

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

Annual Report

December 1973

**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 1101. 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 11 of the Commission's *Reports, Recommendations, and Studies*.

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CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY

STANFORD, CALIFORNIA 94305

(415) 321-2300, EXT. 2479

JOHN D. MILLER

Chairman

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Ex Officio

December 1, 1973

To: THE HONORABLE 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 1973.

This report was printed during the first week of December 1973 so that it would be available in printed form early in January 1974. Accordingly, it does not reflect changes in Commission membership after December 1, 1973.

Respectfully submitted,
JOHN D. MILLER
Chairman



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REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1973

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 for the purpose of discovering defects and anachronisms.

(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. In some cases, the study is prepared by a member of the Commission's staff, but the majority of the 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

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 California Supreme Court or the Supreme Court of the United States. CAL. GOVT. CODE § 10331.

³ See CAL. GOVT. CODE § 10335.

considerable background necessary to understand the specific problems under consideration.

The research study includes a discussion of the existing law and the defects therein and suggests possible methods of eliminating those defects. The study is given careful consideration by the Commission and, 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 legislation necessary to effectuate its recommendation, is published in a printed pamphlet.⁴ If the research study has not been previously published,⁵ it usually is published in the pamphlet containing the recommendation.

The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports⁶ to reflect amendments⁷ made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and potential problems in its meaning or application. The Comments are written as if the legislation were enacted since their primary purpose is to explain the statute to those who will

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 For a background study published in a law review during 1973, see Sterling, *Return Right for Former Owner of Land Taken by Eminent Domain*, 4 PAC. L.J. 65 (1973). For a listing of background studies published in law reviews prior to 1973, see 10 CAL. L. REVISION COMM'N REPORTS 1108 n.5 (1971) and 11 CAL. L. REVISION COMM'N REPORTS 1008 n.5 (1973).

⁶ Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App.3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). For examples of such reports, see 10 CAL. L. REVISION COMM'N REPORTS 1132-1146 (1971).

⁷ Many of the amendments made after the recommended legislation has been introduced are made upon recommendation of the Commission to deal with matters brought to the Commission's attention after its recommendation was printed. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

have occasion to use it after it is in effect.⁸ While the Commission endeavors in the Comment to explain any changes in the law made by the section, the Commission does not claim that every inconsistent case is noted in the Comment, nor can it anticipate judicial conclusions as to the significance of existing case authorities.⁹ Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.¹⁰

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.¹¹ 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.¹² 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.

Commission recommendations have resulted in the enactment of legislation affecting 2,294 sections of the California statutes: 1,145 sections have been added, 553 sections amended, and 596 sections repealed. For a summary of the legislative action on Commission recommendations, see pages 1128-1138 *infra*.

⁸ The Comments are published by both the Bancroft-Whitney Company and the West Publishing Company in their editions of the annotated codes. They are entitled to substantial weight in construing the statutory provisions. *E.g.*, *Van Arsdale v. Holinger*, 68 Cal.2d 245, 249-250, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968).

⁹ See, *e.g.*, *Arellano v. Moreno*, 33 Cal. App.3d 877, 109 Cal. Rptr. 421 (1973).

¹⁰ The commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-159, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-654 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973).

¹¹ See CAL. GOVT. CODE § 10333.

¹² For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 CAL. L. REVISION COMM'N REPORTS 3 (1965).

PERSONNEL OF COMMISSION

Honorable Robert S. Stevens, Member of the Senate for the Twenty-fifth Senate District, was appointed to replace Senator Alfred H. Song who resigned from the Commission. Honorable Alister McAlister, Member of the Assembly for the Twenty-fifth Assembly District, was appointed to replace former Assemblyman Carlos J. Moorhead.

In October 1973, Mr. Marc Sandstrom was elected Chairman and Mr. John N. McLaurin was elected Vice Chairman of the Commission. Their terms commence on December 31, 1973.

As of December 1, 1973, the membership of the Law Revision Commission is:

	<i>Term expires</i>
John D. Miller, Long Beach, <i>Chairman</i>	October 1, 1977
Marc Sandstrom, San Diego, <i>Vice Chairman</i>	October 1, 1975
Hon. Robert S. Stevens, Los Angeles, <i>Senate Member</i>	*
Hon. Alister McAlister, San Jose, <i>Assembly Member</i>	*
John J. Balluff, Palos Verdes Estates, <i>Member</i>	October 1, 1975
Noble K. Gregory, San Francisco, <i>Member</i>	October 1, 1975
John N. McLaurin, Los Angeles, <i>Member</i>	October 1, 1975
Thomas E. Stanton, Jr., San Francisco, <i>Member</i>	October 1, 1977
Howard R. Williams, Stanford, <i>Member</i>	October 1, 1977
George H. Murphy, Sacramento, <i>ex officio Member</i>	†

In addition to its full-time staff, the Commission employed during 1973 on a part-time basis JoAnne Friedenthal and Michael Rand McQuinn as Legal Counsels and Roger LaBrucherie and Tom P. Lallas, Stanford Law School students, as Student Legal Assistants.

* 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. Nevertheless, because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission has determined not to request authority to study any new topics.

The Commission held five two-day meetings and four three-day meetings in 1973.

¹ See pages 1123-1124 *infra*.

² See pages 1112-1121 *infra*.

³ See pages 1125-1126 *infra*.

1974 LEGISLATIVE PROGRAM

The Commission will submit the following recommendations to the 1974 Legislature:

(1) *Recommendation Relating to Prejudgment Attachment* (December 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 701 (1973).

(2) *Recommendation Relating to Enforcement of Sister State Money Judgments* (November 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 451 (1973).

(3) *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information* (September 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973).

(4) *Recommendation Relating to Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege* (September 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973).

(5) *Recommendation and Study Relating to Inheritance Rights of Nonresident Aliens* (September 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 421 (1973).

(6) *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974).

(7) *Recommendations Relating to Landlord-Tenant Relations* (December 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 951 (1973). This report contains two recommendations: *Abandonment of Leased Real Property* and *Personal Property Left on Premises Vacated by Tenant*.

(8) *Recommendation and Study Relating to Liquidated Damages* (December 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973).

The Commission also recommends that three topics be removed from its calendar (see page 1121 *infra*).

MAJOR STUDIES IN PROGRESS

Creditors' Remedies

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. Beginning in 1969, decisions of the United States and California Supreme Courts held that significant portions of the existing statutory provisions relating to creditors' remedies constituted a taking of property in violation of constitutional due process requirements.¹ Therefore, by Resolution Chapter 27 of the Statutes of 1972, the scope of the topic assigned to the Commission was expanded to cover whether the law relating to attachment, garnishment, execution, repossession of property (including the claim and delivery statute, Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, and related matters should be revised. The Commission, working with a special committee of the State Bar,² is now actively considering this topic. Professor William D. Warren, Stanford Law School, and Professor Stefan A. Riesenfeld, Boalt Hall Law School, University of California at Berkeley, are serving as consultants to the Commission.

As a result of its study of creditors' remedies, the Commission submitted recommendations to the 1971,³ 1972,⁴ and 1973⁵

¹ *E.g.*, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *McCallop v. Carberry*, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

² As of December 1973, the members of this committee were Ferdinand F. Fernandez, chairman; Nathan Frankel, Edward N. Jackson, Andrea Ordin, Ronald N. Paul, Arnold M. Quittner, and William W. Vaughn.

³ *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge from Employment*, 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 1607.

⁴ *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971). The recommended legislation—Senate Bill 88 of the 1972 Regular Session—was not enacted, and a revised recommendation on this subject was submitted to the 1973 Legislature. See note 5 *infra*.

⁵ *Recommendation and Study Relating to Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 1 (1973); *Recommendation Relating to Wage Garnishment and Related Matters*, 11 CAL. L. REVISION COMM'N REPORTS 101 (1973); and *Recommendation Relating to the Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301 (1973). The recommended legislation relating to civil arrest and the claim and delivery statute was enacted. See Cal. Stats. 1973, Chs. 20 (civil arrest), and 526

legislative sessions. The Commission will submit two additional recommendations to the 1974 session. See *Recommendation Relating to Prejudgment Attachment* (December 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 701 (1973); *Recommendation Relating to Enforcement of Sister State Money Judgments* (November 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 451 (1973). See also *Tentative Recommendation Relating to Prejudgment Attachment* (March 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 501 (1973).

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 1975 Legislature.

The Commission plans to publish a tentative recommendation during 1974 which will include a draft of a comprehensive eminent domain statute. The comments and criticisms received from interested persons and organizations on the tentative statute will be considered before the statute to be recommended to the Legislature is drafted.

The Commission has studied the relationship of the various improvement acts to the general eminent domain provisions and plans to submit a recommendation to the 1974 session concerning the conforming changes required in the improvement acts. See *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts* (January 1974), to be reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974).

The Commission has retained three consultants to provide expert assistance in the condemnation study: Gideon Kanner, Los Angeles attorney, Thomas M. Dankert, Ventura attorney, and Norman E. Matteoni, Deputy County Counsel of Santa Clara County.

(claim and delivery). The recommended legislation relating to wage garnishment—Assembly Bills 101 and 102—was pending in the Senate when the Legislature recessed in September 1973.

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:

Creditors' remedies. Whether the law relating to attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, and related matters should be revised.²

¹ Section 10335 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.

² Authorized by Cal. Stats. 1972, Res. Ch.27. See also Cal. Stats. 1957, Res. Ch. 202, at 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 15 (1957).

See *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment*, 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1126-1127 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 1607.

See also *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971). For a legislative history of this recommendation, see 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1973 Legislature. See *Recommendation Relating to Wage Garnishment and Related Matters*, 11 CAL. L. REVISION COMM'N REPORTS 101 (1973). For a legislative history of this recommendation, see 11 CAL. L. REVISION COMM'N REPORTS 1123 (1973).

See also *Recommendation and Study Relating to Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 1 (1973). For a legislative history of this recommendation, see 11 CAL. L. REVISION COMM'N REPORTS 1123 (1973). The recommended legislation was enacted. See Cal. Stats. 1973, Ch. 20.

See also *Recommendation Relating to the Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301 (1973). For a legislative history of this recommendation, see 11 CAL. L. REVISION COMM'N REPORTS 1124 (1973). The recommended legislation was enacted. See Cal. Stats. 1973, Ch. 526.

See also *Recommendation Relating to Prejudgment Attachment* (December 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 701 (1973); *Recommendation Relating to Enforcement of Sister State Money Judgments* (November 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 451 (1973). These

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.³

Right of nonresident aliens to inherit. Whether the law relating to the right of nonresident aliens to inherit should be revised.⁴

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases,

recommendations will be submitted to the 1974 Legislature.

³ Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 4 CAL. L. REVISION COMM'N REPORTS 115 (1963).

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 at A-1, B-1, and C-1 (1961). For a legislative history of these recommendations, see 3 CAL. L. REVISION COMM'N REPORTS, Legislative History at 1-5 (1961). See also Cal. Stats. 1961, Ch. 1612 (tax apportionment) and 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 (evidence in eminent domain proceedings); Ch. 1649 and Ch. 1650 (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). The recommended legislation was enacted. See 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 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.

See also *Recommendation Relating to Arbitration of Just Compensation*, 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.

See also *Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts* (January 1974), reprinted in 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974). This recommendation will be submitted to the 1974 Legislature.

The Commission is now engaged in the study of this topic and tentatively plans to submit a recommendation for a comprehensive statute to the 1975 Legislature. See 11 CAL. L. REVISION COMM'N REPORTS 1114 (1973). 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).

⁴ Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888. See *Recommendation and Study Relating to Inheritance Rights of Nonresident Aliens* (September 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 421 (1973). This recommendation will be submitted to the 1974 Legislature.

should be revised.⁵

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.⁶

Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.⁷

Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised.⁸

⁵ Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888. See *Recommendation and Study Relating to Liquidated Damages* (December 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973). This recommendation will be submitted to the 1974 Legislature.

⁶ Authorized by Cal. Stats. 1959, Res. Ch. 218, at 5792; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 21 (1957). The Commission has retained Mr. Garrett H. Elmore as the consultant on this topic. Mr. Elmore is preparing a background study.

⁷ Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

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*, 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*, 9 CAL. L. REVISION COMM'N REPORTS 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.

See also *Recommendations Relating to Landlord-Tenant Relations* (December 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 951 (1973). This report contains two recommendations: *Abandonment of Leased Real Property* and *Personal Property Left on Premises Vacated by Tenant*. These recommendations will be submitted to the 1974 Legislature.

⁸ Authorized by Cal. Stats. 1967, Res. Ch. 81, at 4592; see also Cal. Stats. 1956, Res. Ch. 42, at 263.

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 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).

See also *Recommendation Relating to Unclaimed Property*, 11 CAL. L. REVISION COMM'N REPORTS 401 (1973). For a legislative history of this recommendation, see 11 CAL. L. REVISION COMM'N REPORTS 1124 (1973).

Other Topics Authorized for Study

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

Child custody and related matters. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.¹

Nonprofit corporations. Whether the law relating to nonprofit corporations should be revised.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.³

Parol evidence rule. Whether the parol evidence rule should be revised.⁴

Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised.⁵

Arbitration. Whether the law relating to arbitration should be revised.⁶

¹ Authorized by Cal. Stats. 1972, Res. Ch. 27. See 10 CAL. L. REVISION COMM'N REPORTS 1122 (1971). See also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 29 (1957).

A background study on one aspect of the topic has been prepared by the Commission's consultant. See Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703 (1971). This study does not necessarily represent the views of the Commission; the Commission's action will be reflected in its own recommendation. The Commission has retained the same consultant (Professor Brigitte M. Bodenheimer, Law School, University of California at Davis) to prepare a background study on another aspect of the topic—adoption—and she is now working on this new study.

² Authorized by Cal. Stats. 1970, Res. Ch. 54, at 3547; see also 9 CAL. L. REVISION COMM'N REPORTS 107 (1969).

³ Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 21 (1957). For a background study prepared by a former part-time member of the Commission's staff, see Timbie, *Modification of Written Contracts in California*, 23 HASTINGS L.J. 1549 (1972). This study does not necessarily represent the views of the Commission; the Commission's action will be reflected in its own recommendation.

⁴ Authorized by Cal. Stats. 1971, Res. Ch. 75; see also 10 CAL. L. REVISION COMM'N REPORTS 1031 (1971).

⁵ Authorized by Cal. Stats. 1971, Res. Ch. 75.

⁶ Authorized by Cal. Stats. 1968, Res. Ch. 110, at 3103; see also 8 CAL. L. REVISION COMM'N REPORTS 1325 (1967).

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.

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.

Governmental liability. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.¹

Evidence. Whether the Evidence Code should be revised.²

¹ Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589.

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), Ch. 1715 (claims, actions and judgments against public entities and public employees), Ch. 1682 (insurance coverage for public entities and public employees), Ch. 1683 (defense of public employees), Ch. 1684 (workmen's compensation benefits for persons assisting law enforcement or fire control officers), Ch. 1685 (amendments and repeals of inconsistent special statutes), Ch. 1686 (amendments and repeals of inconsistent special statutes), 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), 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*, 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 *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 CAL. L. REVISION COMM'N REPORTS 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. 1970, Ch. 104.

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 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, Ch. 662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests).

² Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289.

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 liability for damages resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised.³

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), Ch. 262 (Agricultural Code revisions), Ch. 703 (Commercial Code revisions).

See also *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article*, 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*, 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 (1971) and Cal. Stats. 1970, Ch. 41.

See also *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information* (September 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973); *Recommendation Relating to Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege* (September 1973), reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973). These recommendations will be submitted to the 1974 Legislature.

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). See also Cal. Stats. 1972, Ch. 764.

³ Authorized by Cal. Stats. 1970, Res. Ch. 46, at 3541; see also Cal. Stats. 1965, Res. Ch. 130, at 5289.

See *Recommendation Relating to Inverse Condemnation: Insurance Coverage*, 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1126 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 140.

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 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, Ch. 662 (entry to make tests) and Ch. 1099 (liability for use of pesticides, liability for damages from tests). See also *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 CAL. L. REVISION COMM'N REPORTS 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. 1970, Ch. 104.

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.⁴

Topics to Be Removed From Calendar of Topics

On the following topics, studies and recommendations relating to the topics 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.⁵

Powers of appointment. Whether the law relating to a power of appointment should be revised.⁶

Counterclaims and cross-complaints. Whether the law relating to counterclaims and cross-complaints should be revised.⁷

Joinder of causes of action. Whether the law relating to joinder of causes of action should be revised.⁸

See also Van Alstyne, *California Inverse Condemnation Law*, 10 CAL. L. REVISION COMM'N REPORTS 1 (1971).

The Commission's consultant (Professor Arvo Van Alstyne, College of Law, University of Utah) is preparing a background study on the procedural aspects of inverse condemnation.

⁴ Authorized by Cal. Stats. 1966, Res. Ch. 9, at 241; see also Cal. Stats. 1957, Res. Ch. 202, at 4589.

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 1403 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 18-19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 132.

⁵ 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 1119-1121 *supra*.

⁶ Authorized by Cal. Stats. 1965, Res. Ch. 130, at 5289.

See *Recommendation and Study Relating to Powers of Appointment*, 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. 113, 155.

⁷ Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888; see also 9 CAL. L. REVISION COMM'N REPORTS 25 (1969).

See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 CAL. L. REVISION COMM'N REPORTS 501 (1971). For a legislative history of this recommendation, see 10 CAL. L. REVISION COMM'N REPORTS 1125-1126 (1971). The recommended legislation was enacted. See Cal. Stats. 1971, Ch. 244. See also Cal. Stats. 1971, Ch. 950; Cal. Stats. 1972, Ch. 73; Cal. Stats. 1973, Ch. 828.

⁸ *Ibid.*

Topics for Future Consideration

During the next few years, the Commission plans to devote its attention primarily to (1) creditors' remedies and (2) condemnation law and procedure. Legislative committees have indicated that they wish these topics to be given priority.

Because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission does not recommend any additional topics for inclusion on its agenda.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1973 LEGISLATIVE SESSION

Resolution Approving Topics for Study

Senate Concurrent Resolution No. 7, introduced by Senator Alfred H. Song and adopted as Resolution Chapter 39 of the Statutes of 1973, authorizes the Commission to continue its study of topics previously authorized for study. As introduced, the resolution also approved the removal of four topics from the Commission's agenda. However, the resolution was amended in the Senate and, as adopted, approved the removal of only two topics: (1) whether the law relating to the use of fictitious names should be revised and (2) whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised.

Civil Arrest

Senate Bill 81, which became Chapter 20 of the Statutes of 1973, was introduced by Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation and Study Relating to Civil Arrest* (July 1972), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 1 (1973). The bill was enacted as introduced.

Wage Garnishment and Related Matters

Assembly Bill No. 101 and Assembly Bill No. 102 were introduced by Assemblyman Warren and Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Wage Garnishment and Related Matters* (October 1972), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 101 (1973). Both bills were passed in amended form by the Assembly and were pending in the Senate when the Legislature recessed in September 1973. The bills will be given further consideration by the Legislature in 1974.

Claim and Delivery Statute

Assembly Bill No. 103, which in amended form became Chapter 526 of the Statutes of 1973, was introduced by Assemblyman Warren and Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to the Claim and Delivery Statute* (December 1972), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 301 (1973). The bill was substantially amended in the Assembly and in the Senate. The Senate Judiciary Committee adopted a special report with reference to the bill. This report contained revised Comments to various sections which reflected the amendments to the bill after its introduction. See *Report of Senate Committee on Judiciary on Assembly Bill 103*, SENATE J. (Sept. 13, 1973) at 6307. See Appendix I to this Report. The text of the bill as enacted, together with the official Comments, is set out as Appendix IV to this Report. Most of the amendments to Assembly Bill No. 103 were technical or clarifying. One significant amendment was made: Subdivision (b) of Section 512.020 was amended to add paragraph (3) which authorizes the court to issue a writ ex parte where the property claimed is commercial property which is not necessary for the support of the defendant or his family and which is likely to be unavailable for levy if the matter is heard upon noticed motion.

Unclaimed Property

Assembly Bill No. 727 and Assembly Joint Resolution No. 27 were introduced by Assemblyman McAlister to effectuate the Commission's recommendation concerning the Unclaimed Property Law (Code of Civil Procedure Section 1500 *et seq.*). See *Recommendation Relating to Unclaimed Property* (March 1973), to be reprinted in 11 CAL. L. REVISION COMM'N REPORTS 401 (1973). Assembly Bill No. 727 was pending in the Assembly Judiciary Committee when the Legislature recessed in September 1973. The bill will be given further consideration by the Legislature in 1974. Assembly Joint Resolution No. 27 was adopted as Resolution Chapter 76 of the Statutes of 1973. The resolution was adopted as introduced.

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

*People v. Barksdale*² held that Health and Safety Code Section 25951(c)(1) which establishes medical criteria for lawful abortions is unconstitutionally vague under the due process clauses of the California and United States Constitutions. In addition, the court invalidated Health and Safety Code Sections 25951(b) (establishing a medical committee to approve abortion requests), 25951(c)(2) (allowing abortion in cases of rape or incest), 25952 (providing a procedure for approving abortions in cases of rape and incest), 25954 (defining "mental health"), and the first sentence of Section 25953 (prescribing qualifications for members of the medical committee).

*In re Lynch*³ held that part of Penal Code Section 314—in effect imposing a life sentence for a second conviction of indecent exposure—violates the prohibition against cruel or unusual punishments in Article I, Section 6, of the California

¹ This study has been carried through 93 S. Ct. 3072 (July 15, 1973) and 10 Cal.3d 109 (Oct. 9, 1973).

² 8 Cal.3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

³ 8 Cal.3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

Constitution.

*Brooks v. Small Claims Court*⁴ held that Code of Civil Procedure Sections 1171 and 11711, which require the defendant in a small claims court proceeding to file an undertaking or make a deposit as a condition to an appeal, offend the due process requirements of the California and United States Constitutions.

*Brown v. Merlo*⁵ held that the automobile guest statute, Vehicle Code Section 17158, violates the equal protection principles of the California and United States Constitutions.

*Haman v. County of Humboldt*⁶ held Revenue and Taxation Code Section 227 (a)—providing a special tax assessment for vessels whose port of documentation is in California—violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

*Ramirez v. Brown*⁷ held that, under the equal protection clause of the Fourteenth Amendment of the United States Constitution, the right of suffrage may not be denied ex-felons whose terms of imprisonment and parole have expired. Provisions violating this principle appear in Article II, Section 3, and Article XX, Section 11, of the California Constitution and in various sections of the Elections Code which implement the constitutional disqualification.⁸

⁴ 8 Cal.3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973).

⁵ 8 Cal.3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). In recognition of the holding in this case, the reference to guests in Vehicle Code Section 17158 was deleted. See Cal. Stats. 1973, Ch. 803, §4.

⁶ 8 Cal.3d 922, 506 P.2d 993, 106 Cal. Rptr. 617 (1973).

⁷ 9 Cal.3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973).

⁸ The affected statutes listed by the court are Election Code Sections 310, 321, 383, 389, 390, 14240, and 14246.

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 1115–1121 of this Report) and to remove from its calendar of topics the topics listed on page 1121 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 1125–1126 to the extent that those provisions have been held to be unconstitutional.

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

Recommendation	Action by Legislature
1. <i>Partial Revision of Education Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 12 (1957)	Enacted. Cal. Stats. 1955, Chs. 799, 877
2. <i>Summary Distribution of Small Estates Under Probate Code Sections 640 to 646</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 50 (1957)	Enacted. Cal. Stats. 1955, Ch. 1183
3. <i>Fish and Game Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1957 at 13 (1957); 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1956 at 13 (1957)	Enacted. Cal. Stats. 1957, Ch. 456
4. <i>Maximum Period of Confinement in a County Jail</i> , 1 CAL. L. REVISION COMM'N REPORTS at A-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 139
5. <i>Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at B-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 540
6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see CODE CIV. PROC. § 612.5 enacting substance of this recommendation.

7. *The Dead Man Statute*, 1 CAL. L. REVISION COMM'N REPORTS at D-1 (1957) Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 1261.
8. *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957) Enacted. Cal. Stats. 1957, Ch. 490
9. *The Marital "For and Against" Testimonial Privilege*, 1 CAL. L. REVISION COMM'N REPORTS at F-1 (1957) Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 970.
10. *Suspension of the Absolute Power of Alienation*, 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 14 (1959) Enacted. Cal. Stats. 1959, Ch. 470
11. *Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378*, 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957) Enacted. Cal. Stats. 1957, Ch. 102
12. *Judicial Notice of the Law of Foreign Countries*, 1 CAL. L. REVISION COMM'N REPORTS at I-1 (1957) Enacted. Cal. Stats. 1957, Ch. 249
13. *Choice of Law Governing Survival of Actions*, 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957) No legislation recommended.

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| 14. <i>Effective Date of Order Ruling on a Motion for New Trial</i> , 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959) | Enacted. Cal. Stats. 1959, Ch. 468 |
| 15. <i>Retention of Venue for Convenience of Witnesses</i> , 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957) | Not enacted. |
| 16. <i>Bringing New Parties Into Civil Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957) | Enacted. Cal. Stats. 1957, Ch. 1498 |
| 17. <i>Grand Juries</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959) | Enacted. Cal. Stats. 1959, Ch. 501 |
| 18. <i>Procedure for Appointing Guardians</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959) | Enacted. Cal. Stats. 1959, Ch. 500 |
| 19. <i>Appointment of Administrator in Quiet Title Action</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959) | No legislation recommended. |
| 20. <i>Presentation of Claims Against Public Entities</i> , 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959) | Enacted. Cal. Stats. 1959, Chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., Art. XI, § 10 (1960) |
| 21. <i>Right of Nonresident Aliens to Inherit</i> , 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959) | Not enacted. But new recommendation will be submitted to 1974 session. |

22. *Mortgages to Secure Future Advances*, 2 CAL. L. REVISION COMM'N REPORTS at C-1 (1959) Enacted. Cal. Stats. 1959, Ch. 528
23. *Doctrine of Worthier Title*, 2 CAL. L. REVISION COMM'N REPORTS at D-1 (1959) Enacted. Cal. Stats. 1959, Ch. 122
24. *Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving*, 2 CAL. L. REVISION COMM'N REPORTS at E-1 (1959) Not enacted.
25. *Time Within Which Motion for New Trial May Be Made*, 2 CAL. L. REVISION COMM'N REPORTS at F-1 (1959) Enacted. Cal. Stats. 1959, Ch. 469
26. *Notice to Shareholders of Sale of Corporate Assets*, 2 CAL. L. REVISION COMM'N REPORTS at G-1 (1959) Not enacted.
27. *Evidence in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961) Not enacted. But see EVID. CODE § 810 *et seq.* enacting substance of recommendation.
28. *Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961) Enacted. Cal. Stats. 1961, Chs. 1612, 1613
29. *Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961) Not enacted. But see GOVT. CODE § 7260 *et seq.* enacting substance of recommendation.

30. *Rescission of Contracts*, 3 CAL. L. REVISION COMM'N REPORTS at D-1 (1961) Enacted. Cal. Stats. 1961, Ch. 589
31. *Right to Counsel and Separation of Delinquent From Nondelinquent Minor In Juvenile Court Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at E-1 (1961) Enacted. Cal. Stats. 1961, Ch. 1616
32. *Survival of Actions*, 3 CAL. L. REVISION COMM'N REPORTS at F-1 (1961) Enacted. Cal. Stats. 1961, Ch. 657
33. *Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961) Enacted. Cal. Stats. 1961, Ch. 461
34. *Presentation of Claims Against Public Officers and Employees*, 3 CAL. L. REVISION COMM'N REPORTS at H-1 (1961) Not enacted 1961. See recommendation to 1963 session (item 39 *infra*) which was enacted.
35. *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961) Enacted. Cal. Stats. 1961, Ch. 636
36. *Notice of Alibi in Criminal Actions*, 3 CAL. L. REVISION COMM'N REPORTS at J-1 (1961) Not enacted.
37. *Discovery in Eminent Domain Proceedings*, 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967) Enacted. Cal. Stats. 1967, Ch. 1104

38. *Tort Liability of Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 801 (1963) Enacted. Cal. Stats. 1963, Ch. 1681
39. *Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1001 (1963) Enacted. Cal. Stats. 1963, Ch. 1715
40. *Insurance Coverage for Public Entities and Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1201 (1963) Enacted. Cal. Stats. 1963, Ch. 1682
41. *Defense of Public Employees*, 4 CAL. L. REVISION COMM'N REPORTS 1301 (1963) Enacted. Cal. Stats. 1963, Ch. 1683
42. *Liability of Public Entities for Ownership and Operation of Motor Vehicles*, 4 CAL. L. REVISION COMM'N REPORTS 1401 (1963); 7 CAL. L. REVISION COMM'N REPORTS 401 (1965) Enacted. Cal. Stats. 1965, Ch. 1527
43. *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer*, 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963) Enacted. Cal. Stats. 1963, Ch. 1684
44. *Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes*, 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963) Enacted. Cal. Stats. 1963, Chs. 1685, 1686, 2029

45. *Evidence Code*, 7 CAL. L. REVISION COMM'N REPORTS 1 (1965) Enacted. Cal. Stats. 1965, Ch. 299
46. *Claims and Actions Against Public Entities and Public Employees*, 7 CAL. L. REVISION COMM'N REPORTS 401 (1965) Enacted. Cal. Stats. 1965, Ch. 653
47. *Evidence Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101 (1967) Enacted in part: Cal. Stats. 1967, Ch. 650; balance enacted: Cal. Stats. 1970, Ch. 69
48. *Evidence—Agricultural Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 201 (1967) Enacted. Cal. Stats. 1967, Ch. 262
49. *Evidence—Commercial Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 301 (1967) Enacted. Cal. Stats. 1967, Ch. 703
50. *Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967) Enacted. Cal. Stats. 1968, Chs. 457, 458
51. *Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967) Enacted. Cal. Stats. 1967, Ch. 702
52. *Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967) Enacted. Cal. Stats. 1967, Ch. 72

53. *Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); 9 CAL. L. REVISION COMM'N REPORTS 153 (1969) Enacted. Cal. Stats. 1970, Ch. 89
54. *Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1373 (1967) Enacted. Cal. Stats. 1968, Ch. 150
55. *Suit By or Against an Unincorporated Association*, 8 CAL. L. REVISION COMM'N REPORTS 901 (1967) Enacted. Cal. Stats. 1967, Ch. 1324
56. *Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967) Enacted. Cal. Stats. 1968, Chs. 247, 356
57. *Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967) Enacted. Cal. Stats. 1968, Ch. 133
58. *Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967) Enacted. Cal. Stats. 1968, Ch. 132

59. *Sovereign Immunity—Statute of Limitations*, 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); 9 CAL. L. REVISION COMM'N REPORTS 175 (1969) Vetoed 1969. Enacted: Cal. Stats. 1970, Ch. 104
60. *Additur and Remittitur*, 9 CAL. L. REVISION COMM'N REPORTS 63 (1969) Enacted. Cal. Stats. 1969, Ch. 115
61. *Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 71 (1969) Enacted. Cal. Stats. 1969, Ch. 114
62. *Quasi-Community Property*, 9 CAL. L. REVISION COMM'N REPORTS 113 (1969) Enacted. Cal. Stats. 1970, Ch. 312
63. *Arbitration of Just Compensation*, 9 CAL. L. REVISION COMM'N REPORTS 123 (1969) Enacted. Cal. Stats. 1970, Ch. 417
64. *Revisions of Evidence Code*, 9 CAL. L. REVISION COMM'N REPORTS 137 (1969) Enacted in part: Cal. Stats. 1970, Ch. 69; see also Cal. Stats. 1970, Chs. 1396, 1397
65. *Mutuality of Remedies in Suits for Specific Performance*, 9 CAL. L. REVISION COMM'N REPORTS 201 (1969) Enacted. Cal. Stats. 1969, Ch. 156
66. *Powers of Appointment*, 9 CAL. L. REVISION COMM'N REPORTS 301 (1969) Enacted. Cal. Stats. 1969, Chs. 113, 155

67. *Evidence Code—Revisions of Privileges Article*, 9 CAL. L. REVISION COMM'N REPORTS 501 (1969) Vetoed. But see Cal. Stats. 1970, Chs. 1396, 1397
68. *Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 601 (1969) Enacted. Cal. Stats. 1970, Ch. 618
69. *Representations as to the Credit of Third Persons and the Statute of Frauds*, 9 CAL. L. REVISION COMM'N REPORTS 701 (1969) Enacted. Cal. Stats. 1970, Ch. 720
70. *Revisions of Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 (1969) Enacted in part: Cal. Stats. 1970, Chs. 662, 1099
71. *"Vesting" of Interests Under Rule Against Perpetuities*, 9 CAL. L. REVISION COMM'N REPORTS 901 (1969) Enacted. Cal. Stats. 1970, Ch. 45
72. *Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 CAL. L. REVISION COMM'N REPORTS 501 (1971) Enacted. Cal. Stats. 1971, Chs. 244, 950; see also Cal. Stats. 1973, Ch. 828
73. *Wage Garnishment and Related Matters*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971); 11 CAL. L. REVISION COMM'N REPORTS 101 (1973) Not enacted 1972. Introduced in 1973 as AB 101, 102 which were pending in the Senate when the Legislature recessed in September 1973
74. *Proof of Foreign Official Records*, 10 CAL. L. REVISION COMM'N REPORTS 1022 (1971) Enacted. Cal. Stats. 1970, Ch. 41

75. *Inverse Condemnation—Insurance Coverage*, 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971) Enacted. Cal. Stats. 1971, Ch. 140
76. *Discharge From Employment Because of Wage Garnishment*, 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971) Enacted. Cal. Stats. 1971, Ch. 1607
77. *Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 1 (1973) Enacted. Cal. Stats. 1973, Ch. 20
78. *Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301 (1973) Enacted. Cal. Stats. 1973, Ch. 526
79. *Unclaimed Property*, 11 CAL. L. REVISION COMM'N REPORTS 401 (1973) Introduced in 1973 as AB 727 which was pending in the Assembly when the Legislature recessed in September 1973
80. *Pleading* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973) Enacted. Cal. Stats. 1972, Ch. 73
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- Fictitious Business Names
- Representations as to the Credit of Third Persons and the Statute of Frauds
- The "Vesting" of Interests Under the Rule Against Perpetuities

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Tentative Recommendation Relating to:
Prejudgment Attachment (March 1973)

APPENDIX I

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 103

[Extract from Senate Journal for September 13, 1973 (1973 Regular Session).]

In order to indicate more fully its intent with respect to Assembly Bill 103, 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 Assembly Bill 103 as set out in *Recommendation of the California Law Revision Commission Relating to the Claim and Delivery Statute* (December 1972), 11 Cal. L. Revision Comm'n Reports 301 (1973), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bill 103.

The following revised comments also reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 103.

[Note: This report contained Comments to Sections 511.090, 511.100, 512.010, 512.020, 512.060, 512.110, 513.010, 513.020, 514.020, 514.030, 515.010, 515.020, and 515.030 of the Code of Civil Procedure. These Comments are set out following the appropriate sections of the bill as enacted in Appendix IV to this Report.]

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Evidence Code Section 999—The “Criminal
Conduct” Exception to the Physician-Patient
Privilege**

September 1973

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

(1147)

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

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September 20, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue to study the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed.

This recommendation is submitted as a result of this continuing review and is made in response to a suggestion in the vacated opinion in *Fontes v. Superior Court*, 104 Cal. Rptr. 845 (Ct. App. 1972), that the need for Section 999 of the Evidence Code be reevaluated. Section 999 provides that the physician-patient privilege is not applicable in a proceeding to recover damages on account of conduct of the patient which constitutes a crime. Although a rehearing was granted in *Fontes* and the case was ultimately decided on another ground, the vacated opinion is reprinted as an addendum to this recommendation because it contains a good discussion of the background, effect, and problems inherent in Section 999.

Respectfully submitted,
JOHN D. MILLER
Chairman

**RECOMMENDATION OF THE
CALIFORNIA
LAW REVISION COMMISSION**

relating to

**EVIDENCE CODE SECTION 999—THE
“CRIMINAL CONDUCT” EXCEPTION TO THE
PHYSICIAN-PATIENT PRIVILEGE**

Section 999 of the Evidence Code provides that the physician-patient privilege¹ is not applicable “in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.” The Commission recommends that this exception to the physician-patient privilege be repealed for the following reasons:

1. The exception involves the court in collateral inquiries which are not justified by its utility. It is easy to apply only where the patient has been tried and convicted of the crime.² Where the patient has been tried and acquitted of the crime, the court is faced in the civil case with the question whether the acquittal should be accepted as determinative against application of the exception.³ And in the great majority of cases in which the exception might be invoked—where there has been no criminal trial—the court must rule on whether the

¹ See EVID. CODE §§ 990–1007.

² Where the patient has been convicted of a crime punishable as a felony, the exception is unnecessary because the judgment of conviction is admissible under Evidence Code Section 1300 and is obviously of much greater evidentiary value than the confidential communication between the patient and his physician in establishing that the patient engaged in the criminal conduct. Section 1300 applies to any crime punishable as a felony. The fact that a misdemeanor sentence is imposed does not affect the admissibility of the judgment of a conviction under the section. As to the reasons for limiting Section 1300 to crimes punishable as a felony, thus excluding admission of evidence of a judgment of conviction of a misdemeanor, see discussion in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence: Article VIII. Hearsay Evidence*, 4 CAL. L. REVISION COMM'N REPORTS 301, 540 (1963).

³ Some of the issues involved in determining the effect of the judgment of acquittal are listed in note 5 *infra*.

exception applies⁴ and determine the extent of the evidentiary showing as to the criminality of the patient's conduct required to invoke the exception.⁵

2. No satisfactory justification has been given for the exception. See the discussion in *Fontes v. Superior Court*, set out in the addendum to this recommendation.

3. Repeal of the exception will rarely prevent access to medical information needed in a damage action since the court has the power under Code of Civil Procedure Section 2032 to order the defendant to submit to a physical, mental, or blood examination.⁶ Repeal of the exception will not make evidence unavailable in a criminal action since the privilege is not applicable in criminal proceedings.⁷ Likewise, the other limitations⁸ and exceptions⁹ to the physician-patient privilege will continue.

⁴ See EVID. CODE § 405 and Comment thereto. The procedure in ruling on the applicability of the privilege is explained in the Comment to Section 405 as follows:

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by such finding.

* * * * *

Under this code, as under existing law, the party claiming a privilege has the burden of proof on the preliminary facts. [Citations omitted.] The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an exception to the privilege is applicable. . . .

⁵ This raises difficult questions. Must the judge find the patient guilty beyond a reasonable doubt as in a regular criminal trial or only guilty by the civil trial standard of a preponderance of the evidence? Do all the protections afforded a defendant in a criminal trial apply in the judge's determination of the preliminary fact under Section 999? What is the meaning of the word "crime" in Section 999? Does "crime" include minor traffic violations? What relationship between the issue in the civil action for damages and the alleged criminal conduct is required to satisfy the exception? What use may be made of the evidence disclosed at the hearing on the claim of the privilege?

⁶ See *Harabedian v. Superior Court*, 195 Cal. App.2d 26, 15 Cal. Rptr. 420 (1961). See also CODE CIV. PROC. § 2034 (sanctions for failure to comply with order under Section 2032).

⁷ EVID. CODE § 998.

⁸ See definitions of "patient" (EVID. CODE § 991) and "confidential communication between patient and physician" (EVID. CODE § 992).

⁹ See EVID. CODE §§ 996 (so-called patient-litigant exception), 997 (services of physician sought or obtained to assist in crime or tort), 998 (criminal proceeding), 1000 (parties claiming through deceased patient), 1001 (breach of duty arising out of physician-patient relationship), 1002 (intention of deceased patient concerning writing affecting property interest), 1003 (validity of writing affecting property interest), 1004 (commitment or similar proceeding), 1005 (proceeding to establish patient's competence), 1006 (required report), 1007 (proceeding to determine right, license, or privilege). See also EVID. CODE § 912 (waiver of privilege).

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

An act to repeal Section 999 of the Evidence Code, relating to the physician-patient privilege.

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

SECTION 1. Section 999 of the Evidence Code is repealed.

~~999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.~~

Comment. Section 999 is repealed because it was burdensome and difficult to administer, unjustified, and unnecessary. See *Recommendation Relating to Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege*, 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973). Where medical information is needed, the patient may be ordered to submit to an examination under Code of Civil Procedure Section 2032. See also CODE CIV. PROC. § 2034 (sanctions for failure to comply with order under Section 2032).

**FONTES v. SUPERIOR COURT FOR COUNTY OF
LOS ANGELES**

Cite as, App., 104 Cal.Rptr. 845

Court of Appeal, Second District, Division 5.

Nov. 9, 1972.

Rehearing Granted Dec. 6, 1972.

KAUS, Presiding Justice.

Consolidated proceedings in mandate and prohibition to compel and prohibit discovery. Writs to issue.

These two consolidated writ matters arise out of a personal injury action resulting from an intersection accident on April 9, 1969. It is one of plaintiff Salas' theories that defendant Fontes, responding to an emergency, drove a fire truck through a red light without sounding a siren and at an excessive speed. Fontes and his employer, the County of Los Angeles, are defendants. At a deposition of Fontes it appeared that he had had a cataract operation on his right eye in 1968; thereafter he was required to wear a contact lens on that eye, together with his regular glasses. He was 51 years old at the time and approaching retirement.

Salas then became curious to find out whether Fontes' eyesight, even as corrected, was such that perhaps he should not have been driving an emergency vehicle. To satisfy himself on that point, he filed two motions in the respondent court: first, a motion to compel an ophthalmological as well as a general physical examination of Fontes; second a motion to permit the inspection of some of Fontes' past medical records.

Fontes resisted the motion for the two physical examinations, claiming that his physical condition was not in controversy. He pointed to the fact that counsel for Salas had been "furnished with the names of the places where information could be obtained concerning [Fontes'] eye examination." He also asserted that, in any event, two physical examinations were at least one too many.

The motion for inspection of documents was met by a claim of the benefit of the physician-patient privilege with respect to the information to which Salas' counsel had been referred in response to the other motion!

The respondent court denied the motion for physical examinations of Fontes, but granted the motion for an inspection of the medical records. No reasons for its rulings

were given. (See *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 384, 15 Cal.Rptr. 90, 364 P.2d 266.)

Each side then petitioned this court for appropriate relief. (*Burke v. Superior Court*, 71 Cal.2d 276, 277, fn. 1, 78 Cal.Rptr. 481, 455 P.2d 409.) In view of the interrelated and partly novel problems involved, we issued alternative writs and consolidated the proceedings for the purpose of this opinion.

Physical Examination of Fontes

The power of the court to order the physical examination of a defendant driver in an action for personal injuries was established in *Harabedian v. Superior Court*, 195 Cal.App.2d 26, 31-32, 15 Cal.Rptr. 420. Although, as the Supreme Court of the United States, in *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed.2d 152, said, *Harabedian* was then the only modern case in state courts which had permitted such an examination, its authority has never been questioned. In fact in *Schlagenhauf* the existence of such a power even in the federal courts was expressly recognized. (Cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479.) Indeed *Fontes* does not really question *Harabedian*, but points out that there the trial court had exercised its discretion in favor of allowing the examination, while here the discretion went the other way.

True enough, but discretion appears to have been partly abused here. *Salas* has made out a strong prima facie case for the granting of the motion for an eye examination. Its factual basis—the cataract operation—is in no way disputed. Ophthalmological examinations are neither painful nor embarrassing. About the only reason we can think of for not granting the motion is that the court may have thought that the inspection of the records might make it moot. If that was the implied basis for the ruling, it should have been made without prejudice.

On the other hand no basis for a general physical examination is shown and it was properly denied. The fact that a generous pension law permits *Fontes* to retire relatively early in life does not make him decrepit. (See generally, *Grossman & Van Alstyne, Discovery Practice*, (Vol. 14 of *Cal.Practice* §§ 745, 747).)

Inspection of Medical Records

As noted, the motion for an inspection of *Fontes*' medical records was met by an assertion of the physician-patient privilege. (*Evid.Code* § 900 et seq.)

The physician-patient privilege—hereafter sometimes simply “the privilege”—was unknown to the common law. The history of its grudging acceptance in the United States is outlined in 8 Wigmore, Evidence, section 2380–2380a (McNaughton rev. 1961) where the author finally concludes: “There is little to be said in favor of the privilege, and a great deal to be said against it.”¹ In many states the privilege still does not exist. (See 8 Wigmore, Evidence, § 2380, fn. 5.) Where it has been recognized, the accepted technique has been to qualify it with broad exceptions which cover just about every situation in which the evidence encompassed by the privilege might possibly become relevant. (See 6 Cal.L.Revision Comm. Reports, Recommendations, & Studies, (1964) p. 420, fn. 10.) In recognition of this fact of legal life, the framers of the “Proposed Rules of Evidence for the U. S. District Courts and Magistrates” rejected the privilege altogether. Their reasons are quoted in the footnote.²

Given the will-o'-the-wisp nature of the privilege and the relevance of Fontes' eyesight to the issues, it would be surprising if some statutory exception did not apply to the situation at bar. Salas recognizes that he cannot rely on the

¹ In this he echoes most legal writers. (Quick, Privileges Under the Uniform Rules of Evidence, 26 U.Cinc.L.Rev. 537, 547–548.) A physician-patient privilege was included in the Uniform Rules of Evidence only over the objection of the committee that drafted them. (Gard, The Uniform Rules of Evidence, 31 Tul.L.Rev. 19, 26.)

² “The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege. Among the exclusions from the statutory privilege, the following may be enumerated; communications not made for the purposes of diagnosis and treatment; commitment and restoration proceedings; issues as to wills or otherwise between parties claiming by succession from the patient; actions on insurance policies; required reports (venereal diseases, gunshot wounds, child abuse); communications in furtherance of crime or fraud; mental or physical condition put in issue by patient (personal injury cases); malpractice actions; and some or all criminal prosecutions. California, for example, excepts cases in which the patient puts his condition in issue, all criminal proceedings, will and similar contests, malpractice cases, and disciplinary proceedings, as well as certain other situations, thus leaving virtually nothing covered by the privilege. California Evidence Code §§ 990–1007. For other illustrative statutes see Ill.Rev.Stat.1967, c.51, § 5.1; N.Y.C.P.L.R. § 4504; N.C.Gen.Stat.1953, § 8–53. . . .” (Comm. on Rules of Practice & Proc. of the Jud. Conf. of the U.S., Prop. Rules of Ev. for the U.S. Dist. Cts. and Magistrates, p. 53 (1971) Rev.Draft West ed.). See also McCormick on Evidence, (1972), § 105, p. 227, fn. 95: “The California privilege, for example, is subject to 12 exceptions. . . . Not much except the smile is left. . . .”

It is generally believed that the psychiatrist-patient relationship is entitled to more protection than that between physician-patient. Thus the psychotherapist-patient privilege as enacted in California (Evid.Code § 1010 et seq.) is significantly broader than the physician-patient privilege. (See also In re Lifshutz, 2 Cal.3d 415, 437–439, 85 Cal.Rptr. 829, 467 P.2d 557.) A psychotherapist-patient privilege is also contained in rule 504 of the proposed federal rules.

so-called patient-litigant exception (Evid.Code § 996), since Fontes has never tendered an issue relevant to his physical condition: he merely meets one tendered by Salas. (*Carlton v. Superior Court*, 261 Cal.App.2d 282, 289–290, 67 Cal.Rptr. 568, 68 Cal.Rptr. 469.) Instead Salas argues that public policy requires that the privilege be deemed waived because Fontes was driving the fire truck as a public employee—a rather startling proposition, which we reject. He also relies on the dissent in *Carlton v. Superior Court*, *supra*, at pages 293–296, 67 Cal.Rptr. 568, 68 Cal.Rptr. 469.

Carlton presented a situation on all fours with this case, except that the alleged vehicular misconduct of the defendant was not just running a red light and speeding, but felony drunk driving. (Veh.Code § 23101.) For obvious reasons the plaintiff in the personal injury action wanted to see the records of the hospital where Carlton had been taken after the accident. The majority of the court of appeal prohibited the enforcement of superior court orders permitting such an inspection. It held that the privilege applied. The dissent pointed to the fact that in a criminal case against Carlton he could not have asserted the privilege, and argued that the victim of an intoxicated driver was entitled to just as much protection as the general public. (Evid.Code § 998.) The Supreme Court denied a hearing.

We do not feel bound to follow *Carlton* because neither the majority nor the dissent even discussed the applicability of section 999 of the Evidence Code,³ which reads as follows:

“There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.”

As this case reaches us it seems clear that plaintiff's cause of action is based, at least in part, on a claim that Fontes violated section 21453, subdivision (a) of the Vehicle Code, relating to the duty to stop when faced with a traffic control signal displaying a red light, and section 22350 of the Vehicle Code, the basic speed law. Whether or not the crimes referred to in section 999 include infractions, violations of sections 21453 and 22350 of the Vehicle Code are misdemeanors. (Veh.Code § 40000.15.)⁴

³ Hereafter, unless otherwise indicated, all statutory references are to the Evidence Code.

⁴ A study of the Uniform Rules of Evidence, which contain a provision similar to section 999 in rule 27 (3) (a), and of the history of the Evidence Code (6 Cal.L.Revision Comm., Reports, Recommendations, & Studies, (1964) pp. 410–411), leaves no doubt that the framers of the code, when referring to “a crime” in section 999, meant to include all crimes, at least as that term was then defined in the Penal Code. (Pen.Code § 16.)

We have—though, as will appear, with reluctance—come to the conclusion that on the record before us Salas has made out a colorable case for the application of section 999.⁵ At the same time we feel bound to explain why—given the legislative determination that the physician-patient relationship deserves protection, at least in some situations—section 999 vindicates no countervailing policy worthy of attention. Instead it opens the door to invasions of patients' privacy in private litigation not initiated by the patient or by anyone in his behalf.⁶ It invites extortionate settlements, made to avoid embarrassing disclosures. We earnestly suggest that the section be reevaluated.⁷

The black letter of section 999, a verbatim copy of the California Law Revision Commission's⁸ recommendation, has a traceable ancestry;⁹ however we know of no attempt to rationalize it until the commission drafted its comment to

⁵ As we shall point out (see fn. 17, post), this holding does not preclude the trial court from reconsidering its order permitting the inspection in the light of this opinion and additional facts and arguments which the parties may wish to submit after remand.

⁶ Although the privilege is not available in criminal proceedings (Evid.Code § 998), these are initiated by a public official who, presumably, has no motive except to secure a conviction. Further, even if they have relevant testimony to give, the physicians of criminal defendants are rarely called as witnesses. (Quick, *op. cit.*, fn. 1, *supra*, p. 549.) It is, of course, appreciated that bad faith attempts at discovery of medical facts may be thwarted by protective orders under section 2019(d) of the Code of Civil Procedure.

⁷ It may be thought that we are going to a great deal of trouble writing about an obscure section in the Evidence Code which has never been discussed in any published opinion. Sooner or later, however, it would be spotlighted somewhere and its potential for abuse realized by the unscrupulous.

⁸ Both the section and the comment were adopted by the Legislature precisely as recommended by the California Law Revision Commission—hereinafter "the commission."

⁹ Rule 223(2)(a) of the Model Code of Evidence (1942) contains an identical exception to the privilege where the patient's criminal conduct which is called into question in a civil action is felonious. The stated reason for the exception is that it "is dictated by the necessity of fullest disclosure in criminal prosecutions for serious offenses." That is no reason at all for the exception in civil cases. The complete inapplicability of the privilege in felony prosecutions was already provided for in rule 221. The Uniform Rules of Evidence have a similar exception in rule 27(3)(a). No reason is given in the comment, which merely explains that the privilege was first voted out altogether by the National Conference of Commissioners on Uniform State Laws, but was included three years later by a close vote. When Professor Chadbourn wrote his study of the Uniform Rules for the California Law Revision Commission, he said with respect to rule 27(3)(a): "Evidently, the thought here is that if the action were criminal there would be no privilege . . . and, by analogy, there should be no privilege where the action is civil." This may be a thought, but is not much of a reason. If certain policy considerations dictate the creation of the privilege, and other policies peculiar to criminal prosecutions point to its abandonment in criminal actions, it certainly does not follow that the latter policies suddenly apply to civil cases as well. Nevertheless, Professor Chadbourn recommended acceptance of the principle of rule 27(3)(a). (6 Cal.L.Revision Comm., *supra*, fn. 4, pp. 410-411.)

section 999. With all respect it appears to us that the comment vainly attempts to state a legal rationale for an inherited exception to the privilege which exception is, in truth, based on a fundamental lack of sympathy for the privilege itself.¹⁰ The comment reads as follows:

“Section 999 makes the physician-patient privilege inapplicable in civil actions to recover damages for any criminal conduct, whether or not felonious, on the part of the patient. Under Sections 1290–1292 (hearsay), the evidence admitted in the criminal trial would be admissible in a subsequent civil trial as former testimony. Thus, if the exception provided by Section 999 did not exist, the evidence subject to the privilege would be available in a civil trial only if a criminal trial were conducted first; it would not be available if the civil trial were conducted first. *The admissibility of evidence should not depend on the order in which civil and criminal matters are tried.* This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried.” (Emphasis added.)

We submit that an analysis of the comment merely exposes the lack of a sound basis for section 999.

1. The basic legal premise for the comment is, to put it gently, suspect. It is obviously the thought that if the criminal action is tried first, the privilege could not be claimed in a later civil action, since its very assertion would make the witness who testified to a confidential communication between doctor and patient in the criminal trial “unavailable” within the meaning of sections 1291 and 1292 of the Evidence Code (see Evid.Code § 240(a)(1)) and that, therefore, his former testimony at the criminal trial would be admissible in the later civil proceeding. The reason why the privilege, normally applicable in civil proceedings, could not be asserted is that former testimony admissible under sections 1291 and 1292 is not subject to objections “based on competency or privilege which did not exist at the time the former testimony was given.” (Evid.Code §§ 1291(b)(2), 1292(b).) That being so, the availability of the privilege should not depend on the sequence in which the interrelated civil and criminal trials take place.

¹⁰ This is not a matter of speculation. Professor Morgan, the “Reporter” of the Model Code writes that the privilege was included by the American Law Institute “contrary to the recommendation of the Reporter and his advisors and of the Council.” (Morgan, *Basic Problems of Evidence* (A.L.I.1957) p. 110.) The Uniform Rules’ comment on the privilege is actually an apology for its inclusion.

It is not, however, necessarily so. Unavailable at the later civil trial are objections based on competency and privilege which did not “exist” at the earlier criminal one, rather than objections which simply did not apply. What the framers of section 1291 and 1292 obviously had in mind was the witness who, between the two trials, has become a lunatic or married the party against whom he is called to testify. The problems arising from these intervening events truly did not “exist” at the first trial. This is not so with the privilege under consideration. It always “existed” as to a civil proceeding—it merely did not apply in the criminal case.

2. Even if the legal premise to the comment is sound—which we obviously doubt—the policy rationale for its application is mind-boggling. “The admissibility of evidence should not depend on the order in which civil and criminal cases are being tried.” Why not? While this declaration commands a nice egalitarian ring, what value does it vindicate? One may legitimately ask: is it more important not to discriminate between patients who are so unfortunate that their medical problems have become relevant in an earlier criminal case and those whom the vagaries of court calendaring thrust first into the civil spot light, than to protect the confidentiality of the doctor-patient relationship in a setting in which it otherwise deserves protection?¹¹ In this connection it should be pointed out that the affirmative answer implicit in the comment sacrifices the privilege for a principle which, as a practical matter, needs no protection. How often does it happen that a civil trial involving a defendant—not necessarily the patient—who is being sued for damages¹² on account of criminal conduct of the patient actually precedes a criminal trial in which the same patient’s confidential medical communications are in issue?

Every experienced trial lawyer knows the answer to that question.¹³ Further, in a large percentage of cases where someone is being sued on account of the patient’s criminal conduct, the patient will never have been charged with a crime;

¹¹ We repeat that we fully realize that it is not a judicial function to make the basic determination whether the physician-patient relationship deserves protection.

¹² Why must the defendant in the civil case be sued for damages? Why discriminate in favor of patients whose criminal conduct has caused someone to be sued to abate a nuisance or for declaratory relief? The strange result of this limitation is that the privilege is not available in an action such as the one at bar, but could be claimed in a life insurance company’s action against the patient to have it established that he cannot claim the benefit of a policy because he murdered the deceased! (Meyer v. Johnson, 115 Cal.App. 646, 2 P.2d 456.)

¹³ We note that section 1382 of the Penal Code counts in days what section 583 of the Code of Civil Procedure measures in months!

if charged, the chances that there has been an actual trial are statistically quite remote.¹⁴ Even more remote is the assumption that medical evidence, relevant in both trials, will actually have been offered in the criminal case.

It seems pretty clear, therefore, that the comment's rationale sacrifices the privilege for a pseudoegalitarian principle which even in theory seems to be based on values far less vital than those which underlie the privilege; in practice it needs no protection.

3. Section 999 goes further than is justified by the comment's rationale that the admissibility of evidence should not depend on the order in which the civil and criminal cases are tried. This rationale obviously assumes that privileged testimony, relevant in the civil trial, would also have been relevant in the criminal trial, if that had been tried first, so that it could be offered under sections 1291 or 1292. Yet it requires no demonstration that there is such a difference between the principles of culpability applicable in criminal, as opposed to civil, matters, that the assumption is not justified. Yet section 999 applies on its face, even if the evidence never would have been admissible in the criminal trial.

4. If it is supposed to effectuate the purpose of the comment, section 999 does not go far enough. Confidential medical communications of a particular patient can be relevant in interrelated criminal and civil cases whether or not the civil case involves a defendant who is being sued for damages on account of the patient's criminal misconduct. Yet section 999 only applies in this last situation. In all others—on the comment's interpretation of sections 1291 and 1292—the privilege disappears if the criminal case is tried first, but remains assertable if the sequence is reversed. Yet the principle that the admissibility of evidence should not depend on which case is tried first, is clearly violated.¹⁵

So much for the comment's justification for section 999. Yet we are still faced with the section itself. We can think of no reasonable interpretation which would make it inapplicable to civil automobile litigation, such as the case at bar.¹⁶

¹⁴ Parenthetically it may be observed that in the case at bar it would be very odd if Fontes has been charged criminally. That he went through a red light is admitted by Captain Schnakenberg, his superior, who also gave his deposition. The captain rode on Fontes' truck. The siren could be operated by Schnakenberg or Fontes. Schnakenberg testified that he himself was operating the siren at the critical time.

¹⁵ See E. Heafey, *California Trial Objections*, (CEB 1967), section 36.10. The nonapplicability of section 999 to civil actions for nonmonetary relief on account of the patient's criminal conduct, (see fn. 8, ante) is only the most obvious example of section 999's failure to put the comment's rationale into effect.

¹⁶ It could perhaps be argued that section 999 was intended to apply to civil litigation only in the very unusual situation where, but for the existence of a criminal statute,

At the very least, section 999 is highly relevant to a proper disposition of Salas' discovery motions.

Disposition

The writ prayed for by Salas will have to be granted with respect to the requested eye examination of Fontes. While everything we have said so far with respect to Fontes' petition concerning the inspection of his medical records indicates that we can find no basis for saying that the order allowing it was wrong, we think that because of the interrelated nature of the two proceedings, both writs should be granted. This will enable the parties to make any further showing with respect to both discovery motions which they may care to make in the light of this opinion. Further an affirmative reconsideration with respect to the eye examination may cause the court to feel that—at least for the time being—there is no “good cause” for the inspection of the medical records. Other considerations, not argued or brought to our attention, may enter the picture.¹⁷

Both writs to issue.

no case at all could be stated. (Cf. *Hudson v. Craft*, 33 Cal.2d 654, 660, 204 P.2d 1.) Such an interpretation of section 999 would probably remove most automobile accident litigation from its ambit: the reasonable man needs no statute to tell him that drunk driving is negligent. Further, most criminal statutes which give birth to civil causes of action otherwise unknown are in the commercial field; but crimes such as violations of section 28051 of the Vehicle Code, prohibiting the resetting of odometers, rarely raise questions of the used car dealer's health. (See *Laczko v. Jules Meyers, Inc.*, 276 Cal.App.2d 293, 80 Cal.Rptr. 798.) Since we must assume that it was intended to give section 999 some effect, we cannot make it disappear by confining it to cases where the very existence of a civil cause of action depends on a criminal statute. Further, the policy considerations underlying section 999—such as they are—are equally applicable whether the very cause of action is created by the criminal statute, or whether the violation of such a statute is merely one way of proving the civil case.

¹⁷ For example, we have intentionally said nothing concerning the strength of the showing necessary to establish that Salas is suing on account of Fontes' criminal conduct. Obviously the trial court cannot try the whole case on liability to determine that preliminary question. On the other hand Fontes may be able to make a respectable argument that something more than a mere assertion in a pleading is required. (See generally Evid.Code § 400 et seq.) This question is more complicated here than in the usual automobile accident case, because Fontes will assuredly try to make something of his immunity from criminal liability extended, under certain conditions, by section 21055 of the Vehicle Code. Except for the unmeritorious contention that Fontes waived his privilege just by driving a fire truck in the line of duty, no issues peculiar to Fontes' status as a public employee have been raised in this court. (See generally Veh.Code §§ 17004, 21055; *Torres v. City of Los Angeles*, 58 Cal.2d 35, 22 Cal.Rptr. 866, 372 P.2d 906; *Van Alstyne, California Government Tort Liability* (C.E.B.1964), §§ 2.41, 7.25(a), 7.30(a), 7.71.)

APPENDIX III
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Erroneously Ordered Disclosure
of Privileged Information

September 1973

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

September 20, 1973

To: THE HONORABLE RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the law relating to evidence. Pursuant to this directive, the Commission has undertaken a continuing study of the Evidence Code to determine whether any substantive, technical, or clarifying changes are needed.

This recommendation is submitted as a result of this continuing review. It deals with the effect of erroneously ordered disclosure of privileged information, a problem called to the Commission's attention by Judge Herbert S. Herlands of the Orange County Superior Court.

Respectfully submitted,
JOHN D. MILLER
Chairman



RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

ERRONEOUSLY ORDERED DISCLOSURE OF PRIVILEGED INFORMATION

Section 912 of the Evidence Code provides that the right to claim certain privileges¹ is waived "if any holder of the privilege, *without coercion*, has disclosed a significant part of the communication or has consented to such disclosure made by anyone."² Evidence Code Section 919 provides that evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if a "person authorized to claim the privilege claimed it but nevertheless disclosure *erroneously was required to be made . . .*"³

It seems clear from the quoted language that disclosure of privileged information is coerced where the privilege is properly claimed but disclosure is erroneously ordered by the trial judge or other presiding officer. The privilege, therefore, should not be deemed waived as to the information disclosed; and the privilege holder should not be required to refuse to disclose, face citation for contempt, and seek review of the erroneous order in order to preserve his privilege. Nevertheless, a pre-Evidence Code case, *Markwell v. Sykes*,⁴ contains language indicating that the privilege is waived unless the holder of the privilege refuses to comply with the erroneous order and seeks immediate appellate review of the order.⁵

¹ This portion of Section 912 applies to the lawyer-client privilege, the privilege for confidential marital communications, the physician-patient privilege, the psychotherapist-patient privilege, the privilege of penitent, and the privilege of clergyman.

² Emphasis added.

³ Emphasis added.

⁴ 173 Cal. App.2d 642, 649-650, 343 P.2d 769, 773-774 (1959).

⁵ In a letter to the Law Revision Commission, dated December 18, 1972, Judge Herbert S. Herlands of the Orange County Superior Court wrote:

It seems quite clear to me from the Code and Comments that an erroneous judicial order to disclose the privileged matter constitutes "coercion" and "requires" disclosure; that, contrary to *Markwell*, such a disclosure is not "public property", is not "irrevocable" and may be "recalled." It should not make any difference whether the coerced disclosure occurs in the "same" or a "prior" proceeding.

From the vantage point of "law of the case", as that doctrine is applied in California, a decision of one trial judge is not, in the absence of statutes to the contrary, binding on another judge of the same court at a later hearing. For example, the law and motion judge may overrule a general demurrer to a com-

The official Comments to the Evidence Code do not make any reference to the language found in the *Markwell* case. While the Commission considers this language to be dictum and that it does not establish the rule attributed to it, the Commission also believes that the law on this point should be certain and that any possibility that the omission to refer to the *Markwell* case in the Comments might be construed as preserving the rule attributed to that case should be avoided.⁶ Therefore, the Commission recommends that a new subdivision be added to Section 919 of the Evidence Code to provide in substance that, if an authorized person claimed the privilege (whether in the same or a prior proceeding) but nevertheless the trial judge or other presiding officer erroneously ordered that the privileged information be disclosed, neither the failure to refuse to disclose the information nor the failure to seek appellate review of the erroneous order indicates consent to the disclosure or constitutes a waiver of the privilege, and, under these circumstances, the disclosure is one made under coercion.⁷

plaint, but the trial judge may decide the complaint does not state a cause of action. What *Markwell* does (*sub silentio*) is create an exception to the foregoing general rule by making the order of the first judge binding on the litigants unless the party claiming the privilege obtains prompt appellate review of the erroneous order. Thus, *Markwell* seems to be in conflict not only with the Evidence Code but with the way in which California generally handles "law of the case."

⁶ This type of omission was deemed significant by the California Supreme Court in *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-159, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-654 (1971):

Each comment summarizes the effect of the section, advises whether it restates existing law or changes it, and cites the relevant statutes or judicial decisions in either event. In particular, in every instance in which a significant change in the law would be achieved by the code, the commission's comment spells out that effect in detail and cites the precise authorities which it repeals. [Footnote omitted.]

In sharp contrast, neither the commission's background study nor its comment to any section of the Evidence Code discloses an intent to alter or abolish the *Martin* rule. Indeed, the commission nowhere even mentions, let alone "carefully weighs," that rule. In view of the commission's painstaking analysis of many evidentiary rules that are of far less importance and notoriety than *Martin*, its deafening silence on this point cannot be deemed the product of oversight. It can only mean the commission did not intend—and the code therefore does not accomplish—a change in the *Martin* rule. [Footnote omitted.]

This recommendation is in no way intended to indicate concurrence by the Commission in the *Kaplan* statement quoted above. For further discussion, see 11 CAL. L. REVISION COMM'N REPORTS 1101, 1109 (1973).

⁷ This clarification represents sound public policy:

Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously

With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. [Citations omitted.] However, this exacts of the holder greater fortitude in the face of authority than

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

An act to amend Section 919 of the Evidence Code, relating to privileges.

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

SECTION 1. Section 919 of the Evidence Code is amended to read:

919. (a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

~~(a)~~ (1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

~~(b)~~ (2) The presiding officer did not exclude the privileged information as required by Section 916.

(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.

Comment. Subdivision (b) has been added to Section 919 to make clear that, after disclosure of privileged information has been erroneously required to be made by order of a trial court or other presiding officer, neither the failure to refuse to disclose nor the failure to challenge the order (by, for example, a petition for a writ of habeas corpus or other special writ or by an appeal from a contempt order) amounts to a waiver and the disclosure is one made under coercion for the purposes of

ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, *Evidence of Guilt* 66 (1959); McCormick § 127; 8 Wigmore § 2270 (McNaughton Rev. 1961), and the principle is equally sound when applied to other privileges. [Advisory Committee's Note to Rule 512 of the Federal Rules of Evidence.]

Sections 912(a) and 919(a)(1). See Section 905 (defining "presiding officer"). The addition of subdivision (b) will preclude any possibility of a contrary interpretation of Sections 912 and 919 based on the language found in *Markwell v. Sykes*, 173 Cal. App.2d 642, 649-650, 343 P.2d 769, 773-774 (1959). See *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973).

The phrase "whether in the same or a prior proceeding" has been included in subdivision (b) to avoid any implication that might be drawn from the original Law Revision Commission Comment to Section 919 that subdivision (a)(1) applies only where the privilege was claimed in a *prior* proceeding. The protection afforded by Section 919, of course, also applies where a claim of privilege is made at an earlier stage in the same proceeding and the presiding officer erroneously overruled the claim and ordered disclosure of the privileged information to be made.

APPENDIX IV

Assembly Bill No. 103

CHAPTER 526

Code of Civil Procedure

§§ 509–521 (repealed)

SECTION 1. Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure is repealed.

§§ 511.010–516.050 (new)

SEC. 2. Chapter 2 (commencing with Section 511.010) is added to Title 7 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CLAIM AND DELIVERY OF PERSONAL
PROPERTY

Article 1. Words and Phrases Defined

§ 511.010. Application of definitions

511.010. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this chapter.

Law Revision Commission Comment

Comment. Section 511.010 is a standard provision found in the definitional portion of recently enacted California codes. See, *e.g.*, EVID. CODE § 100; VEH. CODE § 100.

Additional definitions are found in the preliminary provisions of the Code of Civil Procedure. *E.g.*, Section 17 provides “the singular number includes the plural and the plural the singular.”

§ 511.020. Complaint

511.020. “Complaint” includes a cross-complaint.

§ 511.030. Defendant

511.030. "Defendant" includes a cross-defendant.

§ 511.040. Farm products

511.040. "Farm products" means crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, honey, milk, and eggs) while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is not inventory.

Law Revision Commission Comment

Comment. Section 511.040 is based on the definition of "farm products" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple sirup, honey, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory

Inventory is defined by Section 511.050. A definition of "equipment" is unnecessary. Farm products and inventory are defined only because the terms are used in connection with provisions which permit sale of such property in the ordinary course of business despite the issuance of a temporary restraining order. See Section 513.020. Equipment would not by its nature usually be sold in the ordinary course of business and is not, therefore, included in the exception permitting transfer.

§ 511.050. Inventory

511.050. "Inventory" means tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service.

Law Revision Commission Comment

Comment. Section 511.050 is based on the definition of “inventory” provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . “inventory” if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has leased or so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

The phrase “or if he has leased or so furnished them” has been deleted to make clear that inventory under this title is limited to property in the possession of the defendant. See also Comment to Section 511.040. The phrase “raw materials, work in process, or materials used or consumed in” the defendant’s business has also been deleted. This property would not be sold in the ordinary course of business anyway; hence, it does not need to be included in the exception permitting transfer. See Sections 511.040 and 513.020 and Comments thereto.

§ 511.060. Levying officer

511.060. “Levying officer” means the sheriff, constable, or marshal who is directed to execute a writ of possession issued under this chapter.

§ 511.070. Person

511.070. “Person” includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.

§ 511.080. Plaintiff

511.080. “Plaintiff” means a person who files a complaint or cross-complaint.

§ 511.090. Probable validity

511.090. A claim has “probable validity” where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

Legislative Committee Comment

Comment. Section 511.090 requires that, at the hearing on the application for a writ, the plaintiff must at least establish a prima facie case. If the defendant makes an appearance, the court must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.

§ 511.100. Public entity

511.100. "Public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Legislative Committee Comment

Comment. Section 511.100 adopts the language of the definition found in Section 811.2 of the Government Code.

Article 2. Writ of Possession**§ 512.010. Application for writ of possession**

512.010. (a) Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this chapter for a writ of possession by filing a written application for the writ with the court in which the action is brought.

(b) The application shall be executed under oath and shall include all of the following:

(1) A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument shall be attached.

(2) A showing that the property is wrongfully detained by the defendant, of the manner in which the defendant came into possession of the property, and, according to the best knowledge, information, and belief of the plaintiff, of the reason for the detention.

(3) A particular description of the property and a statement of its value.

(4) A statement, according to the best knowledge, information, and belief of the plaintiff, of the location of the property and, if the property, or some part of it, is within a private place which may have to be entered to take possession, a showing that there is probable cause to believe that such property is located there.

(5) A statement that the property has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure.

(c) The requirements of subdivision (b) may be satisfied by one or more affidavits filed with the application.

Legislative Committee Comment

Comment. Subdivision (a) of Section 512.010 is based on former Section 509. However, subdivision (a) enlarges slightly the period during which the plaintiff may claim the delivery of property and removes the ambiguous reference to "before trial." After judgment, the plaintiff will, if necessary, enforce his judgment by writ of execution. See Section 684.

Subdivision (b) of Section 512.010 requires the plaintiff to file a separate application for claim and delivery supported by affidavit or verified complaint. Under former law, this was not clear and it appeared that a claim could be made by verified complaint alone. See former Section 510.

Subdivision (b) is based on subdivision (a) of former Section 510. Paragraph (1) of subdivision (b) eliminates as a separate ground for repossession a showing of ownership. Compare paragraph (1) of subdivision (a) of Section 510. A plaintiff could be an "owner" in the broad sense of the word and not be entitled to possession. For example, a lessor of personal property where there has been no default by the lessee could be considered the "owner" of the property but not be entitled to possession. Paragraph (1) focuses simply on the ultimate issue of the right to possession.

Paragraph (2) of subdivision (b) continues without substantive change the provisions of paragraph (2) of subdivision (a) of former Section 510.

Paragraphs (3) and (4) of subdivision (b) are based on the provisions of paragraph (3) of subdivision (a) of former Section 510. Paragraph (4), however, adds the requirement that, where

the property is in a "private place," the plaintiff establish that there is probable cause to believe that the property is located there. See Section 512.060(b). The term "private place" is that used by the California Supreme Court in *Blair v. Pitchess*, 5 Cal. 3d 258, 270-276, 486 P.2d 1242, 1250-1255, 96 Cal. Rptr. 42, 50-55 (1971). Such showing may be based on information and belief, but the court must be presented with facts sufficient to show that the information and the informant are credible and reliable. See *Aguilar v. Texas*, 378 U.S. 108 (1964). See also Comment to Section 516.030.

Paragraph (5) of subdivision (b) continues without substantive change the provisions of paragraph (4) of subdivision (a) of former Section 510.

Subdivision (c) makes clear that the application required by this section may be supported by a separate affidavit or affidavits or by a verified complaint; this is not required, however, if the application itself satisfies the requirements of this chapter. For the general requirements of an affidavit, see Section 516.030.

For additional requirements where the plaintiff also seeks a temporary restraining order in connection with the application for writ of possession, see Section 513.010.

§ 512.020. Hearing required for issuance of writ; ex parte issuance in specified circumstances

512.020. (a) Except as otherwise provided in this section, no writ shall be issued under this chapter except after a hearing on a noticed motion.

(b) A writ of possession may be issued ex parte pursuant to this subdivision if probable cause appears that any of the following conditions exists:

(1) The defendant gained possession of the property by feloniously taking the property from the plaintiff. This subdivision shall not apply where the defendant has fraudulently appropriated property entrusted to him or obtained possession by false or fraudulent representation or pretense or by embezzlement.

(2) The property is a credit card.

(3) The defendant acquired possession of the property in the ordinary course of his trade or business for commercial purposes and:

(i) The property is not necessary for the support of the defendant or his family; and

(ii) There is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the state or will become substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner; and

(iii) The ex parte issuance of a writ of possession is necessary to protect the property.

The plaintiff's application for the writ shall satisfy the requirements of Section 512.010 and, in addition, shall include a showing that the conditions required by this subdivision exist. A writ of possession may issue if the court finds that the conditions required by this subdivision exist and the requirements of Section 512.060 are met. Where a writ of possession has been issued pursuant to this subdivision, a copy of the summons and complaint, a copy of the application and any affidavit in support thereof, and a notice which satisfies the requirements of subdivisions (c) and (d) of Section 512.040 and informs the defendant of his rights under this subdivision shall be served upon the defendant and any other person required by Section 514.020 to be served with a writ of possession. Any defendant whose property has been taken pursuant to a writ of possession issued under this subdivision may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released. Such application shall be made by noticed motion, and the provisions of Section 512.050 shall apply. Pending the hearing on the defendant's application, the court may order that delivery pursuant to Section 514.030 of any property previously levied upon be stayed. If the court determines that the plaintiff is not entitled to a writ of possession, the court shall quash the writ of possession and order the release and redelivery of any property previously levied upon, and shall award the defendant any damages sustained by him which were proximately caused by the levy of the writ of possession and the loss of possession of the property pursuant to such levy.

Legislative Committee Comment

Comment. Subdivision (a) of Section 512.020 and Sections 512.030 and 512.040 replace subdivision (b) of former Section 510. Section 510 required an initial judicial review of the plaintiff's application for a writ of possession followed by the issuance of an order directed to the defendant to show cause why a writ should not issue. This procedure was both inefficient and unnecessary and has been replaced here by a noticed motion procedure in most situations.

Subdivision (b) of Section 512.020 provides an ex parte issuance procedure available only in certain circumstances. Compare former Section 510(c). Subdivision (b) authorizes the court to issue a writ ex parte where the property claimed (1) has been stolen from the plaintiff and is still in the possession of the thief, (2) is a credit card, or (3) is commercial property which is not necessary for the support of the defendant or his family and which is likely to be unavailable for levy if the matter is heard upon noticed motion. Paragraph (1) does not apply where the property is in the possession of a person who did not take the property from the plaintiff, nor does it apply where possession was obtained by fraud, trick or device, or similar means. These limitations do not completely deprive the plaintiff of a remedy; rather, they compel the use of either the noticed motion procedure provided by this chapter or criminal process. See PENAL CODE §§ 1407-1413, 1523-1542. See also *Recommendation Relating to the Claim and Delivery Statute*, 11 CAL. L. REVISION COMM'N REPORTS 301, 317 n.45 (1973).

Subdivision (b) outlines the procedures for the ex parte issuance of a writ and the review of such issuance. The plaintiff's application is basically the same as that required under the noticed motion procedure but must also include a showing of the special circumstances that permit ex parte issuance. The plaintiff must, of course, show the probable validity of his claim and probable cause for the entry and taking of property from a private place. See Section 512.010 and the Comment thereto. The court may, in its discretion, issue a writ ex parte if it finds that the special circumstances required by subdivision (b) exist, that the plaintiff has established probable validity, and that the plaintiff has filed the proper undertaking. See Section 512.060 and the Comment thereto. The writ, a copy of the summons and complaint, a copy of the application for the writ and affidavits in support thereof, and a notice informing the defendant of his rights must be served on the defendant and any other person required to be served by Section 514.020. Following issuance,

the defendant may apply by noticed motion for an order quashing the writ. The rules governing the time for service and the manner of service are the same as for motions generally. See Comment to Section 512.030. A special provision for an order shortening time is unnecessary since the provisions of Section 1005 authorizing such an order apply. Contrast former Section 510(c). Of course, nothing in subdivision (b) precludes the defendant from obtaining the release of the property by posting the undertaking required by Section 515.020. If the writ is quashed, Section 512.020 requires that the defendant be awarded any damages sustained by him which were proximately caused by the levy. This right does not depend upon whether the defendant ultimately prevails in the action.

§ 512.030. Notice to defendant

512.030. Prior to the hearing required by subdivision (a) of Section 512.020, the defendant shall be served with all of the following:

- (a) A copy of the summons and complaint.
- (b) A Notice of Application and Hearing.
- (c) A copy of the application and any affidavit in support thereof.

Law Revision Commission Comment

Comment. Section 512.030 replaces a portion of former Section 510. The rules governing the time for service and the manner of service are the same as for motions generally. See Chapters 4 (commencing with Section 1003) and 5 (commencing with Section 1010) of Title 14 of this part. The contents of the Notice of Application and Hearing are prescribed by Section 512.040.

§ 512.040. Contents of Notice of Application and Hearing

512.040. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) A hearing will be held at a place and at a time, to be specified in the notice, on plaintiff's application for a writ of possession.

(b) The writ will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The

hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision at the hearing on the application for the writ.

(c) If the defendant desires to oppose the issuance of the writ, he shall file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or an undertaking to stay the delivery of the property in accordance with Section 515.020.

(d) The notice shall contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing."

Law Revision Commission Comment

Comment. Section 512.040 is based on a portion of subdivision (b) of former Section 510. Under the former procedure, the order to show cause informed the defendant of the time and place of the hearing and the defendant's right to appear and oppose the issuance of the writ or to file an undertaking. Section 512.040 requires the notice to do these things as well as inform the defendant of the purpose of the hearing and the need for prompt action in response to the notice.

§ 512.050. Service of affidavits prior to hearing

512.050. Each party shall file with the court and serve upon the other party within the time prescribed by rule any affidavits and points and authorities intended to be relied upon at the hearing. At the hearing, the court shall make its determinations upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider additional evidence and authority produced at the hearing or may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Law Revision Commission Comment

Comment. Section 512.050 is new. Subdivision (b) of former Section 510 apparently permitted the defendant to delay indicating his opposition to issuance of a writ until his appearance at the hearing. Section 512.050 is intended to encourage an earlier framing of the parties' contentions and an exchange of support therefor. The time limit for filing is left to rules adopted by the Judicial Council, but the trial court may grant relief from such limits upon a showing of good cause.

§ 512.060. Issuance of the writ of possession

512.060. (a) At the hearing, a writ of possession shall issue if both of the following are found:

(1) The plaintiff has established the probable validity of his claim to possession of the property.

(2) The plaintiff has provided an undertaking as required by Section 515.010.

(b) No writ directing the levying officer to enter a private place to take possession of any property shall be issued unless the plaintiff has established that there is probable cause to believe that such property is located there.

Legislative Committee Comment

Comment. Section 512.060 is based on subdivision (e) of former Section 510 and former Section 511. The term "probable validity" used in paragraph (1) of subdivision (a) is defined in Section 511.090. The burden of proof rests on the plaintiff to establish the probable validity of his claim. He will, of course, fail to satisfy this requirement if the defendant shows that there is a reasonable probability that he can assert a successful defense to the action. The provisions of this title are basically procedural. No attempt has been made to state the substantive law governing the circumstances under which a person is entitled to possession of personal property.

Paragraph (2) of subdivision (a) simply requires the plaintiff to file an undertaking as provided by Section 515.010. The detail provided by subdivision (b) of former Section 511 is now provided by Section 515.010.

Subdivision (b) makes clear that no writ permitting a levying officer to enter a private place may be issued unless there is probable cause to believe that the property claimed is located there. See also Comment to Section 512.010(b) (4).

§ 512.070. Issuance of order directing transfer

512.070. If a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. Such order shall contain a notice to the defendant or the party in possession of such property, that failure to turn over possession of such property to plaintiff may subject the defendant, or person in possession of such property, to being held in contempt of court or arrest.

Law Revision Commission Comment

Comment. Section 512.070 is new. It makes clear that the court has power to issue a “turnover” order directing the defendant to cooperate in transferring possession. Such order is not issued in lieu of a writ but rather in addition to or in aid of a writ, permitting the plaintiff to select a more informal and less expensive means of securing possession.

§ 512.080. Writ of possession

512.080. The writ of possession shall meet all of the following requirements:

(a) Be directed to the levying officer within whose jurisdiction the property is located.

(b) Describe the specific property to be seized.

(c) Specify any private place that may be entered to take possession of the property or some part of it.

(d) Direct the levying officer to levy on the property pursuant to Section 514.010 if found and to retain it in his custody until released or sold pursuant to Section 514.030.

(e) Inform the defendant that he has the right to except to the sureties upon the plaintiff's undertaking, a copy of which shall be attached to the writ, or to obtain redelivery of the property by filing an undertaking as prescribed by Section 515.020.

Law Revision Commission Comment

Comment. Section 512.080 is substantively the same as subdivision (a) of former Section 512.

§ 512.090. Endorsement of writ

512.090. (a) The plaintiff may apply ex parte in writing to the court in which the action was brought for an endorsement on the writ directing the levying officer to seize the property at a private place not specified in the writ.

(b) The court shall make the endorsement if the plaintiff establishes by affidavit that there is probable cause to believe that the property or some part of it may be found at that place.

Law Revision Commission Comment

Comment. Section 512.090 is based on subdivision (b) of former Section 512.

§ 512.100. Defendant's defense to action on claim not affected

512.100. Neither the failure of the defendant to oppose the issuance of a writ of possession under this chapter nor his failure to rebut any evidence produced by the plaintiff in connection with proceedings under this chapter shall constitute a waiver of any defense to plaintiff's claim in the action or any other action or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action.

§ 512.110. Effect of determinations of court

512.110. The determinations of the court under this chapter shall have no effect on the determination of any issues in the action other than the issues relevant to proceedings under this chapter, nor shall they affect the rights of any party in any other action arising out of the same claim. The determinations of the court under this chapter shall not be given in evidence nor referred to in the trial of any such action.

Legislative Committee Comment

Comment. Section 512.110 makes clear that the determinations of the court under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant nor do they affect

the rights of any party in any other action. Section 512.110 does not, however, make inadmissible any affidavit filed under this chapter. The admissibility of such an affidavit is determined by the rules of evidence otherwise applicable.

§ 512.120. Liability where plaintiff fails to recover judgment

512.120. If the plaintiff fails to recover judgment in the action, he shall redeliver the property to the defendant and be liable for all damages sustained by the defendant which are proximately caused by operation of the temporary restraining order and preliminary injunction, if any, the levy of the writ of possession, and the loss of possession of the property pursuant to levy of the writ of possession or in compliance with an order issued under Section 512.070.

Article 3. Temporary Restraining Order

§ 513.010. Issuance of temporary restraining order

513.010. (a) Except as otherwise provided by this chapter, the provisions of Chapter 3 (commencing with Section 525) of this title relating to the issuance of a temporary restraining order apply. At or after the time he files his application for writ of possession, the plaintiff may apply for a temporary restraining order by setting forth in the application a statement of grounds justifying the issuance of such order.

(b) A temporary restraining order may issue ex parte if all of the following are found:

(1) The plaintiff has established the probable validity of his claim to possession of the property.

(2) The plaintiff has provided an undertaking as required by Section 515.010.

(3) The plaintiff has established the probability that there is an immediate danger that the property claimed may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value.

(c) If at the hearing on issuance of the writ of possession the court determines that the plaintiff is not entitled to a writ of possession, the court shall dissolve any temporary restraining order; otherwise, the court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession.

Legislative Committee Comment

Comment. Section 513.010 replaces subdivisions (c) and (d) of former Section 510. This section provides an alternative to subdivision (b) of Section 512.020 which permits the seizure of property upon an ex parte application in certain circumstances. See Section 512.020 and Comment thereto. The order directed to the defendant, prohibits him from taking action with respect to the property which would be detrimental to the plaintiff. The grounds for issuance of a temporary restraining order stated in subdivision (b) are substantively similar to those provided in paragraph (3) of subdivision (c) of former Section 510.

Except where a specific provision of this chapter applies (*e.g.*, Sections 515.010 (undertaking required) and 516.030 (form of affidavits)), the provisions of Chapter 3 (commencing with Section 525) relating to injunctive relief generally are applicable. Hence, the defendant may obtain relief from a temporary restraining order pursuant to Section 532. Moreover, although neither this section nor this chapter provides for injunctive relief generally, the claim and delivery remedy is not an exclusive one, and the plaintiff may apply for injunctive relief under the other provisions of this code. The denial of a writ of possession, where denial was due to a close factual case on liability, should not prejudice such an application where an injunction will provide relief less drastic than repossession. See Section 516.050.

§ 513.020. Provisions of temporary restraining order

513.020. In the discretion of the court, the temporary restraining order may prohibit the defendant from doing any or all of the following:

(a) Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering, the property. If the property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from transferring the

property in the ordinary course of business, but the order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

(b) Concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.

(c) Impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner.

Legislative Committee Comment

Comment. Section 513.020 provides specificity with respect to the nature of the temporary restraining order authorized by Section 513.010. Compare subdivision (d) of former Section 510. The court in its discretion, may generally prohibit transfers of the property in question. This should not, however, cause interference with a manufacturer's processing of raw materials or work in process. Moreover, where the property is farm goods or inventory (defined in Sections 511.040 and 511.050, respectively), subdivision (a) requires that such property be permitted to be sold in the ordinary course of business, subject to limitations on the disposition of the proceeds from sale.

The rare case in which the property will perish or deteriorate, for example, if not refrigerated or, in the case of animals, if not cared for properly, is taken care of in subdivision (c) under which the defendant can be ordered to take whatever precautions are necessary to preserve the property until the time of the hearing.

Article 4. Levy and Custody

§ 514.010. Levy

514.010. (a) Except as otherwise provided in this section, upon receipt of the writ of possession the levying officer shall search for and take custody of the specified property, if it be in the possession of the defendant or his agent, either by removing the property to a place of safekeeping or by installing a keeper.

(b) If the specified property is used as a dwelling, such as a mobilehome or boat, levy shall be made by placing a keeper in charge of the property for two days, at the plaintiff's expense, after which period the levying officer

shall remove the occupants and any contents not specified in the writ and shall take exclusive possession of the property.

(c) If the specified property or any part of it is in a private place, the levying officer shall at the time he demands possession of the property announce his identity, purpose, and authority. If the property is not voluntarily delivered, the levying officer may cause any building or enclosure where the property may be located to be broken open in such a manner as he reasonably believes will cause the least damage and may call upon the power of the county to aid and protect him, but, if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property and shall promptly make a return to the court from which the writ issued setting forth the reasons for his belief that the risk exists. In such case, the court shall make such orders as may be appropriate.

(d) Nothing in this section authorizes the levying officer to enter or search any private place not specified in the writ of possession or other order of the court.

Law Revision Commission Comment

Comment. Section 514.010 is substantively the same as the first two paragraphs of former Section 513.

§ 514.020. Service of writ of possession

514.020. (a) At the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession with a copy of the plaintiff's undertaking attached.

(b) If no one is in possession of the property at the time of levy, the levying officer shall subsequently serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part. If the defendant has not appeared in the action, service shall be accomplished in the manner provided for the service

of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part.

Legislative Committee Comment

Comment. Section 514.020 is similar in effect to the last paragraph of former Section 513. Section 514.020 does not require a second service of the summons and complaint and application for writ of possession. That has presumably been accomplished pursuant to Section 512.030. See also Section 512.020 (service of summons and complaint required where writ issued ex parte). Moreover, Section 514.020 requires service of the writ of possession on the defendant only if he is the person in possession or no one is in possession of the property at the time of levy. Service is in no event a condition to levy. Levy is accomplished by taking the property into custody.

§ 514.030. Custody of levying officer

514.030. (a) After the levying officer takes possession pursuant to a writ of possession, he shall keep the property in a secure place. Except as otherwise provided by Sections 512.020 and 514.050:

(1) If notice of the filing of an undertaking for redelivery or notice of exception to the plaintiff's sureties is not received by the levying officer within 10 days after levy of the writ of possession, the levying officer shall deliver the property to plaintiff, upon receiving his fees for taking and necessary expenses for keeping the property.

(2) If notice of the filing of an undertaking for redelivery is received by the levying officer within 10 days after levy of the writ of possession and defendant's sureties are not excepted to, the levying officer shall redeliver the property to defendant upon expiration of the time to so except, upon receiving his fees for taking and necessary expenses for keeping the property not already paid or advanced by the plaintiff.

(3) If notice of exception to the plaintiff's sureties or notice of the filing of an undertaking for redelivery is received within 10 days after levy of the writ of possession and defendant's sureties are excepted to, the levying officer shall not deliver or redeliver the property until the time provided in Section 515.030.

(b) Notwithstanding subdivision (a), where not otherwise provided by contract and where an undertaking for redelivery has not been filed, upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interests of the parties will be best served thereby, the court may order that the property be sold and the proceeds deposited in the court to abide the judgment in the action.

Legislative Committee Comment

Comment. Subdivision (a) of Section 514.030 is based on former Section 516. The former reference to an order staying delivery is now provided in subdivision (b) of Section 512.020.

Subdivision (b) is new. Traditionally, the plaintiff, upon gaining possession of the property, has been required to keep and preserve it so that it may be returned to the defendant if the latter ultimately prevails. See 2 B. WITKIN, CALIFORNIA PROCEDURE *Provisional Remedies* § 34 at 1486–1487 (1970). It is apparent that in some circumstances, this would be undesirable. Apparently the former law relied on the parties to agree voluntarily to a disposition that would be to their mutual benefit. Subdivision (b) also permits the parties to provide by contract for an appropriate disposition but, where not otherwise provided by contract and where the defendant has not filed a redelivery bond, subdivision (b) authorizes either party to apply for an order requiring the sale of property where necessary to preserve its value pending the final outcome of the case.

§ 514.040. Return

514.040. The levying officer shall return the writ of possession, with his proceedings thereon, to the court in which the action is pending within 30 days after levy but in no event more than 60 days after the writ is issued.

Law Revision Commission Comment

Comment. Section 514.040 is substantively similar to former Section 518. Section 514.040 has, however, been revised to provide a date certain for the return of all writs—even those under which the sheriff has not been able to levy.

§ 514.050. Third-party claims

514.050. Where the property taken is claimed by one other than the defendant or his agent, the rules and proceedings applicable in cases of third-party claims after levy under execution shall apply.

Law Revision Commission Comment

Comment. Section 514.050 is substantively identical to former Section 517.

Article 5. Undertakings**§ 515.010. Plaintiff's undertaking**

515.010. The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court a written undertaking. The undertaking shall provide that the sureties are bound to the defendant in the amount of the undertaking for the return of the property to the defendant, if return thereof be ordered, and for the payment to him of any sum he may recover against plaintiff. The undertaking shall be executed by two or more sufficient sureties in an amount not less than twice the value of the property as determined by the court.

Legislative Committee Comment

Comment. Section 515.010 is substantively similar to subdivision (b) of former Section 511. Section 515.010 requires the plaintiff to file an undertaking to secure a temporary restraining order as well as a writ of possession. See Comment to Section 513.010.

§ 515.020. Defendant's undertaking

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought a written undertaking executed by two or more sufficient sureties in an amount equal to either the amount of the plaintiff's undertaking required by Section 515.010 or, if there has been no judicial determination, the value of the

property stated in the plaintiff's application for a writ of possession. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property, not exceeding the amount of the undertaking. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the undertaking is filed.

(c) The defendant's undertaking shall state the address to which a copy of the notice of exception to sureties may be sent.

(d) If an undertaking for redelivery is filed and defendant's sureties are not excepted to, the levying officer shall deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such property to the defendant. If an undertaking for redelivery is filed and defendant's sureties are excepted to, the provisions of Section 515.030 shall apply.

Legislative Committee Comment

Comment. Section 515.020 is substantively similar to former Section 514. However, Section 515.020 eliminates the time limit for the filing of an undertaking and permits such filing at any time. Accordingly, this section also provides for redelivery by the plaintiff where he has previously been given possession. Subdivision (d). See also Section 515.030(e),(f).

§ 515.030. Exception to sureties

515.030. (a) The defendant may except to the plaintiff's sureties not later than 10 days after levy of the writ of possession by filing with the court in which the action was brought a notice of exception to sureties and

mailing a copy of the notice to the levying officer and to the plaintiff. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed.

(b) The plaintiff may except to the defendant's sureties not later than 10 days after the defendant's undertaking is filed by filing with the court in which the action was brought a notice of exception to sureties and mailing a copy of the notice to the levying officer and to the defendant at the address set out in his undertaking. An affidavit stating that such copies have been mailed shall be filed with the court at the time the notice is filed.

(c) If the plaintiff or the defendant does not except to the sureties of the other as provided in this section, he waives all objection to them.

(d) When excepted to, the sureties shall justify in the manner provided in Chapter 7 (commencing with Section 830) of Title 10 of this part before the court in which the action was brought at a time specified by the excepting party.

(e) If the plaintiff's sureties, or others in their place, fail to justify at the time and place appointed or do not qualify, the court shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the plaintiff's sureties do qualify, the court shall order the levying officer to deliver the property to the plaintiff.

(f) If the defendant's sureties, or others in their place, fail to justify at the time and place appointed or do not qualify, the court shall order the levying officer to deliver the property to the plaintiff, or, if the plaintiff has previously been given possession of the property, he shall retain such possession. If the defendant's sureties do qualify, the court shall order the levying officer or the plaintiff to deliver the property to the defendant.

Legislative Committee Comment

Comment. Section 515.030 is substantively similar to former Section 515. Section 515.030 makes minor changes in the time limits formerly provided and incorporates the procedures for the justification of sureties from Sections 830 through 835 (actions for libel and slander) of this code. These provisions are comparable to those relating to bail on arrest; the latter have been recommended for repeal. See *Recommendation and Study Relating to Civil Arrest*, 11 CAL. L. REVISION COMM'N REPORTS 1 (1973). Because the time limit for the defendant's filing of a redelivery bond has been eliminated (see Section 515.020(b)), subdivision (f) provides for redelivery by the plaintiff where he has previously been given possession of the property. Similarly, subdivision (e) provides for redelivery where notice of exception to the plaintiff's sureties is received after the levying officer makes delivery to the plaintiff. See Section 514.030(a)(1).

Article 6. Miscellaneous Provisions

§ 516.010. Rules for practice and procedure

516.010. The Judicial Council may provide by rule for the practice and procedure in proceedings under this chapter.

§ 516.020. Forms

516.020. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this chapter.

Law Revision Commission Comment

Comment. Section 516.020 requires the Judicial Council to prescribe the forms necessary for the purposes of this chapter. The Judicial Council has authority to adopt and revise forms as necessary but must act in a manner consistent with the provisions of this chapter.

§ 516.030. General requirements for affidavits

516.030. The facts stated in each affidavit filed pursuant to this chapter shall be set forth with particularity. Except where matters are specifically permitted by this chapter to be shown by information and

belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts. A verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an ordinary affidavit.

Law Revision Commission Comment

Comment. Section 516.030 provides standards for affidavits filed pursuant to this chapter. These standards are comparable to but not as restrictive as those provided for affidavits filed in support of or in opposition to a motion for summary judgment. Compare Section 437c. A verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an ordinary affidavit. It should be noted that under Section 512.010 certain matters may be shown to the best of the plaintiff's knowledge, information, and belief. In such situations, the facts stated in the affidavit will be the facts on which his belief is based and may include the nature of his information and the reliability of his informant.

§ 516.040. Judicial duties prescribed are "subordinate judicial duties"

516.040. The judicial duties to be performed under this chapter are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.

§ 516.050. Injunctive relief not precluded.

516.050. Nothing in this chapter shall preclude the granting of relief pursuant to Chapter 3 (commencing with Section 525) of this title.

Severability Clause

SEC. 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without

the invalid provision or application, and to this end the provisions of this act are severable.

Operative Date

SEC. 4. (a) This act becomes operative on July 1, 1974.

(b) Except as otherwise provided by rules adopted by the Judicial Council effective on or after July 1, 1974, this act shall not apply to any writ of possession issued prior to July 1, 1974, and such writs of possession shall continue to be governed in all respects by the provisions of Chapter 2 (commencing with Section 509) of Title 7 of Part 2 of the Code of Civil Procedure in effect on June 30, 1974.

(1196-1200 blank)