damages—even liquidated damages—can be brought until the end of the original term. If that is the California law, it follows that there can be little uncertainty concerning the damages a lessor is entitled to recover, since in every case the actual damages will be fixed over the whole term of the lease before any action to recover them can be brought.

2. Acceleration of Rental

In *Ricker v. Rombough*,¹⁷¹ a provision accelerating all of the rentals due under the lease upon default by the lessee was held void. The lessee had abandoned the property, and the lessor was attempting to relet it at the time of the action. The acceleration provision was held invalid as being in the nature of a penalty—a requirement for the payment of a specified sum of money without reference to the actual damage sustained.

A note discussing the *Ricker* case as well as acceleration provisions generally has suggested that the defect in the lessor's position in the *Ricker* case was that he had retaken possession of the property and was seeking to relet it.¹⁷² Enforcement of the acceleration provision under such circumstances would force the defendant lessee to pay for a benefit never received. The note suggests that an acceleration provision might be valid if the lessee were permitted to retain his estate in, and right to possession of, the leased property.¹⁷³

3. Prepayments

Many leases contain provisions requiring the lessee to pay a certain sum to the lessor at the time the lease is made, which sum is to be credited to the last rental installment or installments due under the lease. Some leases refer to such a prepayment requirement as a bonus or consideration for the execution of the lease, others as prepaid rent, and still others as a deposit. Sometimes the lease will provide for the forfeiture of the prepaid sum as liquidated damages in the event the lessee defaults in his obligations under the lease.¹⁷⁴

P.2d 981 (1956), the supreme court explained: "Ordinarily, provisions for liquidated damages will not lie for failure to pay rent as provided in the lease. [Citations omitted.] This is so because in such a case there is no presumption that the amount of damages which may result from a tenant's breach of a covenant to pay rent is impossible or extremely difficult to fix." *Id.* at 583, 297 P.2d 985.

¹⁷¹ 120 Cal. App. 2d Supp. 912, 261 P.2d 328 (1953).

¹⁷² Note, 43 CALIF. L. REV. 344, 349 (1955).

¹⁷³ *Id.* at 351-52. A 1966 chattel lease case has adopted this position. *Associates Discount Corp. v. Tobb Co., Inc.*, 241 A.C.A. 663, 672, 50 Cal. Rptr. 738, 743 (1966).

¹⁷⁴ See the discussion of prepayment provisions in 26 CALIF. L. REV. 385 (1938).

The case law relating to these various prepayment devices has been 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.¹⁷⁵

Although the labels differ, these various prepayment provisions are substantively the same. However, the name applied to the prepayment by the parties to the lease actually determines whether the sum may be forfeited to the lessor upon the lessee's default.¹⁷⁶ Hence, if the correct nomenclature is used, the lessor may succeed in retaining a substantial penalty for the lessee's default in the performance of the lease.

Two cases will illustrate current California law. In *Warming v. Shapiro*,¹⁷⁷ the lessee paid \$11,988 to the lessor at the time of the execution of a ten-year lease. The lease provided for a monthly rental of \$1,000 for the first nine years and one dollar per month for the last year of the lease. The lessee assigned his interest contrary to the provisions of the lease and the lessor evicted the assignee. The assignee sued to recover the \$11,988. The court held that the sum was paid both as a consideration for the execution of the lease and as a prepaid rental. Hence, it could not be recovered.

*Boral v. Caldwell*¹⁷⁸ involved a two-year lease. The stipulated rental for the entire term was \$24,000. The lessee paid \$3,000 upon execution of the lease; \$1,000 was due after the first month of the lease and monthly thereafter until the full \$24,000 was paid. The lease provided that during the last two months of the term the lessee was entitled to occupy the property without paying rent if he was not then in default. Because of various defaults on the part of the lessee, the lessor terminated the lease and relet the property. At the time of the termination, the lessee was \$2,439 in arrears on the payment of rent. Although the advance payment of \$2,000 was not referred to in the lease as a security deposit, the court found that the lessor referred to it in his testimony as a security deposit. Therefore, the sum could not be forfeited and the lessee was entitled to

¹⁷⁵ *Warming v. Shapiro*, 118 Cal. App. 2d 72, 75, 257 P.2d 74, 76 (1953).

¹⁷⁶ 26 CALIF. L. REV. 385 (1938).

¹⁷⁷ 118 Cal. App. 2d 72, 257 P.2d 74 (1953).

¹⁷⁸ 223 Cal. App. 2d 157, 35 Cal. Rptr. 689 (1963).

have the sum credited upon the amount due to the lessor. One can only ask with the notewriter:

Why should not the substance control rather than technical terminology? Such a suggestion, however, is met with the protest that to regard the payment when denominated a "consideration" as a security deposit would be to rewrite the agreement of the parties. If this be correct, should not provisions for prepayment of rent or for consideration be held invalid as violations of the spirit if not the wording of the strict rules against forfeitures? The courts refuse to enforce a forfeiture in the situation of a security deposit provision, yet the consequences of this construction of the provision are harsher than would follow from holding it a provision for liquidated damages.¹⁷⁹

Explanation for the existing rule can be found in the common law notion that the lessor's right to a rental installment accrues only upon the date the installment is due under the terms of the lease. But that theory was rejected in *Respini v. Porta*¹⁸⁰ where the advance rental installment due the lessor was unpaid. In *Respini* the lessor was held entitled to recover only his damages and not the full rental installment because he had relet the property for a portion of the period covered by the rental installment. This is different from the rule applied by *Warming*¹⁸¹ when the rental installment is actually paid and the defaulting lessee is seeking to recover that portion that exceeds the lessor's damages. The existing law, therefore, is that if the lessor actually collects the prepaid rent, he can keep the full sum if the lessee abandons the property and the property is relet. But if the lessor is unsuccessful in his attempts to collect rentals that are due in advance, he can recover from the lessee only the amount of the actual damage resulting from the lessee's default. This is not a sound basis for a distinction.

Recent developments in the California law on forfeitures generally may herald a change in the law relating to prepayments under leases. In *Freedman v. The Rector*,¹⁸² the supreme court held that a wilfully defaulting purchaser under a contract for the sale of land could recover his deposit where the seller had resold the property at a profit to a different buyer. In *Caplan v. Schroeder*,¹⁸³ the principle of *Freedman* was applied to permit a defaulting buyer to recover a payment that had been designated in the purchase contract as consideration for the execution of the contract. The court looked beyond the recital in the land sale contract

¹⁷⁹ 26 CALIF. L. REV. 385, 388 (1938) (footnotes omitted).

¹⁸⁰ 89 Cal. 464, 26 Pac. 967 (1891).

¹⁸¹ See text accompanying note 177 *supra*.

¹⁸² 37 Cal. 2d 16, 230 P.2d 629 (1951).

¹⁸³ 56 Cal. 2d 515, 364 P.2d 321, 15 Cal. Rptr. 145 (1961).

and found that there was in fact no separate consideration for the advance payment aside from the sale of the property itself.¹⁸⁴

The California courts have not yet considered whether the doctrine developed in *Freedman* and *Caplan* can or should be applied to leases. Commentators have suggested that the cases involving prepaid rent and bonuses are now of doubtful authority.¹⁸⁵ And when the issue is finally raised, "another anachronism in the law may be on the way out."¹⁸⁶

4. Acceleration of Damages

In *Moore v. Investment Properties Corp.*,¹⁸⁷ the parties to a 15-year lease had provided that, upon stipulated conditions including repudiation of the lease, the lessor could terminate the lease and immediately recover from the lessee the difference between the value of the rentals provided for in the lease and the fair rental value of the property for the balance of the lease term. The lessee became bankrupt and repudiated the lease. The federal court held that, under California law, the provision for immediate recovery of damages was a liquidated damages provision and void.¹⁸⁸

Moore was decided in 1934. In 1937, the legislature enacted Civil Code section 3308.¹⁸⁹ Section 3308 provides:

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.

¹⁸⁴ *Id.* at 519, 364 P.2d at 323, 15 Cal. Rptr. at 147.

¹⁸⁵ Smith, *Contractual Controls of Damages*, 12 HASTINGS L.J. 122, 139-40 (1960); Note, 43 CALIF. L. REV. 344, 349 n.32 (1955).

¹⁸⁶ Note, 43 CALIF. L. REV. 344, 350 n.32 (1955).

¹⁸⁷ 71 F.2d 711 (9th Cir. 1934).

¹⁸⁸ *Id.* at 716-19.

¹⁸⁹ Cal. Stat. 1937, ch. 504, § 1, p. 1494.

Section 3308 thus provides that the parties, by agreement, may grant the lessor the right, in effect, to sue for anticipatory breach. No objection can be raised to the application of the doctrine of anticipatory breach to leases. This reform has been long overdue.¹⁹⁰ It is unfortunate, however, that the right of the lessor to use this remedy must depend upon a provision in the lease and that the section continues to permit the lessor to refuse to mitigate his damages.

A slight defect appears in the wording of section 3308. It provides that, upon termination of a lease, the lessor is entitled to recover as damages the "worth at the time of such termination" of the excess of the rentals specified in the lease over the then reasonable rental value of the property for the same period. Professor Corbin sets forth the preferable rule:

[T]he value of the promised performance is ordinarily to be determined as of the time when and the place where that performance was to be rendered. This is equally true in cases where the breach is anticipatory or partly anticipatory. . . .

A promise is not treated as a promise to perform at the date of repudiation merely because a repudiation that takes place before the time agreed upon for performance is treated as a present breach of contract. . . . If trial is reached before the time for performance has arrived, it may be a little harder to apply the rules of damages to the case, for the value of the promised performance must be reached by prediction.¹⁹¹

The worth of the excess of the rentals over the reasonable value of the property for the rental period should, therefore, be commuted from its value at the time of the performance specified in the lease to its value at the time of *trial*, not the time of the breach.¹⁹² And if trial occurs after the time specified for performance, the damages should be determined as of the time of the trial, and not by reference to the time of the repudiation or breach. Thus, if the rental is a liquidated amount, the lessor should be able to recover interest to the date of trial on the rental deficiencies.¹⁹³

The following hypothetical will illustrate the principles involved: *A* leases to *B* for 10 years at an annual rental of \$1,000. After two years, *B* repudiates the lease and abandons the leased property. *A* does not relet. At the time of the breach, the fair rental value of the property is \$800 annually. At the time of trial, one year later, the fair rental value of the

¹⁹⁰ See Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Covenants)*, 16 TEXAS L. REV. 47 (1937).

¹⁹¹ 5 CORBIN, CONTRACTS § 1053, at 311-13 (1964). See also RESTATEMENT, CONTRACTS § 338, comment *a* (1932).

¹⁹² See, e.g., *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir. 1941); *Moore v. Investment Properties Corp.*, 71 F.2d 711, 712 (9th Cir. 1934) (trial court's decision).

¹⁹³ RESTATEMENT, CONTRACTS § 387, comment *h* and illustration 8 (1932).

remainder of the term has risen to \$900 annually. *A* should be able to recover the deficiency for the first year of \$200 together with interest thereon to the date of trial. But *A* should be able to recover damages at the rate of only \$100 per year for losses yet to accrue at the time of trial. The total future loss at the time of trial would amount to \$700, but the \$700 to accrue over the ensuing seven years should be commuted to its value at the time of trial.¹⁹⁴

5. Agency to Relet

A clause appearing frequently in the leases involved in appellate cases provides that upon abandonment by the lessee, or after default by the lessee and eviction by the lessor, the lessor may reenter the property, relet it as "agent" for the defaulting lessee and hold the lessee responsible for any deficiencies resulting from the reletting.

*Burke v. Norton*¹⁹⁵ held that such a provision would be enforced by the courts despite its inconsistency with the then applicable version of Code of Civil Procedure section 1174. Section 1174 then provided that in an unlawful detainer action the judgment was required to declare the forfeiture of the lease. Without mentioning this requirement, *Burke v. Norton* held that a judgment in an unlawful detainer action erroneously declared the forfeiture of the lease when the lease authorized reentry without termination of the lease following the lessee's default.¹⁹⁶ This inconsistency between the case law and the statute was eliminated by the 1931 amendment to section 1174.¹⁹⁷

The California Supreme Court has subsequently reaffirmed the right of a lessor to evict a lessee for breach of a lease and to relet the property pursuant to a lease provision authorizing such action without termination of the lease.¹⁹⁸ It is well established that a lessor may also act pursuant to such a lease provision in abandonment cases.¹⁹⁹ Moreover, reletting of the property for a period in excess of the remainder of the lessee's term has been held to be properly authorized by a lease provision authorizing the lessor to act as the lessee's "agent" for purposes of reletting.²⁰⁰

The cases involving agency-to-relet lease provisions reveal confusion as to the governing theory. It is clear that the lease is not surrendered

¹⁹⁴ Cf. RESTATEMENT, CONTRACTS §§ 337, 338 (1932); *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir. 1941); *Moore v. Investment Properties Corp.*, 71 F.2d 711, 712 (9th Cir. 1934) (trial court's decision).

¹⁹⁵ 42 Cal. App. 705, 184 Pac. 45 (1919).

¹⁹⁶ *Id.* at 709-10 184 Pac. at 46-47.

¹⁹⁷ Cal. Stat. 1931, ch. 231, § 1 at 447.

¹⁹⁸ *Lawrence Barker, Inc. v. Briggs*, 39 Cal. 2d 654, 248 P.2d 897 (1952).

¹⁹⁹ *Yates v. Reid*, 36 Cal. 2d 383, 224 P.2d 8 (1950); *Narcisi v. Reed*, 107 Cal. App. 2d 586, 237 P.2d 558 (1951).

²⁰⁰ *Narcisi v. Reed*, 107 Cal. App. 2d 586, 237 P.2d 558 (1951).

and, therefore, the lessee's rental obligation and interest in the leasehold continues.²⁰¹ But, even though the leasehold still "belongs" to the lessee in theory, the lessor has the right to evict the lessee from the premises.²⁰² And, in addition, there is language indicating that when the property is relet after the eviction the reletting is for the lessor's account, not the lessee's.²⁰³

The "agency to relet" is a fiction. The lessor is not an agent of the lessee since the lessee has no right to direct or control the activities of the lessor—if he did, he could order the lessor to allow him back into possession. As Justice Cardozo correctly stated: "The provision that the landlord may relet as the agent of the tenant after the termination of the lease does not mean that he is an agent in a strict sense. Plainly, he is not, for, after the termination of the lease, what he relets is his own."²⁰⁴ The case law confusion in theory and the fictional agency seem to derive from an underlying notion that damages for the loss of future rentals cannot be recovered unless the lease somehow continues in existence. This, of course, is a reflection of the common law conception of rent as an incident of the leasehold estate which ceases only upon termination of that estate. But damages for the loss of the rental obligation is a contractual remedy.²⁰⁵ It is compensation for a lost obligation, not a recovery of a continuing obligation. As Justice Cardozo pointed out,²⁰⁶ the leasehold actually terminates when the lessee ceases to have any enforceable right to possession of the property. What remains is merely a right to damages, and it is unnecessary to recognize any fictional interest of the lessee in a nonexistent estate to support that right of the lessor.

Perhaps theory is not too important in the ordinary agency to relet case, but it would be important if the lessor relet the property for a profit or if he refused to relet the property at all. Whether in the first case the profit would belong to the lessor or defaulting lessee, and whether in the second case the lessor could collect the full rental called for in the lease, will depend to a great extent on the theory followed.

²⁰¹ *Lawrence Barker, Inc. v. Briggs*, 39 Cal. 2d 654, 664, 248 P.2d 897, 902-03 (1952); *Yates v. Reid*, 36 Cal. 2d 383, 385, 224 P.2d 8, 9 (1950).

²⁰² *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).

²⁰³ See *Yates v. Reid*, 36 Cal. 2d 383, 386, 224 P.2d 8, 9 (1950). ("[T]he plaintiff took possession of the premises and relet them on his own behalf and not for the account of the defendant . . . [But] it is immaterial that the plaintiff reentered and relet for his own account. The terms of the lease gave him the right to do so if he so desired.")

²⁰⁴ *Hermitage Co. v. Levine*, 248 N.Y. 333, 337, 162 N.E. 97, 98 (1928).

²⁰⁵ *Respini v. Porta*, 89 Cal. 464, 26 Pac. 967 (1891).

²⁰⁶ See note 204 *supra* and accompanying text.

C. *Rights of Lessee Upon Breach by Lessor*

Although the California courts have tended to treat a lease more as a conveyance than a contract when a lessor's rights are involved, they have tended to take the converse approach when a lessee's rights are involved. This phenomenon has resulted in cases holding that the same covenants in a lease are dependent when viewed from the lessee's standpoint but are independent when viewed from the lessor's.²⁰⁷ Much of the protection given lessees is due to application of the contractual principle of dependency of covenants through the fiction of "constructive eviction."²⁰⁸

The rights of a lessee upon breach by the lessor have been summarized by the California Supreme Court as follows:

In such a case the lessee has a choice of several remedies: he may rescind and become absolved from further payment of rentals; he may continue under the lease and sue for loss of profits [or other damages]; or he may treat the violation as putting an end to the lease for the purposes of performance and sue for damages.²⁰⁹

There are numerous examples of the various remedies. In *Medico-Dental Bldg. Co v. Horton & Converse*,²¹⁰ the lessor's breach of a covenant not to permit a competing business to operate in the same building as the premises leased to the defendant was held to be sufficient justification for the lessee's vacation of the leased property and refusal to pay any more rent. The case is of especial interest because the court based its decision, not on the property law notion of "constructive eviction," but frankly on the contractual doctrine that the lessee's obligations to occupy the premises and pay rent were dependent upon the lessor's continued observance of his covenant relating to competing businesses.²¹¹

In *Noble v. Tweedy*,²¹² the lessor failed to comply with a provision in the lease requiring construction of a building upon the leased property. The lessee was held entitled to continue under the lease and sue for the damages caused by the lessor's breach as measured by the decrease in the value of the leasehold.²¹³

If the lessee chooses to terminate the lease as a result of the lessor's breach, he is entitled to recover damages for loss of good will, loss of prospective profits, and expenses of removal from the leased property.²¹⁴

²⁰⁷ *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244, 251-53 (1952).

²⁰⁸ 3A CORBIN, CONTRACTS § 686, at 242-44 (Rev. ed. 1960).

²⁰⁹ *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal. 2d 664, 672, 155 P.2d 24, 28 (1944).

²¹⁰ 21 Cal. 2d 411, 132 P.2d 457 (1942).

²¹¹ *Id.* at 419-20, 132 P.2d at 462.

²¹² 90 Cal. App. 2d 738, 203 P.2d 778 (1949).

²¹³ *Id.* at 743, 203 P.2d at 781.

²¹⁴ *Beckett v. City of Paris Dry Goods Co.*, 14 Cal. 2d 633, 96 P.2d 122 (1939); Still-

The remedies afforded to a lessee upon a material breach by the lessor are the same remedies provided to any promisee under a bilateral contract:

One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a *quantum meruit* so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing.²¹⁵

As these remedies provide a lessee with as much protection as is afforded to any other party to a bilateral contract, there is little need to alter them to give the lessee additional protection. In one respect, however, modification of a lessee's remedies might alleviate unnecessary hardship to the lessor without diminishing the protection now provided the lessee.

In *Noble v. Tweedy*,²¹⁶ the lessee chose to treat the lessor's breach of the lease as a partial breach and to keep the lease in force. He then sought and recovered damages for the partial breach. In computing the damages, the court determined that the lessor's breach had damaged the value of the lessee's interest in the amount of \$75 per month for each month of the lease. The lessee was granted a judgment both for the sum of the damages that had previously accrued until the time of judgment and for the value, at the time of judgment, of the prospective damages to be suffered over the remainder of the lease.²¹⁷

There is no objection to the *Noble* holding insofar as it allows the lessee to treat the breach as a partial breach and recover the damages that had accrued to the time of judgment. But to give the lessee a judgment for the loss of the future rental value of the property and then expect him to pay the full amount of rent stipulated in the lease for the remainder of the term inflicts a wholly unnecessary hardship upon the lessor. The lessor's principal security for the payment of the stipulated rent over the remainder of the lease is the value of the leasehold itself: if the lessee fails to pay the rent, the lessor can relet the property to another for its reasonable rental value. Since the court in *Noble* gave the lessee an immediately enforceable judgment for the full amount of the decrease in value of the leasehold, it left the lessor with a security for the payment of the lessee's

well Hotel Co. v. Anderson, 4 Cal. 2d 463, 50 P.2d 441 (1935); Johnson v. Snyder, 99 Cal. App. 2d 86, 221 P.2d 164 (1950); Riechhold v. Sommarstrom Investment Co., 83 Cal. App. 173, 256 Pac. 592 (1927).

²¹⁵ McConnell v. Corona City Water Co., 149 Cal. 60, 64-65, 85 Pac. 929, 930 (1906).

²¹⁶ 90 Cal. App. 2d 738, 203 P.2d 778 (1949).

²¹⁷ *Id.* at 741, 203 P.2d at 779.

future obligations that the court had itself determined was no longer adequate.

The civil law suggests that a different remedy, which would have protected the rights of both parties, might have been used in *Noble*. In a variety of situations where the value of a leasehold has been impaired, the lessee is entitled under the civil law, in lieu of terminating the lease, to obtain an abatement of the rent.²¹⁸ Had the court in *Noble* abated the rent that was not yet due, the lessee still would have been fully compensated for the loss caused by the lessor, and the lessor would not have been obliged to look to the lessee for the continued payment of the rent specified in the lease when the rental value of the property had substantially decreased.²¹⁹

III

RECOMMENDATIONS

At the beginning of this article, a statement appears declaring that it is the task of modern courts to divorce the law of leases from its medieval setting of real property law and adapt it to present-day conditions and

²¹⁸ CODE NAPOLEON arts. 1722, 1724, 1726. Sections 1932 and 1933 of the California Civil Code adopt the principle of the civil law requiring an abatement of the rent where there has been a total destruction of the leased property. In such cases the rent is totally abated and the lease terminates. Of course, the lessor remains liable to the lessee for any consequential damages that he has inflicted upon the lessee. See note 214 *supra*, and accompanying text.

²¹⁹ The California courts apply a principle similar to that applied in *Noble v. Tweedy* when the property is partially taken by eminent domain. In such a case the lessee is given a judgment for the decrease in value of the leasehold and he is expected to pay the full rental due to the lessor over the remainder of the lease. See *City of Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526 (1927). Abatement of the rent in such a case would adequately compensate the lessee without requiring the lessor to bear the risk of the lessee's full performance without the security of the unimpaired value of the leasehold. See the criticism of the *Porter* case in Horgan, *Some Legal and Appraisal Considerations in Leasehold Valuation Under Eminent Domain*, 5 HASTINGS L.J. 34, 48-49 (1953); Bertero, *Condemnation of Leasehold Premises*, 1 SO. CAL. L. REV. 141 (1928); Note, 16 CALIF. L. REV. 48 (1927). The text writers overwhelmingly condemn the *Porter* rule. References are collected in Note, *Condemnation and the Lease*, 43 IOWA L. REV. 279, 280 n.13 (1958).

Civil Code sections 1932 and 1933 provide, in accordance with the civil law principle, that destruction of all or of a substantial part of the leased property terminates the lease. Where leased property is totally taken by eminent domain, virtually all states regard the lease and the lessee's rental obligation that is dependent thereon as terminated. 2 NICHOLS, EMINENT DOMAIN § 5.23 at 70 (1950). Nichols recognizes that the rule permitting a total abatement of the rent where there has been a total taking is inconsistent with the rule denying an abatement of the rent where there is a partial taking, and states in regard to the inconsistent rule that is followed in total taking cases that "it is much the better and the more practical rule . . . even if it is not easy to justify this practice upon strict legal theory." *Id.* at 71. It is not easy to justify the rule permitting total abatement of the rent "upon strict legal theory" only if one's strict legal theories are those formulated in medieval England. Total abatement of the rent follows naturally if one's strict legal theories are the theories of the civil law or of modern contract law. Cf. 6 CORBIN, CONTRACTS § 1337 (1962); RESTATEMENT, CONTRACTS § 460 (1932).

necessities by means of contract principles. The California courts have done little in response to this challenge even though there has been a strong statutory basis for such action since 1872. Apparently the legislative declaration of the principle that a lease is a contract²²⁰ has been an insufficient basis for the courts to depart substantially from the common law notion that a lease is a conveyance of an estate in land that gives rise to a tenurial relationship, the principal incident of which is the feudal service of rent that must be rendered by tenant to lord. Some contractual remedies have been made available to landlords and tenants, but the value of these remedies has been seriously impaired by the efforts of the courts to fit them within feudal property concepts.

To remedy the situation, the task of divorcing the law of leases from its medieval setting should be undertaken by the legislature and should no longer be left solely to the courts. By statute, the legislature can and should make clear that an abandonment and repudiation of a lease is not an offer to surrender the remainder of the term but is a breach which both excuses counterperformance and gives rise to immediate remedial rights on the part of the aggrieved party.

Upon a material breach of a lease, the aggrieved party should have the right to rescind or cancel the lease without seeking damages if he chooses to do so. But he should also have the right to terminate the lease for purposes of performance and sue for all of the damages caused by the breach, including, in the lessor's case, the loss of the rentals to become due under the lease for the remainder of the term. Damages should not be recoverable, however, for any detriment that reasonably can be avoided. Hence, a lessor should not be permitted to recover the full amount of the rentals accruing under the lease when the property could readily be relet to another tenant. And if damages would not provide the aggrieved party with adequate relief, he should be entitled to obtain specific performance of the defaulting party's obligations.

When there has been a prepayment of rent—or when a prepayment of the consideration for the use of the property is designated by any other name—the lessor should have no right following a breach to retain any sums in excess of the damages suffered. The legislature, by statute, should specify that forfeitures cannot be exacted from defaulting lessees merely by the artful use of language.

Since legislation embodying the foregoing principles would make Civil Code section 3308²²¹ superfluous, that section should be repealed. The 1931 amendment to Code of Civil Procedure section 1174²²² that permits

²²⁰ CAL. CIV. CODE § 1925 (1965). See text accompanying note 44 *supra*.

²²¹ See text accompanying notes 189-90 *supra*.

²²² See note 165 *supra* and accompanying text.

a lessor to evict a lessee without terminating the lease should be removed from that section. It should be made clear, instead, that an eviction of the lessee for good cause terminates the lease but without prejudice to the right of the lessor to recover his damages.

Finally, the legislature should make available the remedy of rental abatement to compensate a lessee for a loss in the value of his leasehold resulting from the lessor's breach.

Enactment of the recommended legislative program would do much to bring the California law of landlord and tenant into harmony with present conditions and to eliminate the many anachronisms that exist in this branch of the law.

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