

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1970

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

This pamphlet begins on page 1001. 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 10 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

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SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
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THOMAS E. STANTON, JR.
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December 1, 1970

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In conformity with Government Code Section 10335, the California Law Revision Commission herewith submits this report of its activities during 1970.

This report was printed during the first week of December 1970 so that it would be available in printed form early in January 1971. Accordingly, it does not reflect changes in Commission membership after December 1, 1970.

Respectfully submitted,
THOMAS E. STANTON, JR.
Chairman

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REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1970

FUNCTION AND PROCEDURE OF COMMISSION

The California Law Revision Commission consists of one Member of the Senate, one Member of the Assembly, seven members appointed by the Governor with the advice and consent of the Senate, and the Legislative Counsel who is *ex officio* a nonvoting member.¹

The principal duties of the Law Revision Commission are to:

(1) Examine the common law and statutes of the State for the purpose of discovering defects and anachronisms therein.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, bar associations, and other learned bodies, judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in the law as it deems necessary to bring the law of this State into harmony with modern conditions.²

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. The Commission may study only topics which the Legislature, by concurrent resolution, authorizes it to study.³

Each of the Commission's recommendations is based on a research study of the subject matter concerned. Many of these studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration. In some cases, the research study is prepared by a member of the Commission's staff.

The research study includes a discussion of the existing law and the defects therein and suggests possible methods of eliminating those defects. The detailed research study is given careful consideration by the Commission. After making its preliminary decisions on the subject, the Commission distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legis-

¹ See CAL. GOVT. CODE §§ 10300-10340.

² See CAL. GOVT. CODE § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States. CAL. GOVT. CODE § 10331.

³ See CAL. GOVT. CODE § 10335.

lation necessary to effectuate its recommendation, is published in a printed pamphlet.⁴ If the research study has not been previously published, it usually is published in the pamphlet containing the recommendation.

The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the State.⁵ Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is submitted to the Legislature. The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the State.

A total of 86 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.⁶ Sixty of these bills were enacted at the first session to which they were presented; sixteen bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 86 bills recommended, 76 eventually became law.⁷ One of the pro-

⁴ Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission.

⁵ See CAL. GOV'T. CODE § 10333.

⁶ The number of bills actually introduced was in excess of 78 since, in some cases, the substance of the same bill was introduced at a subsequent session and, in the case of the Evidence Code, the same bill was introduced in both the Senate and the Assembly.

⁷ Cal. Stats. 1955, Ch. 799, p. 1400 and Ch. 877, p. 1494. (Revision of various sections of the Education Code relating to the Public School System.)
 Cal. Stats. 1955, Ch. 1182, p. 2193. (Revision of Probate Code Sections 640 to 646—setting aside of estates.)
 Cal. Stats. 1957, Ch. 102, p. 678. (Elimination of obsolete provisions in Penal Code Sections 1377 and 1378.)
 Cal. Stats. 1957, Ch. 139, p. 732. (Maximum period of confinement in a county jail.)
 Cal. Stats. 1957, Ch. 249, p. 902. (Judicial notice of the law of foreign countries.)
 Cal. Stats. 1957, Ch. 456, p. 1308. (Recodification of Fish and Game Code.)
 Cal. Stats. 1957, Ch. 490, p. 1520. (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere.)
 Cal. Stats. 1957, Ch. 540, p. 1539. (Notice of application for attorney's fees and costs in domestic relations actions.)
 Cal. Stats. 1957, Ch. 1498, p. 2824. (Bringing new parties into civil actions.)
 Cal. Stats. 1959, Ch. 122, p. 2005. (Doctrine of worthier title.)
 Cal. Stats. 1959, Ch. 468, p. 2403. (Effective date of an order ruling on motion for new trial.)
 Cal. Stats. 1959, Ch. 469, p. 2404. (Time within which motion for new trial may be made.)
 Cal. Stats. 1959, Ch. 470, p. 2405. (Suspension of absolute power of alienation.)
 Cal. Stats. 1959, Ch. 500, p. 2441. (Procedure for appointing guardians.)
 Cal. Stats. 1959, Ch. 501, p. 2443. (Codification of laws relating to grand juries.)
 Cal. Stats. 1959, Ch. 528, p. 2496. (Mortgages to secure future advances.)
 Cal. Stats. 1959, Ch. 1715, p. 4115 and Chs. 1724-1728, pp. 4133-4156. (Presentation of claims against public entities.)
 Cal. Stats. 1961, Ch. 461, p. 1540. (Arbitration.)
 Cal. Stats. 1961, Ch. 539, p. 1732. (Rescission of contracts.)
 Cal. Stats. 1961, Ch. 636, p. 1838. (Inter vivos marital property rights in property acquired while domiciled elsewhere.)
 Cal. Stats. 1961, Ch. 657, p. 1867. (Survival of actions.)
 Cal. Stats. 1961, Ch. 1612, p. 3439. (Tax apportionment in eminent domain proceedings.)
 Cal. Stats. 1961, Ch. 1613, p. 3442. (Taking possession and passage of title in eminent domain proceedings.)
 Cal. Stats. 1961, Ch. 1616, p. 3459. (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject.)
 Cal. Stats. 1963, Ch. 1681. (Sovereign immunity—tort liability of public entities and public employees.)
 Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)
 Cal. Stats. 1963, Ch. 1682. (Sovereign immunity—insurance coverage for public entities and public employees.)
 Cal. Stats. 1963, Ch. 1683. (Sovereign immunity—defense of public employees.)

posed constitutional amendments was approved and ratified by the people; ⁸ the other was not approved by the Legislature.

Commission recommendations have resulted in the enactment of legislation affecting 2,073 sections of the California statutes: 1,062 sections have been added, 508 sections amended, and 503 sections repealed.

- Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)
- Cal. Stats. 1963, Ch. 1635. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)
- Cal. Stats. 1963, Ch. 1636. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)
- Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)
- Cal. Stats. 1965, Ch. 299. (Evidence Code.)
- Cal. Stats. 1965, Ch. 653. (Sovereign immunity—claims and actions against public entities and public employees.)
- Cal. Stats. 1965, Ch. 1151. (Evidence in eminent domain proceedings.)
- Cal. Stats. 1965, Ch. 1527. (Sovereign immunity—liability of public entities for ownership and operation of motor vehicles.)
- Cal. Stats. 1965, Chs. 1649, 1650. (Reimbursement for moving expenses.)
- Cal. Stats. 1967, Ch. 72. (Additur.)
- Cal. Stats. 1967, Ch. 262. (Evidence Code—Agricultural Code revisions.)
- Cal. Stats. 1967, Ch. 650. (Evidence Code—Evidence Code revisions.)
- Cal. Stats. 1967, Ch. 702. (Vehicle Code Section 17150 and related sections.)
- Cal. Stats. 1967, Ch. 703. (Evidence Code—Commercial Code revisions.)
- Cal. Stats. 1967, Ch. 1104. (Exchange of valuation data in eminent domain proceedings.)
- Cal. Stats. 1967, Ch. 1324. (Suit by or against an unincorporated association.)
- Cal. Stats. 1968, Ch. 132. (Unincorporated associations.)
- Cal. Stats. 1968, Ch. 133. (Fees on abandonment of eminent domain proceeding.)
- Cal. Stats. 1968, Ch. 150. (Good faith improvers.)
- Cal. Stats. 1968, Ch. 247. (Escheat of decedent's estate.)
- Cal. Stats. 1968, Ch. 356. (Unclaimed property act.)
- Cal. Stats. 1968, Ch. 457. (Personal injury damages.)
- Cal. Stats. 1968, Ch. 458. (Personal injury damages.)
- Cal. Stats. 1969, Ch. 113. (Powers.)
- Cal. Stats. 1969, Ch. 114. (Fictitious business names.)
- Cal. Stats. 1969, Ch. 115. (Additur and remittitur.)
- Cal. Stats. 1969, Ch. 155. (Powers of appointment.)
- Cal. Stats. 1969, Ch. 156. (Specific performance of contracts.)
- Cal. Stats. 1970, Ch. 41. (Evidence Code—proof of foreign documents.)
- Cal. Stats. 1970, Ch. 45. (Rule against perpetuities.)
- Cal. Stats. 1970, Ch. 69. (Evidence Code—res ipsa loquitur.)
- Cal. Stats. 1970, Ch. 89. (Leases.)
- Cal. Stats. 1970, Ch. 104. (Sovereign immunity—statute of limitations.)
- Cal. Stats. 1970, Ch. 312. (Quasi-community property.)
- Cal. Stats. 1970, Ch. 417. (Arbitration of just compensation.)
- Cal. Stats. 1970, Ch. 618. (Fictitious business names.)
- Cal. Stats. 1970, Ch. 662. (Entry for survey and examination; condemnation for water carrier terminal facilities.)
- Cal. Stats. 1970, Ch. 720. (Representations as to credit.)
- Cal. Stats. 1970, Ch. 1099. (Sovereign immunity—Entry for survey and examination; police and correctional activities; medical, hospital, and public health activities; liability for use of pesticides.)
- Cal. Stats. 1970, Ch. 1397. (Evidence Code—psychotherapist-patient privilege revisions.)
- ⁸ CAL. CONST., Art. XI, § 10 (1960). (Power of Legislature to prescribe procedures governing claims against chartered cities and counties and employees thereof.)

PERSONNEL OF COMMISSION

In February 1970, Mr. Thomas E. Stanton, Jr., was reappointed by the Governor. Also in February 1970, Mr. G. Bruce Gourley was appointed by the Governor to complete the term of Mr. William A. Yale, who had resigned when appointed judge of the Superior Court; and Professor Joseph T. Sneed was appointed by the Governor to replace Professor Sho Sato whose term of office had expired. In March 1970, Mr. Noble K. Gregory was appointed by the Governor to complete the term of Mr. Roger Arnebergh who had resigned. In April 1970, Mr. Marc Sandstrom was appointed by the Governor to complete the term of Mr. Richard H. Wolford who had resigned. In October 1970, Mr. John N. McLaurin was appointed by the Governor to complete the term of Mr. Lewis K. Uhler who had resigned when appointed director of the State Office of Economic Opportunity. Late in November 1970, Professor Joseph T. Sneed, who had been named Dean of the Duke University School of Law, resigned from the Commission.

In February 1970, Mr. Thomas E. Stanton, Jr., was elected Chairman and Mr. John D. Miller was elected Vice Chairman of the Commission.

As of December 1, 1970, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Thomas E. Stanton, Jr., San Francisco, <i>Chairman</i> -----	October 1, 1973
John D. Miller, Long Beach, <i>Vice Chairman</i> -----	October 1, 1973
Hon. Alfred H. Song, Monterey Park, <i>Senate Member</i> -----	*
Hon. Carlos J. Moorhead, Glendale, <i>Assembly Member</i> -----	*
G. Bruce Gourley, Santa Maria, <i>Member</i> -----	October 1, 1971
Noble K. Gregory, San Francisco, <i>Member</i> -----	October 1, 1971
John N. McLaurin, Los Angeles, <i>Member</i> -----	October 1, 1971
Marc Sandstrom, San Diego, <i>Member</i> -----	October 1, 1971
Vacancy-----	October 1, 1973
George H. Murphy, Sacramento, <i>ex officio Member</i> -----	†

In June 1970, Mr. E. Craig Smay and Mr. Nathaniel Sterling were appointed to the Commission's legal staff to fill vacancies created by the resignations of Mr. Clarence B. Taylor and Mr. John L. Cook.

* The legislative members of the Commission serve at the pleasure of the appointing power.

† The Legislative Counsel is *ex officio* a nonvoting member of the Commission.

SUMMARY OF WORK OF COMMISSION

During the past year, the Law Revision Commission was engaged in three principal tasks:

- (1) Presentation of its legislative program to the Legislature.¹
- (2) Work on various assignments given to the Commission by the Legislature.²
- (3) A study, made pursuant to Section 10331 of the Government Code, to determine whether any statutes of the State have been held by the Supreme Court of the United States or by the Supreme Court of California to be unconstitutional or to have been impliedly repealed.³

During the past year, the Commission has received and considered a number of suggestions for topics that might be studied by the Commission. Some of these suggested topics appear to be in need of study. However, because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission has determined to request authorization to study only one of these topics at this time.

The Commission held one one-day meeting, eight two-day meetings, and two three-day meetings in 1970.

¹ See pages 1017-1023, *infra*.

² See pages 1012-1016, 1024-1031, *infra*.

³ See pages 1033-1034, *infra*.

1971 LEGISLATIVE PROGRAM

The Commission will submit two recommendations to the 1971 Legislature:

- (1) **Counterclaims and Cross-Complaints.** See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 501 (1971).
- (2) **Inverse Condemnation.** See *Recommendation Relating to Inverse Condemnation: Insurance Coverage* (October 1970) (Appendix IX to this Report).

In addition, the Commission is working on the subject of attachment and garnishment and may submit some recommendations on this subject to the 1971 Legislature.

The Commission also recommends that nine studies be removed from its calendar of topics (see pages 1029-1031, *infra*) and that it be authorized to study one additional topic (see pages 1031-1032, *infra*).

STUDIES IN PROGRESS

INVERSE CONDEMNATION

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to study "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects." The Commission intends to devote a substantial portion of its time during the next few years to the study of inverse condemnation and tentatively plans to submit recommendations covering portions of this topic as work on those portions is completed.

The Commission has given priority to the water damage aspect of inverse condemnation. During 1969 and 1970, the Commission devoted considerable time to the preparation of a tentative recommendation relating to liability for water damage and liability for interference with land stability. The Commission concluded that desirable legislation in this field of law appears to require revision of the rules governing liability of private persons as well as public entities. Accordingly, the Commission requested and the 1970 Legislature authorized the expansion of the scope of the inverse condemnation study to include consideration of whether the law relating to the liability of private persons under similar circumstances should be revised.

The Commission has studied the problem of aircraft noise damage and has decided not to recommend legislation on this subject at this time.¹ The final rulings in two cases recently decided by the Superior Court in Los Angeles²—which are likely to be ultimately reviewed by appellate courts—should clarify the law in this area. When the courts have completed their consideration of these cases, the Commission will consider the need and advisability of legislation.

¹ The Commission wishes to acknowledge the substantial assistance it received from its consultants on the aircraft noise study: Professor Arvo Van Alstyne, University of Utah Law School (who prepared the background legal study); Dr. Maurice A. Garbell, aeronautical consultant, San Francisco (who prepared several background papers covering technical aspects of aircraft noise measurement); John N. McLaurin and Gideon Kanner, Los Angeles attorneys. Others who assisted the Commission by attending Commission meetings and providing background legal or technical information include: Dwight E. Bishop of Bolt, Beranek, and Newman, Inc.; Ralph E. Clark, appraiser, San Francisco; Richard F. Desmond, attorney, Sacramento; David Ingram, appraiser, Menlo Park; Bert J. Lockwood, Department of Airports, Los Angeles; E. E. McTaggart, State Department of Aeronautics; John E. Nolan, deputy port attorney, Oakland; John D. Rogers, attorney, San Francisco; J. Kerwin Rooney, port attorney, Oakland; M. N. Sherman, Department of Airports, Los Angeles; Harold H. Woodward, State Department of Aeronautics. Representatives of various state and local public entities, who regularly attend Commission meetings, also assisted in this study.

² *Aaron v. City of Los Angeles* (Los Angeles Superior Court No. 837,799) (Memorandum Opinion of Judge Bernard S. Jefferson, February 5, 1970); *Greater Westchester Homeowners' Ass'n v. City of Los Angeles* (Los Angeles Superior Court No. 931,989) (Memorandum Opinion of Judge Bernard S. Jefferson, April 17, 1970).

Other aspects of inverse condemnation liability under active study by the Commission include liability for highway proximity damage.

Recommendations that already have resulted from the inverse condemnation study are those relating to liability for ultrahazardous activities, liability for the use of pesticides, liability based on a theory of common law nuisance, and the rights and obligations arising when a public entity enters upon private property to survey, examine, and make tests in connection with the possible acquisition of the property for public use.³ The Commission will submit a recommendation relating to insurance against inverse condemnation liability to the 1971 Legislature.⁴

Professor Arvo Van Alstyne of the College of Law, University of Utah, has been retained as the Commission's research consultant on this topic. The first five portions of his research study have been completed and published in law reviews.⁵ Additional portions of the study are in preparation.

CONDEMNATION LAW AND PROCEDURE

The Commission is now engaged in the study of condemnation law and procedure and tentatively plans to submit a recommendation for a comprehensive statute on this subject to the 1973 Legislature.

As it did in connection with the Evidence Code study, the Commission plans to publish a series of reports containing tentative recommendations and research studies covering various aspects of condemnation law and procedure. The comments and criticisms received from interested persons and organizations on these tentative recommendations will be considered before the comprehensive statute is drafted. The first report in this series has been published. See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967). Work on the second report in this series, dealing with the right to take, is well under way. The Commission's staff has begun work on background material for the third report which will deal with compensation and the measure of damages. The Commission has retained Mr. Norman E. Matteoni, Deputy Counsel of Santa Clara County, to prepare a background study on certain procedural aspects of condemnation.

³ See *Recommendation Relating to Sovereign Immunity: Number 10—Revision of the Governmental Liability Act* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1020 (1971). Portions of the recommended legislation were enacted. See Cal. Stats. 1970, Chs. 662 (entry to make tests), 1099 (liability for use of pesticides; liability for damages from tests).

⁴ See Appendix IX to this Report.

⁵ See Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAWYER 1 (1967); *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968); *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L. J. 481 (1969); *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969).

Prior to 1973, the Commission will submit recommendations concerning eminent domain problems that appear to be in need of immediate attention. The Commission submitted the first such recommendation (exchange of valuation data) to the 1967 Legislature,⁶ a second recommendation (recovery of the condemnee's expenses on abandonment of an eminent domain proceeding) to the 1968 Legislature,⁷ and a third recommendation (arbitration of just compensation) to the 1970 Legislature.⁸

ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION

Resolution Chapter 202 of the Statutes of 1957 authorized the Commission to make a study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised. The Commission, working with a special committee of the State Bar, is now actively considering this topic. Professor William D. Warren, U.C.L.A. Law School, and Professor Stefan A. Riesenfeld, Boalt Hall Law School, University of California at Berkeley, are serving as consultants to the Commission and have prepared background material for the Commission. Recommendations to deal with a few problems in need of immediate legislative attention may be submitted to the 1971 session of the Legislature, but any comprehensive revision of the law in this area will necessarily require extended study.

EVIDENCE

The Evidence Code was enacted in 1965 upon recommendation of the Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken two projects.

The first is a continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others concerning the Evidence Code. As a result of this review, the Commis-

⁶ See *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1104.

⁷ See *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 133.

⁸ See *Recommendation Relating to Arbitration of Just Compensation* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1970). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 417.

sion submitted recommendations to the 1967 Legislature,⁹ to the 1969 Legislature,¹⁰ and to the 1970 Legislature.¹¹

The second project is a study of the other California codes to determine what changes, if any, are needed in view of the enactment of the Evidence Code. The Commission submitted recommendations relating to the Agricultural Code¹² and the Commercial Code¹³ to the 1967 legislative session. To the extent that its work schedule permits, the Commission will submit recommendations relating to additional codes to future sessions of the Legislature.

OTHER TOPICS UNDER ACTIVE CONSIDERATION

During the 1971 legislative session, the Commission also will be occupied with the presentation of its legislative program. A major topic under active consideration is attachment and garnishment, and the Commission may submit legislation on this topic to the 1971 legislative session. In addition, the 1971 legislative program includes a recommendation relating to various aspects of pleading¹⁴ and a recommendation relating to inverse condemnation.¹⁵

If work on eminent domain and inverse condemnation does not occupy substantially all of its time, the Commission plans to consider during 1971 other topics authorized for study. These include arbitration, liquidated damages, the problem of disposition of the lessee's property when the lease is terminated, the right of nonresident aliens to inherit, and the jurisdiction of courts in proceedings affecting the custody of children.

⁹ See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 101 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1315 (1967). Much of the recommended legislation was enacted. See Cal. Stats. 1967, Ch. 650.

¹⁰ See *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article* (November 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 501 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was not enacted.

¹¹ See *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 137 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). Some of the recommended legislation was enacted. See Cal. Stats. 1970, Ch. 69 (res ipsa loquitur); Ch. 1397 (psychotherapist-patient privilege). See also report concerning *Proof of Foreign Official Records*, 10 CAL. L. REVISION COMM'N REPORTS 1022; Cal. Stats. 1970, Ch. 41.

¹² See *Recommendation Relating to the Evidence Code: Number 2—Agricultural Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 201 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 262.

¹³ See *Recommendation Relating to the Evidence Code: Number 3—Commercial Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 301 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). Much of the recommended legislation was enacted. See Cal. Stats. 1967, Ch. 703.

¹⁴ See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 501 (1971).

¹⁵ See *Recommendation Relating to Inverse Condemnation: Insurance Coverage* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971).

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1970 LEGISLATIVE SESSION

Eleven bills and three concurrent resolutions were introduced to effectuate the Commission's recommendations to the 1970 session of the Legislature. Ten of the bills were enacted, and portions of the remaining bill were included in other legislation enacted at the 1970 session. The concurrent resolutions were adopted. Of 107 sections recommended to the 1970 Legislature, 98 were enacted.

Following past practice, special reports were adopted by legislative committees that considered the bills recommended by the Commission. Each report, which was printed in the legislative journal, accomplished three things: First, it declared that the Committee presented the report to indicate more fully its intent with respect to the particular bill; second, where appropriate, it stated that the comments under the various sections of the bill contained in the Commission's recommendation reflected the intent of the Committee in approving the bill except to the extent that new or revised comments were set out in the Committee report itself; third, where necessary, the report set out one or more new or revised comments to various sections of the bill in its amended form, stating that such comments also reflected the intent of the Committee in approving the bill. The report relating to the bills that were enacted is included as an appendix to this Report. The following legislative history includes a reference to the report or reports that relate to each bill.

Resolutions Approving Topics for Study

Senate Concurrent Resolution No. 8, introduced by Senator Alfred H. Song and Assemblyman Carlos J. Moorhead and adopted as Resolution Chapter 45 of the Statutes of 1970, authorizes the Commission to continue its study of topics previously authorized for study and to remove from its calendar two topics (service of process by publication; small claims court law).

Senate Concurrent Resolution No. 6, introduced by Senator Song and Assemblyman Moorhead and adopted in amended form as Resolution Chapter 54 of the Statutes of 1970, authorizes the Commission to make a study to determine whether the law relating to nonprofit corporations should be revised.

Senate Concurrent Resolution No. 7, introduced by Senator Song and Assemblyman Moorhead and adopted as Resolution Chapter 46 of the Statutes of 1970, authorizes the expansion of the scope of the previously authorized study of inverse condemnation to include consideration of related areas of the law concerning the liability of private persons.

Real Property Leases

Assembly Bill No. 171, which in amended form became Chapter 89 of the Statutes of 1970, was introduced by Assemblyman Hayes to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Real Property Leases*, 9 CAL. L. REVISION COMM'N REPORTS 153 (1969); *Communication From Assembly Committee on Judiciary on Assembly Bills 123, 126, and 171*, ASSEMBLY J. (Feb. 18, 1970) at 626, reprinted as Appendix V to this Report; *Communication From Assembly Committee on Judiciary on Assembly Bill 171*, ASSEMBLY J. (May 11, 1970) at 3040, reprinted as Appendix VII to this Report.

The following significant amendments were made to Assembly Bill No. 171:

(1) Section 3308 of the Civil Code was amended to restore the phrase "real or" in the first line of that section and to add the third paragraph providing that the section does not apply to a lease of real property unless the lease was either executed or fixed in terms before July 1, 1971.

(2) Section 1951.2 of the Civil Code was amended to add the phrase "Subject to subdivision (c)" to paragraph (3) of subdivision (a), to add a new subdivision (c), and to renumber former subdivisions (c) and (d) as (d) and (e), respectively.

(3) Section 1951.6, which was added to the Civil Code by the bill as introduced, was deleted. A reference to that section was deleted from subdivision (b) of Section 1952.

Other technical amendments were made.

Arbitration of Just Compensation

Assembly Bill No. 125, which became Chapter 417 of the Statutes of 1970, was introduced by Assemblymen Moorhead and Beverly and Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Arbitration of Just Compensation*, 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). The bill was enacted as introduced.

Evidence Code Revisions

Senate Bill No. 95 was introduced by Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code*, 9 CAL. L. REVISION COMM'N REPORTS 137 (1969). The bill passed the Senate in amended form but did not meet the approval of the Assembly Committee on Judiciary. The bill was later used by Senator Cologne as a vehicle to make some technical corrections in earlier passed legislation.

Senate Bill No. 129, which became Chapter 69 of the Statutes of 1970, was introduced by Senators Song and Sherman to effectuate the recommendation of the Commission relating to *res ipsa loquitur*. See *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code, supra; Report of Senate Committee on Judiciary*

on *Senate Bills, 95, 98, and 129*, SENATE J. (Feb. 19, 1970) at 474, reprinted as Appendix IV to this Report. The bill was enacted as introduced.

Senate Bills Nos. 480 and 481, which became Chapters 1396 and 1397 of the Statutes of 1970, were introduced by Senator Song and Assemblyman Foran. These bills included the substance of a portion of the recommendation relating to the psychotherapist-patient privilege contained in the Commission's *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code, supra*.

Fictitious Business Names

Senate Bill No. 98, which in amended form became Chapter 618 of the Statutes of 1970, was introduced by Senator Grunsky to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 601 (1969); *Report of Senate Committee on Judiciary on Senate Bills 95, 98, and 129*, SENATE J. (Feb. 19, 1970) at 474, reprinted as Appendix IV to this Report.

The following significant amendments were made to Senate Bill No. 98:

(1) Section 17913 of the Business and Professions Code was amended to add the phrase "shall contain all of the information required by this subdivision and" to subdivision (a).

(2) Section 17917 of the Business and Professions Code was amended to delete the word "substantially" preceding the phrase "in the form" from subdivision (a).

(3) Section 17919 of the Business and Professions Code was amended to add subdivisions (c) and (d).

(4) Section 17924 of the Business and Professions Code was amended to substitute the phrase "The statement should be published in such county in a newspaper that circulates" for the word "and" in paragraph (1) of subdivision (a).

(5) Section 17927 of the Business and Professions Code was amended to delete the word "consecutive" preceding the words "file number" from subdivision (a) and from subdivision (b).

(6) The second sentence was added to subdivision (a) of the uncodified section pertaining to the operative date.

Quasi-Community Property

Assembly Bill No. 124, which in amended form became Chapter 312 of the Statutes of 1970, was introduced by Assemblyman Moorhead and Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Quasi-Community Property*, 9 CAL. L. REVISION COMM'N REPORTS 113 (1969); *Report of Assembly Committee on Judiciary on Assembly Bill 124*, ASSEMBLY J. (March 11, 1970) at 1109, reprinted as Appendix VI to this Report.

Assembly Bill No. 124 was amended to add Section 4800.5 to the Civil Code; this section was not included in the bill as introduced.

Governmental Liability

Senate Bill No. 94, which in amended form became Chapter 1099 of the Statutes of 1970, was introduced by Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969); *Report of Senate Committee on Judiciary on Senate Bills 92 and 94*, SENATE J. (May 1, 1970) at 1590, reprinted as Appendix II to this Report; *Report of Assembly Committee on Judiciary on Senate Bill 94*, ASSEMBLY J. (Aug. 5, 1970) at 6908, reprinted as Appendix III to this Report.

Senate Bill No. 92 was introduced by Senator Song and Assemblyman Moorhead to effectuate a part of the Commission's recommendation on this subject. It was approved by the Senate Committee on Judiciary but died in the Senate Committee on Finance.

The following significant amendments were made to Senate Bill No. 94:

(1) Section 815.8, which would have been added to the Government Code by the bill as introduced, was deleted entirely.

(2) Section 816 of the Government Code was amended to add the phrase "pursuant to Section 1242 or 1242.5 of the Code of Civil Procedure."

(3) Section 830.6 of the Government Code, which would have been amended by the bill as introduced, was amended several times before it was deleted from the bill entirely.

(4) Section 844.6 of the Government Code was amended to delete the phrase "or the wrongful death of" from paragraph (2) of subdivision (a) and from subdivision (c).

(5) Section 854.8 of the Government Code was amended to delete the phrase "or the wrongful death of" from paragraph (2) of subdivision (a) and from subdivision (c).

(6) Section 856.2 of the Government Code was amended to add the phrase "as a result of his own negligent or wrongful act or omission" to paragraph (2) of subdivision (b).

(7) Sections 861 and 861.2, which would have been added to the Government Code by the bill as introduced, were deleted entirely.

(8) Section 862 of the Government Code was amended to substitute the word "its" for the word "the" preceding the phrase "use of a pesticide" in subdivision (b).

(9) Section 6254.5, which would have been added to the Government Code by the bill as introduced, was deleted entirely.

Other technical amendments were made.

Entry for Survey; Condemnation for Water Carrier Terminal Facilities

Senate Bill No. 91, which in amended form became Chapter 662 of the Statutes of 1970, was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Sovereign Immunity:*

Number 10—Revisions of the Governmental Liability Act, 9 CAL. L. REVISION COMM'N REPORTS 801, 811-815, 853-857 (1969).

The following significant amendments were made to Senate Bill No. 91:

(1) Section 1238 of the Code of Civil Procedure, which was not included in the bill as introduced, was amended to add the phrase "or waterway" to subdivision 22.

(2) Section 1242 of the Code of Civil Procedure was amended to add the phrase "to property" to subdivisions (c) and (d).

(3) Section 1242.5 of the Code of Civil Procedure was amended to delete the words "with the court" from subdivision (b) and to add the phrase "in the manner provided in Section 1243.6" to that subdivision. The first sentence of subdivision (e) was amended to add the phrase "and reasonable attorney fees to be fixed by the court."

Other technical amendments were made.

Statute of Limitations in Actions Against Public Entities and Public Employees

Assembly Bill No. 126, which in amended form became Chapter 104 of the Statutes of 1970, was introduced by Assemblyman Moorhead and Senator Song to effectuate the recommendation of the Commission on this subject. See *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees, 9 CAL. L. REVISION COMM'N REPORTS 175 (1969)*; *Communication From Assembly Committee on Judiciary on Assembly Bills 123, 126, and 171, ASSEMBLY J. (Feb. 18, 1970) at 626*, reprinted as Appendix V to this Report.

This bill was amended to make clear that certain of its provisions do not apply to claims presented to a public entity before January 1, 1971, the operative date of the act.

Other technical amendments were made.

Rule Against Perpetuities

Assembly Bill No. 123, which in amended form became Chapter 45 of the Statutes of 1970, was introduced by Assemblyman Moorhead and Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities, 9 CAL. L. REVISION COMM'N REPORTS 901 (1969)*; *Communication From Assembly Committee on Judiciary on Assembly Bills 123, 126, and 171, ASSEMBLY J. (Feb. 18, 1970) at 626*, reprinted as Appendix V to this Report.

An uncodified section was added to the bill providing that the repeal of Section 715.8 of the Civil Code does not affect the validity of any interest in property which was valid before the effective date of the act.

Representations as to Credit of Third Persons

Senate Bill No. 90, which in amended form became Chapter 720 of the Statutes of 1970, was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on

this subject. See *Recommendation and Study Relating to Representations as to the Credit of Third Persons and the Statute of Frauds*, 9 CAL. L. REVISION COMM'N REPORTS 701 (1969); *Report of Senate Committee on Judiciary on Senate Bill 90*, SENATE J. (April 21, 1970) at 1326, reprinted as Appendix I to this Report.

As introduced, Senate Bill No. 90 would have repealed Section 1974 of the Code of Civil Procedure. The bill was amended so that Section 1974 is retained in a revised form: the first sentence of the section was amended to read as it did before it was amended in 1965; the second sentence was added to the section.

Proof of Foreign Official Records

Senate Bill No. 266, which became Chapter 41 of the Statutes of 1970, was introduced by Senator Gordon Cologne (Chairman of the Senate Committee on Judiciary) to effectuate an unpublished recommendation of the Law Revision Commission.¹ This recommendation resulted from a letter from Charles W. Ricketts, Los Gatos attorney, pointing out a deficiency in Section 1530 of the Evidence Code.

Section 1530 of the Evidence Code is concerned with the use of a copy of a writing in official custody to prove the content of the original. Section 1530 was deficient insofar as it prescribed, in subdivision (a)(3), the procedure for proof of foreign official writings. Subdivision (a)(3) requires that the copy of the foreign official record be attested as a correct copy by "a person having authority to make the attestation." The subdivision further requires that the first attester's signature and his official position be certified by a higher foreign official, whose signature can in turn be certified by a still higher official. Under the section as it formerly read, such certifications could be continued in a chain until a foreign official was reached as to whom a United States foreign service officer "stationed in the nation in which the writing is kept" had adequate information upon which to base his final certification. In other words, to prove a copy of a foreign official record, it was necessary to have a certificate of a United States foreign service officer *stationed in the nation in which the writing was kept*.

In some situations, it was impossible to satisfy the basic requirement of subdivision (a)(3) of Section 1530 because there were no United States foreign service officials in the particular foreign country (such as East Germany) and, hence, there was no one who could make the certificate required by subdivision (a)(3). As a result, in some situations, it was extremely difficult and expensive or even impossible to establish such matters as birth, legitimacy, marriage, death, or a will.

The problem described above was particularly troublesome in the case of a foreign will because Probate Code Section 361 was amended at the 1969 session to provide that a copy of a foreign will (and the related documents concerning the establishment or proof of the will in the foreign country) can be admitted in California "if such copy or other evidence satisfies the requirements of Article 2 (commencing with Section 1530) of Chapter 2 of Division 11 of the Evidence Code."

When Section 1530 of the Evidence Code was drafted in 1964, the Commission had the benefit of a proposed amendment to Rule 44 of

¹ For the full text of Senate Bill 266, see Appendix VIII to this Report.

the Federal Rules of Civil Procedure and based subdivision (a)(3) on that proposed amendment. After the Evidence Code was enacted in 1965, Rule 44 was revised (in 1966) to provide for proof of foreign official records. In the revision of Rule 44 in 1966, the defect pointed out above was discovered and provision was made in Rule 44 to cover the problem.

Rule 44 (as revised in 1966) includes the following provision to deal with the East Germany type of case:

If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

The Note of the Advisory Committee regarding revised Rule 44 states:

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law or practice of a foreign country. See *United States v. Grabina*, 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 548-49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130-31 (1952); Model Code of Evidence §§517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Senate Bill No. 266 adds the substance of the sentence of Rule 44 quoted above, making only those changes needed to conform the language of that sentence to the language used in Section 1530. The bill also adopts the language of Rule 44 which specifies the officers who can make the final certificate. The change made by adopting this language is to restrict the United States foreign service officers who can make the final certificate to certain specified responsible officers and to liberalize the provision by permitting "a diplomatic or consular official of the foreign country assigned or accredited to the United States" to make the final certificate. This latter conforming change achieves desirable conformity with Rule 44 and liberalizes the rule but at the same time assures that a responsible official will make the final certificate.

CALENDAR OF TOPICS FOR STUDY

TOPICS AUTHORIZED FOR STUDY

The Commission has on its calendar of topics the topics listed below. Each of these topics has been authorized for Commission study by the Legislature.¹

Topics Under Active Consideration

During the next year, the Commission plans to devote substantially all of its time to consideration of the following topics:

1. **Condemnation law and procedure.** Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 4 CAL. L. REVISION COMM'N REPORTS at 115 (1963)).²

¹ Section 10835 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topic which the Legislature by concurrent resolution refers to it for such study.

The legislative directives to make these studies are listed after each topic.

² See *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings; Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings; Recommendation and Study Relating to the Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. L. REVISION COMM'N REPORTS, Recommendations and Studies at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. L. REVISION COMM'N REPORTS 1-5 (1961). See also Cal. Stats. 1961, Ch. 1612 (tax apportionment) and Cal. Stats. 1961, Ch. 1613 (taking possession and passage of title). The substance of two of these recommendations was incorporated in legislation enacted in 1965. Cal. Stats. 1965, Ch. 1151, p. 2900 (evidence in eminent domain proceedings); Ch. 1649, p. 3744, and Ch. 1650, p. 3746 (reimbursement for moving expenses).

See also *Recommendation and Study Relating to Condemnation Law and Procedure: Number 4—Discovery in Eminent Domain Proceedings*, 4 CAL. L. REVISION COMM'N REPORTS 701 (1963). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 213 (1963). See also *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967). See also Cal. Stats. 1967, Ch. 1104 (exchange of valuation data).

See also *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1861 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 133.

See also *Recommendation Relating to Arbitration of Just Compensation* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 417.

The Commission is now engaged in the study of this topic and tentatively plans to submit a recommendation for a comprehensive statute to the 1973 Legislature. See 9 CAL. L. REVISION COMM'N REPORTS 94 (1969). See also *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967).

2. **Inverse condemnation.** Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to the liability for inverse condemnation resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised (Cal. Stats. 1970, Res. Ch. 45; see also Cal. Stats. 1965, Res. Ch. 130, p. 5289).³
3. **Counterclaims and cross-complaints.** Whether the law relating to counterclaims and cross-complaints should be revised (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 25 (1969)).⁴
4. **Joinder of causes of action.** Whether the law relating to joinder of causes of action should be revised (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 27 (1969)).⁵
5. **Attachment, garnishment, exemptions from execution.** Whether the law relating to attachment, garnishment, and property exempt from execution should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 15 (1957)).
6. **Lease law.** Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁶
7. **Right of nonresident aliens to inherit.** Whether the law relating to the right of nonresident aliens to inherit should be revised (Cal. Stats. 1969, Res. Ch. 224).

³ See *Recommendation Relating to Inverse Condemnation: Insurance Coverage* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). This recommendation will be submitted to the 1971 Legislature.

⁴ See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 501 (1971). This recommendation will be submitted to the 1971 Legislature.

⁵ See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), reprinted in 10 CAL. L. REVISION COMM'N REPORTS 501 (1971). This recommendation will be submitted to the 1971 Legislature.

⁶ See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

See also *Recommendation Relating to Real Property Leases* (October 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 401 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also *Recommendation Relating to Real Property Leases* (November 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS at 153 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 89.

8. **Governmental liability.** Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁷
9. **Custody proceedings.** Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised (Cal. Stats. 1956, Res. Ch. 42, p. 263; see also 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 29 (1957)).
10. **Arbitration.** Whether the law relating to arbitration should be revised (Cal. Stats. 1968, Res. Ch. 110; see also 8 CAL. L. REVISION COMM'N REPORTS at 1325 (1967)).⁸
11. **Liquidated damages.** Whether the law relating to liquidated damages in contracts and, particularly, in leases, should be revised (Cal. Stats. 1969, Res. Ch. 224).

⁷ See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes.* 4 CAL. L. REVISION COMM'N REPORTS 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. L. REVISION COMM'N REPORTS 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1 (1963). See also Cal. Stats. 1963, Ch. 1681 (tort liability of public entities and public employees); Cal. Stats. 1963, Ch. 1715 (claims, actions and judgments against public entities and public employees); Cal. Stats. 1963, Ch. 1682 (insurance coverage for public entities and public employees); Cal. Stats. 1963, Ch. 1683 (defense of public employees); Cal. Stats. 1963, Ch. 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers); Cal. Stats. 1963, Ch. 1685 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 1686 (amendments and repeals of inconsistent special statutes); Cal. Stats. 1963, Ch. 2029 (amendments and repeals of inconsistent special statutes).

See also *Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act*, 7 CAL. L. REVISION COMM'N REPORTS 401 (1965). For a legislative history of this recommendation, see 7 CAL. L. REVISION COMM'N REPORTS 914 (1965). See also Cal. Stats. 1965, Ch. 653 (claims and actions against public entities and public employees); Cal. Stats. 1965, Ch. 1527 (liability of public entities for ownership and operation of motor vehicles).

See also *Recommendation Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees* (September 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 49 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1020 (1971). Most of the recommended legislation was enacted. See Cal. Stats. 1970, Chs. 662, 1099. See also *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, reprinted in 9 CAL. L. REVISION COMM'N REPORTS at 175 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 104.

This topic will be considered in connection with the Commission's study of topic 2 (inverse condemnation).

⁸ This is a supplemental study; the present California arbitration law was enacted in 1961 upon Commission recommendation. See *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). See also Cal. Stats. 1961, Ch. 461.

Other Topics Authorized for Study

The Commission has not yet begun the preparation of a recommendation on the topics listed below.

1. **Nonprofit corporations.** Whether the law relating to nonprofit corporations should be revised (Cal. Stats. 1970, Res. Ch. 54; see also 9 CAL. L. REVISION COMM'N REPORTS at 107 (1969)).
2. **Oral modification of a written contract.** Whether Section 1698 of the Civil Code (oral modification of a written contract) should be repealed or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 21 (1957)).
3. **Partition procedures.** Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales (Cal. Stats. 1959, Res. Ch. 218, p. 5792; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 21 (1957)).

Topics Continued on Calendar for Further Study

On the following topics, studies and recommendations relating to the topic, or one or more aspects of the topic, have been made. The topics are continued on the Commission's Calendar for further study of recommendations not enacted or for the study of additional aspects of the topic or new developments.

1. **Escheat; unclaimed property.** Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised (Cal. Stats. 1967, Res. Ch. 81; see also Cal. Stats. 1956, Res. Ch. 42, p. 263).¹
2. **Quasi-community property.** Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised (Cal. Stats. 1966, Res. Ch. 9).²

¹ See *Recommendation Relating to Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 16-18 (1969). Most of the recommended legislation was enacted. See Cal. Stats. 1968, Ch. 247 (escheat of decedent's estate) and Ch. 356 (unclaimed property act).

² See *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959). The recommended legislation was enacted. See Cal. Stats. 1957, Ch. 490. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). The recommended legislation was enacted. See Cal. Stats. 1961, Ch. 636.

See also *Recommendation Relating to Quasi-Community Property* (June 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 113 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1019 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 312.

3. **Powers of appointment.** Whether the law relating to a power of appointment should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).³
4. **Evidence.** Whether the Evidence Code should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).⁴
5. **Unincorporated associations.** Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised (Cal. Stats. 1966, Res. Ch. 9; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁵
6. **Fictitious business names.** Whether the law relating to the use of fictitious names should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁶

³ See *Recommendation and Study Relating to Powers of Appointment* (October 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 301 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Chs. 118, 155.

⁴ See *Recommendation Proposing an Evidence Code*, 7 CAL. L. REVISION COMM'N REPORTS 1 (1965). A series of tentative recommendations and research studies relating to the Uniform Rules of Evidence was published and distributed for comment prior to the preparation of the recommendation proposing the Evidence Code. See 6 CAL. L. REVISION COMM'N REPORTS at 1, 101, 201, 601, 701, 801, 901, 1001, and *Appendix* (1964). For a legislative history of this recommendation, see 7 CAL. L. REVISION COMM'N REPORTS 912-914 (1965). See also *Evidence Code With Official Comments*, 7 CAL. L. REVISION COMM'N REPORTS 1001 (1965). See also Cal. Stats. 1965, Ch. 299 (Evidence Code).

See also *Recommendations Relating to the Evidence Code: Number 1—Evidence Code Revisions; Number 2—Agricultural Code Revisions; Number 3—Commercial Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101, 201, 301 (1967). For a legislative history of these recommendations, see 8 CAL. L. REVISION COMM'N REPORTS 1315 (1967). See also Cal. Stats. 1967, Ch. 650 (Evidence Code revisions); Cal. Stats. 1967, Ch. 262 (Agricultural Code revisions); Cal. Stats. 1967, Ch. 703 (Commercial Code revisions).

See also *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article* (November 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 501 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969).

See also *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 137 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1018 (1971). Some of the recommended legislation was enacted. See Cal. Stats. 1970, Chs. 69 (*res ipsa loquitur*), 1397 (psychotherapist-patient privilege).

This topic is under continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code and whether changes are needed in other codes to conform them to the Evidence Code. See 10 CAL. L. REVISION COMM'N REPORTS 1015 (1971).

⁵ See *Recommendation and Study Relating to Suit By or Against an Unincorporated Association*, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1324.

See also *Recommendation Relating to Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS at 1403 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 18-19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 132.

⁶ See *Recommendation Relating to Fictitious Business Names* (October 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 71 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 114.

See also *Recommendation and Study Relating to Fictitious Business Names* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 601 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1019 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 618.

TOPICS TO BE DROPPED FROM CALENDAR OF TOPICS

Study Relating to Taking Instructions to the Jury Room

In 1955, the Commission was authorized to make a study to determine whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases.¹ The Commission published a recommendation and study on this topic in November 1956.² A bill was introduced at the 1957 session of the Legislature to effectuate that recommendation. However, the Commission determined not to seek enactment of the bill because it concluded that further study was needed of the procedural problems involved.

The Commission concluded that the procedural problems could best be solved by rules adopted by the Judicial Council. However, the Judicial Council advised that the Council is opposed, as a matter of policy, to the taking of instructions into the jury room. After further consideration and study by the Commission, including solicitation of the views of both judges and practicing attorneys, the Commission recommends that the topic be dropped from its agenda.

Study Relating to Trial Preferences

In 1969, the Commission was authorized to make a study to determine whether the law giving preference to certain types of actions or proceedings in setting for hearing or trial should be revised.³ The Commission solicited the view of the presiding judge of the superior court in each county whether the existing statutory provisions giving trial preference to certain actions and proceedings create significant problems in the administration of the court's business in his county. The overwhelming consensus of the presiding judges⁴ is that these provisions create no significant problems of judicial administration. Accordingly, the Commission has decided not to recommend any legislation on this topic and recommends that the topic be dropped from its agenda.

¹ This study was authorized by Cal. Stats. 1955, Res. Ch. 207, p. 4207. For a description of the topic, see 1 CAL. L. REVISION COMM'N REPORTS, 1955 Report at 28 (1957).

² See *Recommendation and Study Relating to Taking Instructions to the Jury Room*, 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959).

³ Cal. Stats. 1969, Res. Ch. 224.

⁴ The judges who responded reported that the existing statutory provisions do not create any significant problems in the administration of justice. A minority of the judges suggested that the number of priorities be reduced; a majority recommended no change in existing law. The judges who responded included: Hon. Lyle E. Cook, Alameda County; Hon. Jean Morony, Butte County; Hon. Robert J. Cooney, Contra Costa County; Hon. Joseph A. Wapner, Los Angeles County; Hon. Joseph G. Wilson, Marin County; Hon. Stanley Lawson, Monterey County; Hon. Leo A. Deegan, Riverside County; Hon. Margaret J. Morris, San Bernardino County; Hon. Timothy J. O'Reilly, San Luis Obispo County; Hon. Charles S. Franich, Santa Cruz County; Hon. Richard B. Eaton, Shasta County; Hon. J. E. Barr, Siskiyou County; Hon. Raymond J. Sherwin, Solano County; Hon. William Zeff, Stanislaus County; Hon. Curtiss E. Wetter, Tehama County; Hon. Ross A. Carkeet, Tuolumne County; Hon. Jerome H. Berenson, Ventura County; Hon. John Locke, Visalia County; and Hon. James C. McDermott, Yolo County.

Topics Upon Which Study Completed and Legislation Enacted

On the following topics, studies and recommendations relating to the topic have been made and legislation enacted. Because of their nature, these topics do not need to be continued on the Commission's Calendar for further study.¹

1. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person (Cal. Stats. 1957, Res. Ch. 202, p. 4589).²
2. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).³
3. Whether Vehicle Code Section 17150 and related statutes (liability of vehicle owners and operators) should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1962, Res. Ch. 23, p. 94).⁴
4. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁵
5. Whether Section 1974 of the Code of Civil Procedure (representations as to credit of third person) should be repealed or revised (Cal. Stats. 1958, Res. Ch. 61, p. 135).⁶

¹ Some of the topics upon which studies and recommendations have been made are nevertheless retained on the Commission's Calendar for further study of recommendations not enacted or for the study of additional aspects of the topic or new developments. See pages 1027-1028 *supra*.

² See *Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967).

See also *Recommendation Relating to Damages for Personal Injuries to a Married Person as Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS at 1385 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 18 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Chs. 457 and 458.

³ See *Recommendation and a Study Relating to Mutuality of Remedies in Suits for Specific Performance* (September 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 201 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 99 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 156.

⁴ See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 702.

⁵ See *Recommendation and Study Relating to The Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

See also *Recommendation Relating to Improvements Made in Good Faith Upon Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS at 1373 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 150.

⁶ See *Recommendation and Study Relating to Representations as to the Credit of Third Persons and the Statute of Frauds* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 720.

6. Whether the law relating to additur and remittitur should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁷
7. Whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 28 (1969)).⁸

TOPICS FOR FUTURE CONSIDERATION

During the next few years, the Commission plans to devote its attention primarily to condemnation law and inverse condemnation. Legislative committees have indicated that they wish these topics to be given priority. Nevertheless, the Commission believes that it may have time to consider a few topics that are relatively narrow in scope. During recent years, the Commission has submitted recommendations to the Legislature on most of the authorized topics of this type; work on the remaining ones is in progress. So that the Commission's agenda will include a reasonable balance of broad and narrow topics, the Commission recommends that it be authorized to study the following new topic.

A study to determine whether the parol evidence rule should be revised

The parol evidence rule determines the provability of a prior or contemporaneous oral agreement when the parties have assented to a written agreement. The California statutory formulation of this rule was enacted in Section 1856 of the Code of Civil Procedure¹ in 1872.

⁷ See *Recommendation and Study Relating to Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 72.

See also *Recommendation Relating to Additur and Remittitur* (September 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 63 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 99 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 115.

⁸ See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 901 (1969). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1021 (1971). The recommended legislation was enacted. See Cal. Stats. 1970, Ch. 45.

¹ Section 1856 provides:

1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Variations on the theme stated in Section 1856 appear in Civil Code Sections 1625, 1639, and 1640:

1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

1640. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

Since that date, the rule has acquired a substantial judicial gloss, reflecting a variety of purposes and policies and resulting in a maze of conflicting tests and exceptions.² The Uniform Commercial Code, enacted in California in 1963, contains a significantly different, more modern version of the rule to apply to commercial transactions.³ A study should be made to determine whether the conflict between these statutory statements of the rule should be eliminated and the extent to which the parol evidence rule should be revised.

² See *Masterson v. Sine*, 68 Cal.2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968); Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547 (1970).

³ California Commercial Code Section 2202 provides:

2202. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) By course of dealing or usage of trade (Section 1205) or by course of performance (Section 2208); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

The Commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

Pursuant to this directive the Commission has made a study of the decisions of the Supreme Court of the United States and of the Supreme Court of California handed down since the Commission's last Annual Report was prepared.¹ It has the following to report:

(1) No decision of the Supreme Court of the United States or of the Supreme Court of California holding a statute of this state repealed by implication has been found.

(2) No decision of the Supreme Court of the United States holding a statute of this state unconstitutional has been found.

(3) Four decisions of the Supreme Court of California holding statutes of this state unconstitutional have been found.

The California Supreme Court, in *McCallop v. Carberry*² and a companion case,³ held that California's prejudgment wage garnishment procedures⁴ violated procedural due process under the rationale of the United States Supreme Court decision in *Sniadach v. Family Finance Corp.*⁵ In a related case,⁶ the Court refused to render an advisory opinion whether California's other prejudgment attachment procedures generally are constitutional. The 1970 Legislature enacted a measure which exempts "all of the earnings of the debtor due or owing for his personal services" from levy of attachment,⁷ and which also alters categories of property exempt from execution.⁸ The Law Revision Commission is currently studying whether the law relating to attachment, garnishment, and property exempt from execution should be revised.⁹

The California Supreme Court, in *City of Carmel-by-the-Sea v. Young*,¹⁰ held that the 1969 Conflicts of Interest Law¹¹ is an un-

¹ This study has been carried through 90 S. Ct. 2354 (1970) and 3 Cal.3d 88 (1970).

² 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

³ *Cline v. Credit Bureau*, 1 Cal.3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970) (mem.).

⁴ See generally CAL. CODE CIV. PROC. §§ 537-561.

⁵ 395 U.S. 337 (1969).

⁶ *People ex rel. Lynch v. Superior Court*, 1 Cal.3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970).

⁷ Cal. Stats. 1970, Ch. 1523. See CAL. CODE CIV. PROC. §§ 537 and 690.6 as amended.

⁸ CAL. CODE CIV. PROC. §§ 690.1-690.29 as amended.

⁹ See Cal. Stats. 1957, Res. Ch. 202, p. 4589.

¹⁰ 2 Cal.3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

¹¹ CAL. GOVT. CODE §§ 3600-3754 (West Supp. 1970).

constitutionally broad violation of the constitutional right of privacy and is therefore void in its entirety.¹²

In *Castro v. State*,¹³ the California Supreme Court held that the English literacy voting requirement—imposed by Article II, Section 1, of the California Constitution, and implemented by Elections Code Sections 100, 200, and 310(h)—violated the equal protection clause of the Fourteenth Amendment when applied to persons otherwise qualified to vote who are literate in Spanish or any language other than English and who demonstrate access to sources of political information. Resolution Chapter 308 of the Statutes of 1969 proposed an amendment to Section 1 of Article II of the Constitution to extend the franchise to all California citizens who are literate in Spanish, but the proposed amendment was withdrawn.

Section 40 of Article XIII of the California Constitution¹⁴ and its two implementing statutes, Government Code Section 43614 and Education Code Section 21754, require a two-thirds majority vote for passage of municipal and school district bond elections. The California Supreme Court, in *Westbrook v. Mihaly*¹⁵ and three companion cases,¹⁶ held these requirements of more than a simple majority unconstitutional, in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Petitions for certiorari and an appeal to the United States Supreme Court have been filed in these cases.

¹² The affected sections are Government Code Sections 3600–3704, relating to disclosure of financial interests, but not Sections 3750–3754, relating to political contributions.

¹³ 2 Cal.3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

¹⁴ Formerly numbered CAL. CONST., Art. XI, § 18.

¹⁵ 2 Cal.3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

¹⁶ *Alhambra City School Dist. v. Mize*, 2 Cal.3d 806, 471 P.2d 515, 87 Cal. Rptr. 867 (1970) (mem.); *Larez v. Shannon*, 2 Cal.3d 813, 471 P.2d 519, 87 Cal. Rptr. 871 (1970) (mem.); *Foytik v. Aronson*, 2 Cal.3d 818, 471 P.2d 521, 87 Cal. Rptr. 873 (1970) (mem.).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study (see pages 1024-1028 of this Report), to study the new topic listed on pages 1031-1032 of this Report, and to drop from its calendar of topics the topics listed on pages 1029-1031 of this Report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of the provisions referred to on pages 1033-1034 to the extent that those provisions are unconstitutional.

APPENDIX I

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 90

[Extract from Senate Journal for April 21, 1970 (1970 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill 90, the Senate Committee on Judiciary makes the following report:

Senate Bill 90 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Representations as to the Credit of Third Persons and the Statute of Frauds* (October 1969), 9 Cal. L. Revision Comm'n Reports 705 (1969). The comment set out below reflects the intent of the Senate Committee on Judiciary in approving Senate Bill 90.

Code of Civil Procedure Section 1974 (amended)

Comment. Section 1974 is amended to make clear that it is a Statute of Frauds provision and is to be applied as such. The amendment revises the first sentence so that it reads the same as it read prior to its amendment in 1965. This will make clear that the section is a rule of evidence, not a substantive provision. See *Bank of America v. Hutchinson*, 212 Cal. App.2d 142, 27 Cal. Rptr. 787 (1963). The second sentence is added to make clear that the section is to be interpreted in a manner consistent with the "suretyship" clause of the Statute of Frauds which requires a writing to charge a person with a "special promise to answer for the debt, default, or miscarriage of another." The most significant effect of the second sentence is to make constructions of the general Statute of Frauds applicable in cases where the representation is made under circumstances where there is an estoppel to assert the Statute of Frauds, where a fiduciary acting in a confidential relationship to his principal and owing him a duty to deal honestly with him nevertheless defrauds him, or where the defendant receives a benefit to himself. See *Monarco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737 (1950) (estoppel); *Gerhardt v. Weiss*, 247 Cal. App.2d 114, 55 Cal. Rptr. 425 (1966) (confidential fiduciary relationship); *Michael Distrib. Co. v. Tobin*, 225 Cal. App.2d 655, 37 Cal. Rptr. 518 (1964) (benefit to defendant). See Civil Code Section 2794(1),(4) (benefit to defendant). See also *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal.2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964).

APPENDIX II

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILLS 92 AND 94

[Extract from Senate Journal for May 1, 1970 (1970 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bills 92 and 94, the Senate Committee on Judiciary makes the following report:

Except for the revised comments set out below, the comments contained under the various sections of Senate Bills 92 and 94 as set out in *Recommendation of the California Law Revision Commission Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), 9 Cal. L. Revision Comm'n Reports 801 (1969), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bills 92 and 94.

The following revised comments also reflect the intent of the Senate Committee on Judiciary in approving Senate Bills 92 and 94.

[The revised comments referred to Sections 830.6 and 861.2 which were deleted from the bill as enacted.]

APPENDIX III

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL 94

[Extract from Assembly Journal for August 5, 1970 (1970 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bill 94, the Assembly Committee on Judiciary makes the following report.

Except for the revised comment set out below, the comments contained under the various sections of Senate Bill 94 as set out in *Recommendation of the California Law Revision Commission Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), 9 Cal. L. Revision Comm'n Reports 801 (1969), reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill 94.

Government Code Section 844.6 (Amended)

Comment. The introductory clause of subdivision (a) of Section 844.6 is amended to make clear that the limited liabilities imposed by Section 845.4 (interference with right of prisoner to seek judicial review of legality of confinement) and Section 845.6 (failure to summon medical care for prisoner in need of immediate medical care) also constitute exceptions to the general principle of nonliability embodied in Section 844.6. The courts have held that the liability imposed on a public entity by Section 845.6 exists notwithstanding the broad immunity provided by Section 844.6. *Apelian v. County of Los Angeles*, 266 Cal. App.2d 550, 72 Cal. Rptr. 265 (1968); *Hart v. County of Orange*, 254 Cal. App.2d 30, 6 Cal. Rptr. 73 (1967); *Sanders v. County of Yuba*, 247 Cal. App.2d 748, 55 Cal. Rptr. 852 (1967). Under the reasoning of these decisions, Section 845.4 also creates an exception to the immunity granted by Section 844.6.

This amendment to subdivision (a) is also designed to eliminate uncertainty. As originally enacted, this subdivision appears to preclude liability (except as provided in this section) elsewhere provided by *any law*. Taken literally, this would impliedly repeal, at least in some cases, Penal Code Sections 4900-4906 (compensation for erroneous conviction). Moreover, as a specific provision, it might even be construed to prevail over the general language of Government Code Sections 814 and 814.2, which preserve nonpecuniary liability and monetary liability based on contract and workmen's compensation. The amendment clarifies the section by expressly limiting the "notwithstanding" clause to "this part" and excepting Sections 814 and 814.2. The exception for subdivisions (b), (c), and (d) has been deleted as unnecessary.

The amendment to subdivision (d) makes clear that the indemnification requirement in malpractice cases covers all persons lawfully engaged in the practice of one of the healing arts. The language of the section, as originally enacted, was unduly restrictive since it referred only to medical personnel who were "licensed" under the Business and Professions Code. This excluded, under a possible narrow interpreta-

tion, physicians and surgeons who are "certificated" rather than licensed, as well as "registered" opticians, physical therapists, and pharmacists and excluded persons licensed under other laws, such as the uncodified Osteopathic Act. In addition, the use of the term "licensed" precluded application of subdivision (d) to medical personnel lawfully practicing without a California license. *E.g.*, Bus. & Prof. Code §§ 1626(c) (out-of-state dental licensees teaching in dental colleges), 2137.1 (out-of-state medical licensees practicing in state institutions), 2147 (medical students), 2147.5 (uncertified interns and residents).

APPENDIX IV

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILLS 95, 98, AND 129

[Extract from Senate Journal for February 19, 1970 (1970 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bills 95, 98, and 129, the Senate Committee on Judiciary makes the following report.

Senate Bills 95 and 129 were introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969). The comments to the sections of Senate Bill 95 as amended, and Senate Bill 129 as set out in the Commission's recommendation, reflect the intent of the Senate Judiciary Committee in approving the bills.

Senate Bill 98 was introduced to effectuate the *Recommendation and Study of the California Law Revision Commission Relating to Fictitious Business Names* (October 1969). The comments to various sections of Senate Bill 98, as set out in the Commission's recommendation reflect the intent of the Senate Judiciary Committee in approving the bill.

APPENDIX V

COMMUNICATION FROM ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS 123, 126, AND 171

[Extract from Assembly Journal for February 18, 1970 (1970 Regular Session).]

February 17, 1970

The Honorable Bob Monagan
Speaker of the Assembly

Dear Mr. Speaker: The Assembly Committee on Judiciary, having considered Assembly Bills 123, 126 and 171 and having reported each bill with an "Amend and Do Pass" recommendation, submits the following report in order to indicate more fully its intent with respect to these bills:

Assembly Bill 123 was introduced to effectuate the *Recommendation and Study of the California Law Revision Commission Relating to the "Vesting" of Interests under the Rule Against Perpetuities* (October 1969). The comment under Assembly Bill 123 as set out in the Commission's recommendation reflects the intent of the Assembly Judiciary Committee in approving the bill.

Assembly Bill 126 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees* (September 1968) and the *Proposed Legislation of the California Law Revision Commission Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, published in the Commission's *Annual Report* (December 1969) at pages 175–181. The comments under the various sections of Assembly Bill 126 as set out in the Commission's "Proposed Legislation" reflect the intent of the Assembly Judiciary Committee in approving the bill.

Assembly Bill 171 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Real Property Leases* (November 1969). The comments under the various sections of Assembly Bill 171 as set out in the Commission's recommendation reflect the intent of the Assembly Judiciary Committee in approving the bill.

I respectfully request that this report be printed in the Assembly Journal.

Respectfully yours,

JAMES A. HAYES, Chairman
Assembly Committee on Judiciary

APPENDIX VI

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 124

[Extract from Assembly Journal for March 11, 1970 (1970 Regular Session).]

In order to indicate more fully its intent with respect to Assembly Bill 124, the Assembly Committee on Judiciary makes the following report.

Except for the new comment set out below, the comments contained under the various sections of Assembly Bill 124 as set out in the *Recommendation of the California Law Revision Commission Relating to Quasi-Community Property* (June 1969) reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bill 124.

The following new comment also reflects the intent of the Assembly Committee on Judiciary in approving Assembly Bill 124.

Civil Code Section 4800.5 (new)

Comment. Section 4800.5 has been added to specify the procedure to be followed when the property subject to division under Section 4800 includes real property situated in another state.

When real property is acquired in another state with community funds, the property is treated as community property for the purpose of division on dissolution of the marriage or on legal separation. See *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P. 2d 11 (1957); *Tomaier v. Tomaier*, 23 Cal. 2d 754, 146 P. 2d 905 (1944); *Recommendation Relating to Quasi-Community Property*, 9 Cal. L. Revision Comm'n Reports 113, 119 n. 12 (1969). Quasi-community property likewise may include real property situated in another state. See Section 4803; *Recommendation Relating to Quasi-Community Property*, 9 Cal. L. Revision Comm'n Reports 113 (1969).

Section 4800.5 recognizes that the judgment of the court dividing the property cannot directly affect real property in another state, even though the court has jurisdiction in personam over both spouses, unless the judgment is allowed that effect by the laws of the state in which the property is situated. *Fall v. Eastin*, 215 U.S. 1 (1909); *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P. 2d 11 (1957); *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756 (1923). On the other hand, where the court has jurisdiction in personam over both parties, it may order one of the parties to execute a deed by acting in personam; if the person so ordered does execute the deed, it effectively conveys the interest transferred, even though executed under threat of contempt proceedings. *Fall v. Fall*, 75 Neb. 104, 113 N.W. 175 (1907), *aff'd*, *Fall v. Eastin*, 215 U.S. 1 (1909).

Section 4800.5 requires that the court first attempt to effect the equal division of the community property and quasi-community property required by Section 4800 without making any change in the nature of

the interests held in the real property situated in the other state. This will be the result where the value of the other community and quasi-community property is equal to or exceeds the value of the real property situated in the other state that is subject to division. Where the court determines that the real property situated in another state or an interest in such property must be transferred from one party to the other to effect the equal division of community and quasi-community property required by Section 4800, the court may order the parties to execute the necessary conveyances or to take such other actions—such as selling the property and including the proceeds in the property division—as may be necessary to effect an equal division of the community and quasi-community property and may enforce its order by contempt proceedings. If a party refuses to execute the instrument necessary to effect the transfer or sale of the property or to take some other necessary action, the problem may be dealt with by awarding the money value of the property or interest therein to the other party, which award must be given full faith and credit. *Fall v. Fall*, 75 Neb. 104, 113 N.W. 175 (1907), *aff'd*, *Fall v. Eastin*, 215 U.S. 1 (1909).

APPENDIX VII

COMMUNICATION FROM ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 171

[Extract from Assembly Journal for May 11, 1970 (1970 Regular Session).]

May 7, 1970

The Honorable Bob Monagan
Speaker of the Assembly

Dear Mr. Speaker: I respectfully request that the enclosed amended comments on AB 171 be printed in the Assembly Daily Journal as the legislative intent of the Assembly Committee on Judiciary.

AB 171 was considered by the Assembly Judiciary Committee and reported out with an "Amend and Do Pass" recommendation. It was subsequently amended and the attached report adopted by the Assembly Judiciary Committee on May 7 correctly states the intent of the Committee in regard to the amended bill.

Respectfully yours,

JAMES A. HAYES, Chairman
Assembly Committee on Judiciary

[Civil Code Section 1951.2 (new)]

Comment. Section 1951.2 states the measure of damages when the lessee breaches the lease and abandons the property or when his right to possession is terminated by the lessor because of a breach of the lease. As used in this section, "rent" includes "charges equivalent to rent." See Section 1951.

Nothing in Section 1951.2 affects the rules of law that determine when the lessor may terminate the lessee's right to possession. See generally 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* §§ 276-278 (1960). Thus, for example, the lessor's right to terminate the lessee's right to possession may be waived under certain circumstances. *Id.* at § 278. Likewise, nothing in Section 1951.2 affects any right the lessee may have to an offset against the damages otherwise recoverable under the section. For example, where the lessee has a claim based on the failure of the lessor to perform all of his obligations under the lease, Section 1951.2 does not affect the right of the lessee to have the amount he is entitled to recover from the lessor on such claim offset against the damages otherwise recoverable under the section.

Subdivisions (a) and (b). Under paragraph (1) of subdivision (a), the lessor is entitled to recover the unpaid rent which had been earned at the time the lease terminated. Pursuant to subdivision (b), interest must be added to such rent at such lawful rate as may be specified in the lease or, if none is specified, at the legal rate of seven percent. Interest accrues on each unpaid rental installment from the time it

becomes due until the time of award, *i.e.*, the entry of judgment or the similar point of determination if the matter is determined by a tribunal other than a court.

A similar computation is made under paragraph (2) of subdivision (a) except that the lessee may prove that a certain amount of rental loss could have been reasonably avoided. The lessor is entitled to interest only on the amount by which each rental installment exceeds the amount of avoidable rental loss for that rent period.

The lump sum award of future rentals under paragraph (3) of subdivision (a) is discounted pursuant to subdivision (b) to reflect prepayment. The amount by which each future rental installment exceeds the amount of avoidable rental loss for that rent period is discounted from the due date under the lease to the time of award at the discount rate of the Federal Reserve Bank of San Francisco plus one percent. Judicial notice can be taken of this rate pursuant to Evidence Code Section 452(h). Damages may be recovered under paragraph (3) only if the lease expressly so provides or if the lessor, acting reasonably and in good faith, has relet the property prior to judgment. See subdivision (c).

In determining the amount recoverable under paragraphs (2) and (3) of subdivision (a), the lessee is entitled to have offset against the unpaid rent not merely all sums the lessor has received or will receive by virtue of a reletting of the property which has actually been accomplished but also all sums that the lessee can *prove* the lessor could have obtained or could obtain by acting reasonably in reletting the property. The duty to mitigate the damages will often require that the property be relet at a rent that is more or less than the rent provided in the original lease. The test in each case is whether the lessor acted reasonably and in good faith in reletting the property.

The general principles that govern mitigation of damages apply in determining what constitutes a "rental loss that the lessee proves" could be "reasonably avoided." These principles were summarized in *Green v. Smith*, 261 Cal. App.2d 392, 396-397, 67 Cal. Rptr. 796, 799-800 (1968):

A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures. . . . The frequent statement of the principle in the terms of a "duty" imposed on the injured party has been criticized on the theory that a breach of the "duty" does not give rise to a correlative right of action. . . . It is perhaps more accurate to say that the wrongdoer is not required to compensate the injured party for damages which are avoidable by reasonable effort on the latter's part. . . .

The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. . . . The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken,

though unsuccessful, was unreasonable. . . . "If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen." . . . The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. . . . It is sufficient if he acts reasonably and with due diligence, in good faith. [Citations omitted.]

Paragraph (4) of subdivision (a) makes clear that the measure of the lessor's recoverable damages is not limited to damages for the loss of past and future rentals. This paragraph adopts language used in Civil Code Section 3300 and provides, in substance, that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. For example, to the extent that he would not have had to incur such expenses had the lessee performed his obligations under the lease, the lessor is entitled to recover his reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting the property. Other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee would include damages for the lessee's breach of specific covenants of the lease—for example, a promise to maintain or improve the premises or to restore the premises upon termination of the lease. Attorney's fees may be recovered only if they are recoverable under Section 1717.

If the lessee proves that the amount of rent that could reasonably be obtained by reletting after termination exceeds the amount of rent reserved in the lease, such excess is offset against the damages otherwise recoverable under paragraph (4) of subdivision (a). Subject to this exception, however, the lease having been terminated, the lessee no longer has an interest in the property, and the lessor is not accountable for any excess rents obtained through reletting.

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

Subdivision (d). Under former law, attempts by a lessor to mitigate damages sometimes resulted in an unintended acceptance of the lessee's surrender and, consequently, in loss of the lessor's right to future rentals. See *Dorcich v. Time Oil Co.*, 103 Cal. App.2d 677, 230 P.2d 10 (1951). One of the purposes of Section 1951.2 is to require

mitigation by the lessor, and subdivision (d) is included to insure that efforts by the lessor to mitigate do not result in a waiver of his right to damages under Section 1951.2.

Subdivision (e). The determination of the lessor's liability for injury or damage for which he is entitled to indemnification from the lessee may be subsequent to a termination of the lease, even though the cause of action arose prior to termination. Subdivision (e) makes clear that, in such a case, the right to indemnification is unaffected by the subsequent termination.

Effect on other remedies. Section 1951.2 is not a comprehensive statement of the lessor's remedies. When the lessee breaches the lease and abandons the property or the lessor terminates the lessee's right to possession because of the lessee's breach, the lessor may simply rescind or cancel the lease without seeking affirmative relief under the section. Where the lessee is still in possession but has breached the lease, the lessor may regard the lease as continuing in force and seek damages for the detriment caused by the breach, resorting to a subsequent action if a further breach occurs. In addition, Section 1951.4 permits the parties to provide an alternative remedy in the lease—recovery of rent as it becomes due. See also Section 1951.5 (liquidated damages) and Section 1951.8 (equitable relief).

One result of the enactment of Section 1951.2 is that, unless the parties have otherwise agreed, the lessor is excused from further performance of his obligations after the lease terminates. In this respect, the enactment of Section 1951.2 changes the result in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 155 P.2d 24 (1944).

Statute of Limitations. The statute of limitations for an action under Section 1951.2 is four years from the date of termination in the case of a written lease and two years in the case of a lease not in writing. See Code of Civil Procedure Sections 337.2 and 339.5.

[*Civil Code Section 1952 (new)*]

Comment. Section 1952 is designed to clarify the relationship between Sections 1951–1951.8 and the chapter of the Code of Civil Procedure relating to actions for unlawful detainer, forcible entry, and forcible detainer. The actions provided for in the Code of Civil Procedure chapter are designed to provide a summary method of recovering possession of property.

Subdivision (b) 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 secure the relief to which he is entitled under Sections 1951.2, 1951.5, and 1951.8. Some of the incidental damages to which the lessor is entitled may be recovered in either the unlawful detainer action or in an action to recover the damages specified in Sections 1951.2 and 1951.5. Under Section 1952, 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.

Under subdivision (c), however, when the lessor has evicted the lessee under the unlawful detainer provisions, he cannot proceed under the provisions of Section 1951.4; *i.e.*, a lessor cannot evict the tenant

and refuse to mitigate damages. In effect, the lessor is put to an election of remedies in such a case. Under some circumstances, the court may order that execution upon the judgment in an unlawful detainer proceeding not be issued until five days after the entry of the judgment; if the lessor is paid the amount to which he is found to be entitled within such time, the judgment is satisfied and the tenant is restored to his estate. In such case, since the lessor never obtains possession of the property, his right to the remedy provided by Section 1951.4 is not affected by the proceeding. If the court grants relief from forfeiture and restores the lessee to his estate as authorized by Code of Civil Procedure Section 1179, the lease—including any provision giving the lessor the remedy provided in Section 1951.4—continues in effect.

APPENDIX VIII

SENATE BILL NO. 266

An act to amend Section 1530 of the Evidence Code, relating to evidence of writings, and declaring the urgency thereof, to take effect immediately.

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

SECTION 1. Section 1530 of the Evidence Code is amended to read:

1530. (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

(1) The copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept;

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. ~~The~~ *Except as provided in the next sentence, the final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent; or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. Prior to January 1, 1971, the final statement may also be made by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy*

without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are :

In some situations, it now is impossible to satisfy the basic requirement of paragraph (3) of subdivision (a) of Section 1530 of the Evidence Code because there is no United States official in the particular foreign country (such as East Germany) who can make the final statement required by paragraph (3). As a result, it may be impossible in some situations to establish such matters as birth, legitimacy, marriage, death, or a will. This may result in injustice or in delay in the resolution of issues now pending in California courts. Therefore, it is necessary that this act take immediate effect.

APPENDIX IX
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Inverse Condemnation

Insurance Coverage

October 1970

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

NOTE

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

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
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Ex Officio

October 15, 1970

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study inverse condemnation. See also Resolution Chapter 45 of the Statutes of 1970.

The Commission submits herewith its recommendation on one aspect of this subject—insurance against inverse condemnation liability.

Respectfully submitted,

THOMAS E. STANTON, JR.
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

INVERSE CONDEMNATION

Insurance Coverage

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with liability of public entities and public employees. The comprehensive legislation included provisions recommended by the Commission to "make clear that a public entity's authority to insure is as broad as its potential liability."¹ In the course of its study of inverse condemnation law, the Commission has concluded that the authority of a public entity to insure against all types of liability based on a theory of inverse condemnation is not clearly established by statute.² Accordingly, the Commission recommends that Sections 990 and 11007.4 of the Government Code be amended to express such authority.

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

*An act to amend Sections 990 and 11007.4 of the
Government Code, relating to insurance.*

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

SECTION 1. Section 990 of the Government Code is amended to read:

990. Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, a local public entity may:

(a) Insure itself against all or any part of any tort or inverse condemnation liability ~~for any injury~~.

¹ *Recommendation Relating to Sovereign Immunity: Number 3—Insurance Coverage for Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1201, 1206 (1963).

² Professor Van Alstyne, the Commission's research consultant, points out: Even if it is assumed that commercial insurance against [inverse condemnation liability] is obtainable at reasonable premiums, it is not entirely clear that adequate statutory authority exists for public entities to insure against all inverse liabilities. See CAL. GOV'T CODE §§ 989-991.2, 11007.4 (authorizing insurance against "any injury"). But see *id.* § 810.8 (defining "injury" to mean losses that would be actionable if inflicted by a private person). Since inverse liability may obtain where private tort liability does not, *Albers v. Los Angeles County*, 62 Cal.2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965), comprehensive tort liability insurance may still be regarded as inapplicable to some inverse claims. [Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 494 n.288 (1969).]

(b) Insure any employee of the local public entity against all or any part of his liability for injury resulting from an act or omission in the scope of his employment.

(c) Insure, contract or provide against the expense of defending a claim against the local public entity or its employee, whether or not liability exists on such claim, including a claim for damages under Section 3294 of the Civil Code or otherwise for the sake of example or by way of punishment, where such liability arose from an act or omission in the scope of his employment, and an insurance contract for such purpose is valid and binding notwithstanding Section 1668 of the Civil Code, Section 533 of the Insurance Code, or any other provision of law.

Nothing in this section shall be construed to authorize a local public entity to pay for, or to insure, contract, or provide for payment for, such part of a claim or judgment against an employee of the local entity as is for punitive or exemplary damages.

Comment. Section 990 is amended to make clear that a local public entity has authority to insure against all inverse condemnation liabilities. See *Recommendation Relating to Inverse Condemnation: Insurance Coverage*, 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). This effectuates the original intent of Section 990 that "a public entity's authority to insure is as broad as its potential liability." See *Recommendation Relating to Sovereign Immunity: Number 3—Insurance Coverage for Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1201, 1206 (1963).

SEC. 2. Section 11007.4 of the Government Code is amended to read:

11007.4. (a) As used in this section:

(1) "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

(2) "Employment" includes office or employment.

(3) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such a nature that it would be actionable if inflicted by a private person.

(b) Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, any state agency may, subject to Section 11007.7:

(1) Insure itself against all or any part of any tort or inverse condemnation liability for any injury.

(2) Insure any employee of the State against all or any part of his liability for injury resulting from an act or omission in the scope of his employment.

(3) Insure against the expense of defending a claim against the state agency or its employee, whether or not liability exists on such claim.

(c) The insurance authorized by this section may be provided by:

(1) Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes.

(2) Insurance in any insurer authorized to transact such insurance in this State.

(3) Insurance secured in accordance with Chapter 6 (commencing with Section 1760) of Part 2 of Division 1 of the Insurance Code.

(4) Any combination of insurance authorized by paragraphs (1), (2) and (3).

(d) The authority provided by this section to insure does not affect any other statute that authorizes or requires any state agency to insure against its liability or the liability of its employees. Except as otherwise provided in Section 11007.7, no other statute limits or restricts the authority to insure under this section.

(e) Neither the authority provided by this section to insure, nor the exercise of such authority, shall:

(1) Impose any liability on the State or an employee thereof unless such liability otherwise exists.

(2) Impair any defense the State or an employee thereof otherwise may have.

Comment. Section 11007.4 is amended to make clear that the state has authority to insure against all inverse condemnation liabilities. See *Recommendation Relating to Inverse Condemnation: Insurance Coverage*, 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). This effectuates the original intent of Section 11007.4 that "a public entity's authority to insure is as broad as its potential liability." See *Recommendation Relating to Sovereign Immunity: Number 3—Insurance Coverage for Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1201, 1206 (1963).

(1058-1100 blank)