

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report



December 1976

CALIFORNIA LAW REVISION COMMISSION

Stanford Law School

Stanford, California 94305

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

This pamphlet begins on page 1601. 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 13 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1977.

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SUMMARY OF WORK OF COMMISSION

At the 1976 session, one resolution and 12 bills were introduced upon recommendation of the Commission. The resolution was adopted; nine of the bills were enacted; two bills were held in committee; one bill was vetoed by the Governor. The nine bills enacted in 1976 (which added, amended, or repealed approximately 235 sections) dealt with a wide variety of subjects: operative date of eminent domain law, partition of real and personal property, modification of contracts, relocation assistance, transfer of out-of-state trusts to California, turnover orders under the claim and delivery statute, prejudgment attachment, private condemnation for utility easements, and service of process on unincorporated associations.

The Commission plans to submit five recommendations to the 1977 session. The major recommendation proposes enactment of a new comprehensive nonprofit corporation law. Other recommendations deal with wage garnishment, sister state money judgments, damages in an action for breach of a lease, and liquidated damages.

During 1977, the Commission plans to devote the major portion of its time and resources to the study of creditors' remedies; inverse condemnation; evidence; and child custody, adoption, guardianship, and related matters. Other topics may be considered if time permits.

During 1976, the Commission also reviewed decisions of the Supreme Court of the United States and the Supreme Court of California, as required by Section 10331 of the Government Code, to determine whether any statutes of this state have been held to be unconstitutional or to have been impliedly repealed.

During 1976, the Commission held 10 separate meetings, consisting of 27 days of working sessions.

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
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Ex Officio

December 1, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
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 1976.

I am pleased to report that nine bills and one concurrent resolutions were enacted to implement the Commission's recommendations during the 1976 legislative session.

I would also like to give special recognition to Assemblyman Alister McAlister who carried 11 of the bills recommended by the Commission, to Assemblyman John T. Knox who carried one of the bills recommended by the Commission, and to Senator Robert B. Presley and Senator Alfred H. Song who managed and explained bills recommended by the Commission on the Senate floor.

Respectfully submitted,
JOHN N. McLAURIN
Chairman

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ANNUAL REPORT FOR THE YEAR 1976

INTRODUCTION

The primary objective of the California Law Revision Commission is to study the statutory and decisional law of this state to discover defects and anachronisms and to recommend legislation to make needed reforms.

The Commission consists of a Member of the Senate appointed by the Committee on Rules, a Member of the Assembly appointed by the Speaker, and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel is an ex officio nonvoting member of the Commission.

The Commission assists the Legislature in keeping the law up to date by:

- (1) Intensively studying complex and controversial subjects;
- (2) Identifying major policy questions for legislative attention;
- (3) Gathering the views of interested persons and organizations; and
- (4) Drafting recommended legislation for legislative consideration.

The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems in preparing background studies, working out intricate legal problems, and drafting needed legislation. The Commission thus enables the Legislature to accomplish needed reforms that otherwise might not be made because of the heavy demands on legislative time. In some cases, the Commission's report demonstrates that no new legislation on a particular topic is needed, thus relieving the Legislature of the need to study the topic.

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has a calendar of 23 topics, including six new topics added by the Legislature at the 1975 session and one new topic added by the Legislature at the 1976 session.¹ The Commission recommends that one topic be removed from its calendar.²

Commission recommendations have resulted in the enactment of legislation affecting 4,294 sections of the California statutes: 1,742 sections have been added, 910 sections amended, and 1,642 sections repealed. Of the 102 Commission recommendations submitted to the Legislature, 89 (87%) were enacted into law either in whole or in substantial part.

¹ See listing of topics under "Calendar of Topics for Study" *infra*.

² See discussion under "Topics to Be Removed From Calendar of Topics" *infra*.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1976 LEGISLATIVE SESSION

Twelve bills and one concurrent resolution were introduced to effectuate the Commission's recommendations during 1976.¹ The concurrent resolution was adopted, nine bills were enacted, one bill was passed by the Legislature but vetoed by the Governor, and two bills were held in committee.

Partition of Real and Personal Property

Assembly Bill 1671, which became Chapter 73 of the Statutes of 1976, was introduced by Assemblyman Alister McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976). See also letter submitting report of Assembly Committee on Judiciary, Assembly J. (Jan. 22, 1976), at 11419, reprinted as Appendix VI to this Report, and *Report of Assembly Committee on Judiciary on Assembly Bill 1671*, on file with the Assembly Committee on Judiciary, reprinted as Appendix VII to this Report.

A number of amendments were made to this bill upon recommendation of the Commission as a result of continuing study of this topic after the bill was introduced:

(1) Code of Civil Procedure Section 392, which was not included in the bill as introduced, was amended to delete former paragraph (b) of subdivision (1).

(2) Code of Civil Procedure Section 872.010 was amended to delete from the end of subdivision (d) the phrase "and any right, title, estate, lien, or other interest therein."

(3) Section 872.040, which was not included in the bill as introduced, was added to the Code of Civil Procedure.

(4) Code of Civil Procedure Section 872.110 was amended to add subdivision (b).

(5) Code of Civil Procedure Section 872.210 was amended to add to paragraph (2) of subdivision (a) the clause: "where such property or estate therein is owned by several persons concurrently or in successive estates"; subdivision (b) was added.

(6) Code of Civil Procedure Section 872.230 was amended to add the words "if any" at the end of subdivision (a); in subdivision (d), the word "estate" was substituted for the word "interests" and the word "therein" was added at the end of the subdivision.

(7) Code of Civil Procedure Section 872.250 was amended to substitute a new last sentence in subdivision (c) for the one included in the bill as introduced.

(8) Code of Civil Procedure Section 872.310 was amended to add to subdivision (b) the phrase "and on other persons named as unknown defendants," following "872.550," and to add the phrase "and the provisions of this article" following "415.50".

(9) Code of Civil Procedure Section 872.320 was amended to insert in subdivision (a) the word "real" preceding the word "property".

¹ One of these bills—AB 1671—was actually introduced in 1975 but was enacted in 1976.

(10) Section 872.430, which was not included in the bill as introduced, was added to the Code of Civil Procedure.

(11) Code of Civil Procedure Section 872.510 was amended to insert the phrase "or reasonably apparent from an inspection of the property, in the estate" preceding the words "as to".

(12) Code of Civil Procedure Section 872.710 was amended to insert at the beginning of subdivision (b) the phrase "Except as provided in Section 872.730,"; in subdivision (c), the word "estates" was substituted for the word "interests" in five places.

(13) Code of Civil Procedure Section 872.720 was amended to insert at the end of subdivision (a) the phrase "and, unless it is to be later determined, the manner of partition."

(14) Section 872.730, which was not included in the bill as introduced, was added to the Code of Civil Procedure.

(15) Code of Civil Procedure Section 873.010 was amended to add paragraph (7) to subdivision (b).

(16) Code of Civil Procedure Section 873.080, as it was included in the bill as introduced, was deleted.

(17) Code of Civil Procedure Section 873.090, as it was included in the bill as introduced, was renumbered 873.080.

(18) Code of Civil Procedure Section 873.150 was amended to delete the phrase "in the action" following the words "third person".

(19) Code of Civil Procedure Section 873.230 was amended to insert the phrase "prior to the commencement of the action" following the word "Where".

(20) Code of Civil Procedure Section 873.290 was amended to insert, in subdivision (b), the phrase "of partition" following the word "judgment" and, in subdivision (c), to substitute the word "partition" for the word "confirmation".

(21) Code of Civil Procedure Section 873.640 was amended to insert the words "in writing" preceding the word "requested" in the final sentence.

(22) Code of Civil Procedure Section 873.650 was amended to substitute in subdivision (a) the phrase "place of" for the phrase "addition to" following the word "In".

(23) Code of Civil Procedure Section 873.770 was amended to insert the phrase "or lienholder" following the word "party" in the introductory paragraph.

(24) Code of Civil Procedure Section 873.820 was amended to delete from subdivision (c) the phrase "of parties" following the phrase "any liens".

(25) Section 873.850, which was not included in the bill as introduced, was added to the Code of Civil Procedure.

(26) Code of Civil Procedure Section 873.920 was amended to substitute a new subdivision (d) for the one which was included in the bill as introduced.

(27) Code of Civil Procedure Section 873.930 was amended to insert subdivision (a) at the beginning of the section.

(28) Code of Civil Procedure Section 873.960 was amended as follows: At the beginning of the third sentence, the clause "The order shall be conditioned" was substituted for the clause "The court order is contingent"; at the end of the third sentence, the word "partition" was substituted for the word "action"; the fourth sentence was added.

(29) Code of Civil Procedure Section 874.130 was amended to insert the phrase "all or a portion of" following the word "sale".

(30) Code of Civil Procedure Section 874.210 was amended to insert at the beginning of subdivision (c) the phrase "Except as provided in Section 874.230,".

(31) Code of Civil Procedure Section 874.230 was amended as follows: At the beginning of the section, the words "Where a" were substituted for the words "Notwithstanding Section 874.210, where an occupant or other"; the phrase "the occupancy reasonably should have been known or" was deleted following the word "but"; the phrase "or would have been reasonably apparent from an inspection of the property" was inserted following the words "interlocutory judgment"; the phrase "occupant or other" was deleted following the word "such"; the final sentence was added.

(32) Section 874.240, which was not included in the bill as introduced, was added to the Code of Civil Procedure.

(33) Probate Code Section 1103, which was not included in the bill as introduced, was amended to substitute in the first sentence the words "property when, under the circumstances, sale would be more equitable than partition and when the property" for the words "any property which can not be partitioned without great prejudice to the owners and which".

(34) The effective date provisions were amended to clarify their application.

(35) An uncodified provision was added to the bill to specify when the owner or lienholder may bring an action for partition of real property subject to a lien on a parity with that on which the owner's title is based.

Technical amendments were also made.

Prejudgment Attachment

Assembly Bill 2864, which became Chapter 437 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Revision of the Attachment Law*, 13 Cal. L. Revision Comm'n Reports 801 (1976). See also *Report of Senate Committee on Judiciary on Assembly Bill 2864*, Senate J. (April 22, 1976) at 11113, reprinted as Appendix VIII to this Report.

The following amendments were made to this bill upon recommendation of the Commission as a result of continuing study of this topic after the bill was introduced:

(1) Code of Civil Procedure Section 483.010 was amended to insert in the second sentence of subdivision (b), following the word "valueless", the phrase "or has decreased in value to less than the amount then owing on the claim, in which event the amount for which such attachment may issue shall not exceed the lesser of the amount of such decrease or the difference between the value of the security and the amount then owing on the claim,." This amendment was made at the suggestion of the California State Bar.

(2) Code of Civil Procedure Section 484.050 was amended to substitute a new sentence for the final sentence in subdivision (c).

(3) Code of Civil Procedure Section 484.090 was amended to substitute at the end of subdivision (b) the phrase "attachment, it shall order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220" for the phrase "attachment and the plaintiff has provided the undertaking required by Article 2 (commencing with Section 489.210) of Chapter 9, it shall order the issuance of a writ of attachment."

(4) Code of Civil Procedure Section 484.370 was amended as follows: In the introductory paragraph, following the word "order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, if it finds both" was substituted for the phrase "the issuance of a writ of attachment if it finds all"; the words "to be" were inserted preceding the word "described" in subdivision (b); subdivision (c) was deleted.

(5) Code of Civil Procedure Section 484.520 was amended as follows: In the introductory paragraph, following the word "order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, if it finds both" was substituted for the phrase "the issuance of a writ of attachment if it finds all"; the words "to be" were inserted preceding the word "described" in subdivision (b); subdivision (c) was deleted.

(6) Code of Civil Procedure Section 485.010, which was not contained in the bill as introduced, was amended to insert at the end of subdivision (c) the phrase

"plaintiff's pro rata share of the" preceding the word "proceeds" and to substitute the phrase "in escrow" for the phrase "of the license".

(7) Code of Civil Procedure Section 485.220 was amended as follows: In subdivision (a), following the words "and order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220," was substituted for the phrase "the issuance of a writ of attachment"; the words "to be" were inserted preceding the word "specified" in paragraph (4); paragraph (6) was deleted.

(8) Code of Civil Procedure Section 485.540 was amended as follows: In subdivision (a), following the word "order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220," was substituted for the phrase "the issuance of a writ of attachment"; the words "to be" were inserted preceding the word "specified" in subdivision (b); subdivision (d) was deleted.

(9) Code of Civil Procedure Section 486.020, which was not included in the bill as introduced, was amended as follows: In the introductory paragraph, following the word "order", the phrase "upon the filing of an undertaking as provided by Sections 489.210 and 489.220," was inserted; subdivision (e) was deleted.

(10) Code of Civil Procedure Section 487.020 was amended to insert in subdivision (c), following the word "payable", the words "to a defendant employee" and to delete, following the word "employer", the words "to an employee".

(11) Code of Civil Procedure Section 488.360 was amended as follows: In subdivision (c), the phrase "identifiable cash proceeds (as that term is used in Section 9306 of the Commercial Code)" was substituted for the word "proceeds" in the first sentence; the words "identifiable cash" were inserted preceding the word "proceeds" in the second sentence.

(12) Code of Civil Procedure Section 488.555 was amended as follows: In subdivision (c), the phrase "the defendant's interest in" was inserted following the words "value of" and the phrase "the value of the defendant's interest in" was inserted following the words "extent that".

(13) Code of Civil Procedure Section 489.060, which was not included in the bill as introduced, was amended as follows: At the beginning of subdivision (a), the phrase "Except as provided in subdivision (b)," was inserted; a new subdivision (b) was added; former subdivision (b) was designated as subdivision (c).

(14) Code of Civil Procedure Section 489.210, which was not included in the bill as introduced, was amended as follows: The word "temporary" was inserted preceding the word "protective"; the phrase "the court shall require that" was deleted; the words "shall file" were substituted for the words "have filed".

(15) Code of Civil Procedure Section 489.310 was amended as follows: The second sentence of subdivision (a) was deleted; a new subdivision (b) was substituted for the former subdivision (b); at the beginning of subdivision (c), the phrase "The defendant shall file" was substituted for the phrase "Before making such order, the court shall require the defendant to file with the court in which the application is made"; also in subdivision (c), the phrase "which may be" was inserted preceding the word "recovered" and, in the final sentence, the words "the condition" were substituted for the words "being satisfied", and the word "be" was substituted for the words "has been"; the third sentence was added to subdivision (d).

(16) Code of Civil Procedure Section 489.320 was amended as follows: The phrase "with respect to such defendant" was inserted following the words "temporary protective order" at the end of subdivision (a) and in the final sentence of subdivision (b); at the beginning of subdivision (b), the phrase "The defendant shall" was substituted for the phrase "Before making an order terminating the temporary protective order, the court shall require the defendant to"; in the final sentence of subdivision (b), the words "the condition" were substituted for the words "being satisfied", and the word "be" was substituted for the words "has been"; subdivision (c) was deleted.

(17) Code of Civil Procedure Section 490.010 was amended to restore the original wording of subdivision (d).

(18) Code of Civil Procedure Section 491.010 was amended to insert the second sentence in subdivision (a).

(19) Code of Civil Procedure Section 492.030 was amended as follows: In subdivision (a), following the words "and order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220," was substituted for the phrase "the issuance of a writ of attachment"; the words "to be" were inserted preceding the word "specified" in paragraph (5) of subdivision (a); paragraph (6) of subdivision (a) was deleted.

(20) Code of Civil Procedure Section 492.090 was amended as follows: In the introductory paragraph, following the word "order", the phrase "a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, if it finds both" was substituted for the phrase "the issuance of a writ of attachment if it finds all"; the words "to be" were inserted preceding the word "specified" in subdivision (b); subdivision (c) was deleted.

Technical amendments were also made.

Undertakings for Costs

Assembly Bill 2847 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Undertakings for Costs*, 13 Cal. L. Revision Comm'n Reports 901 (1976). The bill was not enacted; it was held in the Assembly Committee on Judiciary.

Claim and Delivery Statute—Turnover Orders

Assembly Bill 2895, which became Chapter 145 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976). The bill was enacted as introduced.

Eminent Domain

Three bills relating to eminent domain were introduced in 1976.

Operative date of Eminent Domain Law. Assembly Bill 2583, which became Chapter 22 of the Statutes of 1976, was introduced by Assemblyman McAlister to clarify the operative date of the Eminent Domain Law (Chapter 1275 of the Statutes of 1975).

The bill was enacted as introduced.

Relocation assistance. Assembly Bill 2761, which became Chapter 143 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Relocation Assistance by Private Condemnors*, 13 Cal. L. Revision Comm'n Reports 2085 (1976).

The following amendments were made to this bill upon recommendation of the Commission as a result of continuing study of this topic after the bill was introduced:

Subdivision (a) of Government Code Section 7276 was amended to add the introductory phrase referring to the adoption of a resolution concerning the acquisition of the property by eminent domain and to provide that payments required to be made be made in conformity with the guidelines adopted by the Commission of Housing and Community Development.

Subdivision (b), referring to the application of the rules and regulations of the Department of Transportation, was also added.

Technical amendments were also made.

Byroads and utility easements. Assembly Bill 2582, which became Chapter 994 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Condemnation for Byroads and Utility Easements*, 13 Cal. L. Revision Comm'n Reports 2091 (1976).

The following amendments were made to this bill by the legislative committees that considered the bill:

Civil Code Section 1001 was amended as follows: In the first sentence of subdivision (b), the phrase "over private property for which there is a great necessity" and the phrase "or access to a public road from" were deleted; the second sentence of subdivision (b) was deleted; a new subdivision (c) was substituted for the one contained in the bill as introduced.

Code of Civil Procedure Section 1245.325 was amended as follows: In the introductory paragraph, the phrase "by eminent domain" was deleted following the word "acquire" and inserted following the word "easement" and the phrase "over private property" was deleted; in paragraph (2) of subdivision (b), the phrase "or access" was deleted; in paragraph (3) of subdivision (b), the word "clearly" was inserted preceding the word "outweighs".

Technical amendments were also made.

Transfer of Out-of-State Trusts to California

Assembly Bill 2855, which became Chapter 144 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Transfer of Out-of-State Trusts to California*, 13 Cal. L. Revision Comm'n Reports 2101 (1976). The bill was enacted as introduced.

Admissibility of Duplicates

Assembly Bill 2580 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115 (1976). The bill was not enacted; it was held in the Assembly Committee on Judiciary.

Modification of Contracts

Assembly Bill 2581, which became Chapter 109 of the Statutes of 1976, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Oral Modification of Contracts*, 13 Cal. L. Revision Comm'n Reports 2129 (1976).

The following amendment was made to this bill: A section was added stating that Civil Code Sections 1697 and 1698, as those sections formerly existed, and the applicable case law, continue to apply to contracts made prior to the effective date of Assembly Bill 2581.

Liquidated Damages

Assembly Bill 3169 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Liquidated Damages*, 13 Cal. L. Revision Comm'n Reports 2139 (1976). See also *Report of Senate Committee on Judiciary on Assembly Bill 3169*, Senate J. (Aug. 11, 1976) at 15127. The bill was passed in amended form by the Legislature but was vetoed by the Governor. The Commission has revised its earlier recommendation in light of the objection expressed in the Governor's veto message and plans to submit a new recommendation to the 1977 Legislature. See *Recommendation Relating to Liquidated Damages* (December 1976), published as Appendix X to this Report.

Service of Process

Assembly Bill 3128, which became Chapter 888 of the Statutes of 1976, was introduced by Assemblyman John T. Knox to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Service of Process on Unincorporated Associations* (February 1976), published as Appendix III to this Report. The bill was enacted as introduced.

Resolution Approving Topics for Study

Assembly Concurrent Resolution No. 130, introduced by Assemblyman McAlister and adopted as Resolution Chapter 30 of the Statutes of 1976, authorizes the Commission to continue its study of topics previously authorized for study.²

² Resolution Chapter 160 of the Statutes of 1976 also was adopted. This resolution authorizes the Commission to study "whether the law relating to tort liability should be revised, including the rules governing liability for and the amount of compensation or damages to be paid on account of injury to or death of persons or damages to or destruction of property and the manner and method of determination and payment thereof and related matters, including a study of liability arising from defective products, whether based on contract or tort."

1977 LEGISLATIVE PROGRAM

The Commission plans to submit the following recommendations to the 1977 Legislature:

(1) *Recommendation Relating to Nonprofit Corporation Law* (November 1976), to be reprinted in 13 Cal. L. Revision Comm'n Reports 2201 (1976).

(2) *Recommendation Relating to Sister State Money Judgments* (April 1976), published as Appendix IV to this Report.

(3) *Recommendation Relating to Damages in Action for Breach of Lease* (May 1976), published as Appendix V to this Report.

(4) *Recommendation Relating to Wage Garnishment* (October 1976), published as Appendix IX to this Report.

(5) *Recommendation Relating to Liquidated Damages* (December 1976), published as Appendix X to this Report.

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) Five decisions of the Supreme Court of California held statutes of this state unconstitutional.²

¹ This study has been carried through 96 S. Ct. 3235 (Adv. Sh. No. 19A, Aug. 1, 1976) and 18 Cal.3d 124 (Adv. Sh. No. 27, Oct. 5, 1976).

² Several other California Supreme Court decisions may have constitutional impact on state statutes but without a clear holding of unconstitutionality.

In *T. M. Cobb Co. v. County of Los Angeles*, 16 Cal.3d 606, 547 P.2d 431, 128 Cal. Rptr. 655 (1976), the court stated that the authorization contained in former Section 2914 (now Section 2951) of the Revenue and Taxation Code for a tax sale without a prior administrative hearing was "unconstitutional on its face" as a denial of due process. The statement is dictum, however, since the property in question had been released, the plaintiff "suffered no unconstitutional deprivation of property," and "on the facts of this case the taking was in accord with due process." *Id.* at 616-617, 547 P.2d at 437, 128 Cal. Rptr. at 661.

Five decisions imposed constitutional qualifications on the application of state statutes without invalidating any statutory language. *Valley Bank v. Superior Court*, 15 Cal.3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975), held that the discoverability of a bank's confidential customer information under civil discovery statutes is qualified by the right of privacy guaranteed by Article I, Section 1, of the California Constitution. The court concluded that, before such information may be disclosed in civil discovery proceedings, the bank must take reasonable steps to notify the customer so he may object to disclosure. *In re Arthur N.*, 16 Cal.3d 226, 545 P.2d 1345, 127 Cal. Rptr. 641 (1976), held that due process requires that a juvenile court order committing a minor to the Youth Authority pursuant to Welfare and Institutions Code Section 777 be based on proof beyond a reasonable doubt that the minor committed the acts of misconduct charged. *California Housing Fin. Agency v. Elliott*, 17 Cal.3d 575, 551 P.2d 1193, 131 Cal. Rptr. 361 (1976), construed the Zenovich-Moscone-Chacon Housing and Home Finance Act (Health & Saf. Code §§ 41000-42080) to incorporate the provisions of Article XXXIV, Section 1, of the California Constitution which require voter approval at a local election of a proposed low rent housing project. *People v. Richards*, 17 Cal.3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976), held that, although Penal Code Section 1203.1 allows the trial court to

In *Citizens for Jobs & Energy v. Fair Political Practices Commission*,³ the court held unconstitutional the campaign spending limitations for statewide ballot propositions contained in Government Code Sections 85300–85305 as violative of freedom of speech guaranteed by the First Amendment to the United States Constitution.⁴

In *People v. Olivas*,⁵ the court held that Section 1770 of the Welfare and Institutions Code results in an unconstitutional denial of equal protection guaranteed by Article I, Section 7, of the California Constitution and the Fourteenth Amendment to the United States Constitution to the extent that it authorizes the California Youth Authority to maintain control over misdemeanants committed to its care for any period of time in excess of the maximum jail term permitted by statute for the offense committed.

In *Choudhry v. Free*,⁶ the court held that the provisions of Water Code Section 21100, requiring that a director of an irrigation district formed under the Irrigation District Law be “a freeholder of the district” which he represents, are unconstitutional as applied to the Imperial Irrigation District,⁷ in

impose as a condition of probation a requirement that the defendant make restitution “for the breach of the law, for any injury done to any person resulting from such breach,” the court may not require the defendant to pay a third party for losses not actually caused by the defendant’s crime since any legal conclusion that the defendant owed money would be reached “in the absence of due process rights assured to every litigant.” In *People v. Collins*, 17 Cal.3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976), the court construed Penal Code Section 1089, which authorizes upon a showing of good cause the substitution of an alternate juror before or after final submission of a case to the jury, to provide that, when a substitution is made after final submission to the jury, the court must instruct the jury to disregard its past deliberations and to begin deliberating anew. In this case, however, the trial court’s failure so to instruct the jury was held to be harmless error.

³ 16 Cal.3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976).

⁴ Sections 85300–85305 of the Government Code were enacted as part of the Political Reform Act of 1974, a statewide initiative measure (Proposition 9) approved at the June 4, 1974, primary election. See Cal. Stats. 1974, at A-179. By its terms, the act “may be amended to further its purposes” by statute passed by a two-thirds vote of each house of the Legislature and signed by the Governor if at least 20 days prior to passage in each house the bill in its final form has been delivered to the Fair Political Practices Commission for distribution. Govt. Code § 81012(a), as amended by Cal. Stats. 1976, Ch. 883; § 1. The act may for any purpose “be amended or repealed by a statute that becomes effective only when approved by the electors.” Govt. Code § 81012(b).

⁵ 17 Cal.3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

⁶ 17 Cal.3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976).

⁷ The court limited its holding to the Imperial Irrigation District because it “is singular among irrigation districts in that it has more residents, land and employees than the others,” and because the claim of unconstitutionality was not opposed by the respondent or real parties in interest, thus presenting the issue in a nonadversary context. The court therefore expressly declined to decide “whether other irrigation

that they deny equal protection of the laws.

In *Business Title Corp. v. Division of Labor Law Enforcement*,⁸ the court held that, under the supremacy clause of the United States Constitution, the priority of a federal tax lien afforded by federal statute controlled over the lesser priority given to such liens under Section 24074 of the Business and Professions Code.

In *In re Grant*,⁹ the court held unconstitutional the provisions of former Section 11531 (now Section 11360) of the Health and Safety Code which preclude parole consideration of a narcotics offender for five years with one previous conviction, and for 10 years with two or more previous convictions, as constituting cruel and unusual punishment proscribed by the California Constitution.¹⁰

districts, or irrigation districts generally, are affected" by the decision. See Choudhry v. Free, 17 Cal.3d 660, 669, 552 P.2d 438, 444, 131 Cal. Rptr. 654, 660 (1976).

⁸ 17 Cal.3d 878, 553 P.2d 614, 132 Cal. Rptr. 454 (1976).

⁹ 18 Cal.3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).

¹⁰ Three of the seven justices were of the view that the court should also hold unconstitutional a number of related sections of the Health and Safety Code which preclude repeat narcotics offenders from parole consideration for periods of five years or more. See *In re Grant*, 18 Cal.3d 1, 13-14, 553 P.2d 590, 598-599, 132 Cal. Rptr. 430, 438-439 (1976).

CALENDAR OF TOPICS FOR STUDY

Topics Authorized for Study

The Commission has on its calendar of topics the topics listed below.¹ Each of these topics has been authorized for Commission study by the Legislature.²

Topics Under Active Consideration

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

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

The Commission plans to submit a recommendation to the 1977 Legislature for a new comprehensive statute relating to nonprofit corporations. G. Gervaise Davis III, a Monterey lawyer, and Peter A. Whitman, a Palo Alto lawyer, have served as expert consultants. Numerous other persons and organizations have cooperated in the study; they are listed in the acknowledgments in the Commission's recommendation. See *Recommendation Relating to Nonprofit Corporation Law* (November 1976), to be reprinted in 13 Cal. L. Revision Comm'n Reports 2201 (1976).

Creditors' remedies. Whether the law relating to creditors' remedies including, but not limited 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, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, and related matters should be revised.

The Commission, working with a State Bar committee, is now engaged in drafting a comprehensive statute governing enforcement of judgments. Professor Stefan A. Riesenfeld of the

¹ For information concerning prior Commission recommendations and studies concerning these topics, and the legislative history of legislation introduced to effectuate such recommendations, see "Current Topics—Prior Publications and Legislative Action" *infra*.

² 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. The legislative authorization for each topic is noted in "Current Topics—Prior Publications and Legislative Action" *infra*.

Boalt Hall Law School, University of California at Berkeley, is serving as the consultant to the Commission.

The Commission published a recommendation relating to wage garnishment procedure in April 1975, but no bill was introduced in 1975 to effectuate this recommendation. See *Recommendation Relating to Wage Garnishment Procedure*, 13 Cal. L. Revision Comm'n Reports 601 (1976). The Commission has received comments on the 1975 recommendation from various persons and organizations, including the State Bar Committee on Relations of Debtor and Creditor, and plans to have a bill introduced in 1977 relating to this subject. See *Recommendation Relating to Wage Garnishment* (October 1976), published as Appendix IX to this Report.

The Commission plans to submit a recommendation to the 1977 Legislature proposing several technical revisions in the statute relating to enforcement of sister state money judgments. See *Recommendation Relating to Sister State Money Judgments* (April 1976), published as Appendix IV to this Report.

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.

The Commission is engaged in a study of the provisions of the Evidence Code relating to evidence in eminent domain and inverse condemnation actions and is making a study to determine whether any additional changes in other statutes are needed to conform to the new Eminent Domain Law.

Evidence. Whether the Evidence Code should be revised.

The Commission has undertaken a study of the differences between the newly adopted Federal Rules of Evidence and the California Evidence Code. Professor Jack Friedenthal of the Stanford Law School is the Commission's consultant on this study. The Commission also is making a study of the experience under the Evidence Code to determine whether any revisions are needed.

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.

Professor Brigitte M. Bodenheimer of the Law School, University of California at Davis, has been retained as the chief consultant on this topic. She has prepared two background studies—one relating to child custody and the other to adoption.

See Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 Stan. L. Rev. 703 (1971); *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975). The background studies do not necessarily represent the views of the Commission; the Commission's action will be reflected in its own recommendation. Mr. Garrett H. Elmore has been retained as a consultant on one aspect of the topic—a project to eliminate the overlap between the guardianship and conservatorship statutes.

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

The Commission plans to submit a recommendation on one aspect of this topic to the 1977 Legislature. See *Recommendation Relating to Damages in Action for Breach of Lease* (May 1976), published as Appendix V to this Report.

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

Commission recommended legislation on this topic passed the Legislature in 1976 but was vetoed by the Governor. The Commission has revised its earlier recommendation in light of the objection expressed in the Governor's veto message and plans to submit a new recommendation on this topic to the 1977 Legislature. See *Recommendation Relating to Liquidated Damages* (December 1976), published as Appendix X to this Report.

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.

The Commission plans to study one or more aspects of this topic during 1977.

Other Topics Authorized for Study

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

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

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

The Commission is deferring consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. See Cal. Stats. 1976, Res. Ch. 160.

Class actions. Whether the law relating to class actions should be revised.

Offers of compromise. Whether the law relating to offers of compromise should be revised.

The Commission is deferring consideration of this topic in order to avoid possible duplication of the work of the Joint Legislative Committee on Tort Liability. See Cal. Stats. 1976, Res. Ch. 160.

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

Possibilities of reverter and powers of termination. Whether the law relating to possibilities of reverter and powers of termination should be revised.

Marketable Title Act and related matters. Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use should be revised.

Tort liability. Whether the law relating to tort liability should be revised, including the rules governing liability for and the amount of compensation or damages to be paid on account of injury to or death of persons or damages to or destruction of property and the manner and method of determination and payment thereof and related matters, including a study of liability arising from defective products, whether based on contract or tort.

The concurrent resolution (Cal. Stats. 1976, Res. Ch. 160) that authorized the study of this topic also created the Joint Legislative Committee on Tort Liability. The Commission is advised that this Committee plans to make a comprehensive

study of tort liability. Accordingly, the Commission does not plan to consider this topic unless the Committee and the Commission jointly determine that Commission study of some aspect of the topic would be appropriate and would not duplicate the work of the Committee.

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.

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

The State Bar is actively studying this topic. The Commission plans to cooperate with the State Bar if the State Bar concludes that the assistance of the Commission would be useful.

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

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.

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.

Modification of contracts. Whether the law relating to modification of contracts should be revised.

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

The Commission is deferring further consideration of this topic in order to avoid possible duplication of the work of the Joint

Legislative Committee on Tort Liability. See Cal. Stats. 1976, Res. Ch. 160.

Topics to Be Removed From Calendar of Topics

A recommendation has been made on the following topic and the recommended legislation has been enacted. Because of its nature, this topic does not need to be continued on the Commission's calendar for further study.³

Transfer of out-of-state trusts to California. Whether the law relating to transfer of out-of-state trusts to California should be revised.

Topics for Future Consideration

The Commission now has a number of major studies on its calendar. During the next year, studies under active consideration will include nonprofit corporations; inverse condemnation; creditors' remedies; child custody, adoption, and guardianship; and evidence. Because of the substantial and numerous topics already on its calendar (six of which were added by the 1975 Legislature and one by the 1976 Legislature), the Commission does not at this time recommend any additional topics for inclusion on its calendar of topics.

³ A number 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 discussion under "Topics Continued on Calendar for Further Study" *supra*.

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, and from 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 many 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 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

¹ See Govt. Code §§ 10300-10340.

² See 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. Govt. Code § 10331.

³ See Govt. Code § 10335.

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 have occasion to use it after it is in effect. They are entitled to substantial weight in construing the statutory provisions.⁸ However, 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

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 in 1975, see Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975). For a listing of background studies published in law reviews prior to 1975, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971) and 11 Cal. L. Revision Comm'n Reports 1008 n.5 & 1108 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.

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

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 considered for enactment by 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.

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). See also Cal. Stats. 1974, Ch. 227.

¹¹ See 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

As of December 1, 1976, the membership of the Law Revision Commission is:

	<i>Term expires</i>
John N. McLaurin, Los Angeles, <i>Chairman</i>	October 1, 1975
Howard R. Williams, Stanford, <i>Vice Chairman</i>	October 1, 1977
Vacancy, <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
John D. Miller, Long Beach, <i>Member</i>	October 1, 1977
Marc Sandstrom, San Diego, <i>Member</i>	October 1, 1975
Thomas E. Stanton, Jr., San Francisco, <i>Member</i>	October 1, 1977
Vacancy	October 1, 1979
Legislative Counsel, Vacancy, <i>ex officio Member</i>	†

* 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

As of December 1, 1976, the staff of the Commission is:

Legal

John H. DeMouly
Executive Secretary

Stan G. Ulrich,
Staff Counsel

Nathaniel Sterling
Assistant Executive Secretary

Robert J. Murphy III
Staff Counsel

Administrative-Secretarial

Anne Johnston
Administrative Assistant

Violet S. Harju
Clerk-Typist

Kristine A. Powers
Clerk-Typist

Christine E. Kollman
Clerk-Typist

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 "Calendar of Topics for Study" *supra*) and to remove from its calendar of topics the topic listed under "Topics to Be Removed From Calendar of Topics" *supra*.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent that those provisions have been held to be unconstitutional.

APPENDIX I

CURRENT TOPICS—PRIOR PUBLICATIONS AND LEGISLATIVE ACTION

Arbitration

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.

Child Custody and Related Matters

Authorized by Cal. Stats. 1972, Res. Ch. 27, at 3227; 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).

Background studies on two aspects of this topic have been prepared by the Commission's consultant, Professor Brigitte M. Bodenheimer, Law School, University of California at Davis. See Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 Stan. L. Rev. 703 (1971); *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 So. Cal. L. Rev. 10 (1975). The studies do not necessarily represent the views of the Commission; the Commission's action will be reflected in its own recommendation. Mr. Garrett H. Elmore has been retained as a consultant on one aspect of this topic—a project to eliminate the overlap between the guardianship and conservatorship statutes.

Class Actions

Authorized by Cal. Stats. 1975, Res. Ch. 15. See also 12 Cal. L. Revision Comm'n Reports 524 (1974).

Condemnation Law and Procedure

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); Chs. 1649, 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). The recommended legislation was not enacted. 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*, 12 Cal. L. Revision Comm'n Reports 1001 (1974). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 426.

See also *Tentative Recommendations Relating to Condemnation Law and Procedure: The Eminent Domain Law, Condemnation Authority of State Agencies, and Conforming Changes in Special District Statutes*, 12 Cal. L. Revision Comm'n Reports at 1, 1051, and 1101 (1974).

See also *Recommendation Proposing the Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2010 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Chs. 581, 582, 584, 585, 586, 587, 1176, 1239, 1240, 1275, 1276. See also Cal. Stats. 1976, Ch. 22.

See also *Recommendation Relating to Relocation Assistance by Private Condemnors*, 13 Cal. L. Revision Comm'n Reports 2085 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 143.

See also *Recommendation Relating to Condemnation for Byroads and Utility Easements*, 13 Cal. L. Revision Comm'n Reports 2091 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted in part (utility easements). See Cal. Stats. 1976, Ch. 994.

Creditors' Remedies

Authorized by Cal. Stats. 1972, Res. Ch. 27, at 3227. See also Cal. Stats. 1957, Res. Ch. 202, at 4589; 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); 12 Cal. L. Revision Comm'n Reports 530 n.1 (1974). The recommended legislation was not enacted. The Commission submitted a revised recommendation to the 1975 Legislature. See *Recommendation Relating to Wage Garnishment Exemptions*, 12 Cal. L. Revision Comm'n Reports 901 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was not enacted. See also *Recommendation Relating to Wage Garnishment Procedure*, 13 Cal. L. Revision Comm'n Reports 601 (1976). The Commission plans to submit a recommendation to the 1977 Legislature. See *Recommendation Relating to Wage Garnishment* (October 1976), published as Appendix IX to this Report.

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 Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 145.

See also *Recommendation Relating to Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 530 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 1516. See also *Recommendation Relating to Revision of the Attachment Law*, 13 Cal. L. Revision Comm'n Reports 801 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 437.

See also *Recommendation Relating to Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 534 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 211. See also *Recommendation Relating to Sister State Money Judgments* (April 1976), published as Appendix IV to this Report. This recommendation will be submitted to the 1977 Legislature.

Discovery in Civil Cases

Authorized by Cal. Stats. 1975, Res. Ch. 15. See also 12 Cal. L. Revision Comm'n Reports 526 (1974).

Escheat; Unclaimed Property

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). The recommended legislation was not enacted.

See also *Recommendation Relating to Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments*, 12 Cal. L. Revision Comm'n Reports 613 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 25.

Evidence

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

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). The recommended legislation was enacted. See 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). The recommended legislation was enacted. See 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). The recommended legislation was not enacted.

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*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Ch. 227.

See also *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). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was not enacted. A revised recommendation was submitted to the 1975 Legislature. See *Recommendation Relating to the Good Cause Exception to the Physician-Patient Privilege*, 12 Cal. L. Revision Comm'n Reports 601 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 318.

See also *Recommendation Relating to View by Trier of Fact in a Civil Case*, 12 Cal. L. Revision Comm'n Reports 587 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 301.

See also *Recommendation Relating to Admissibility of Copies of Business Records in Evidence*, 13 Cal. L. Revision Comm'n Reports 2051 (1976). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2012 (1976). The recommended legislation was not enacted.

See also *Recommendation Relating to Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was not enacted.

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 (judicial notice—technical amendment).

Governmental Liability

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). Most of the recommended legislation was enacted. See 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 *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1 (1963).

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). The recommended legislation was enacted. See 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).

See also *Recommendation Relating to Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 285.

See also *Recommendation Relating to Undertakings for Costs*, 13 Cal. L. Revision Comm'n Reports 901 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was not enacted.

Inverse Condemnation

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 1031 (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.

See also *Recommendation Relating to Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2011 (1976). The recommended legislation was enacted. See Cal. Stats. 1975, Ch. 285.

See also Van Alstyne, *California Inverse Condemnation Law*, 10 Cal. L. Revision Comm'n Reports 1 (1971).

Lease Law

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). The recommended legislation was not enacted.

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). The recommended legislation was not enacted.

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*, 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*. For a legislative history of these recommendations, see 12 Cal. L. Revision Comm'n Reports 536 (1974). The recommended legislation was enacted. See Cal. Stats. 1974, Chs. 331, 332.

The Commission plans to submit a recommendation to the 1977 Legislature. See *Recommendation Relating to Damages in Action for Breach of Lease* (May 1976), published as Appendix V to this Report.

Liquidated Damages

Authorized by Cal. Stats. 1969, Res. Ch. 224, at 3888.

See *Recommendation and Study Relating to Liquidated Damages*, 11 Cal. L. Revision Comm'n Reports 1201 (1973). For a legislative history of this recommendation, see 12 Cal. L. Revision Comm'n Reports 535 (1974). The recommended legislation was not enacted.

See also *Recommendation Relating to Liquidated Damages*, 13 Cal. L. Revision Comm'n Reports 2139 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was passed by the Legislature but vetoed by the Governor. The Commission has revised its earlier recommendation in light of the objection expressed in the Governor's veto message and plans to submit a new recommendation to the 1977 Legislature. See *Recommendation Relating to Liquidated Damages* (December 1976), published as Appendix X to this Report.

Marketable Title Act and Related Matters

Authorized by Cal. Stats. 1975, Res. Ch. 82.

Modification of Contracts

Authorized by Cal. Stats. 1957, Res. Ch. 202, at 4589. See also 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 21 (1957).

See *Recommendation and Study Relating to Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976). For a legislative history of this recommendation, see 13 Cal. L. Revision Comm'n Reports 2011 (1976). One of the two legislative measures recommended was enacted. See Cal. Stats. 1975, Ch. 7.

See also *Recommendation Relating to Oral Modification of Contracts*, 13 Cal. L. Revision Comm'n Reports 2129 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 109.

Nonprofit Corporations

Authorized by Cal. Stats. 1970, Res. Ch. 54, at 3547. See also 9 Cal. L. Revision Comm'n Reports 107 (1969).

The Commission plans to submit a recommendation to the 1977 Legislature. See *Recommendation Relating to Nonprofit Corporation Law* (November 1976), to be reprinted in 13 Cal. L. Revision Comm'n Reports 2201 (1976).

Offers of Compromise

Authorized by Cal. Stats. 1975, Res. Ch. 15. See also 12 Cal. L. Revision Comm'n Reports 525 (1974).

Parol Evidence Rule

Authorized by Cal. Stats. 1971, Res. Ch. 75, at 4215. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).

Partition Procedures

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).

See *Recommendation Relating to Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 73.

Possibilities of Reverter and Powers of Termination

Authorized by Cal. Stats. 1975, Res. Ch. 15. See also 12 Cal. L. Revision Comm'n Reports 528 (1974).

Prejudgment Interest

Authorized by Cal. Stats. 1971, Res. Ch. 75, at 4215.

Tort Liability

Authorized by Cal. Stats. 1976, Res. Ch. 160.

Transfer of Out-of-State Trusts to California

Authorized by Cal. Stats. 1975, Res. Ch. 15. See also 12 Cal. L. Revision Comm'n Reports 523 (1974).

See *Recommendation Relating to Transfer of Out-of-State Trusts to California*, 13 Cal. L. Revision Comm'n Reports 2101 (1976). For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 144.

Unincorporated Associations

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.

See also *Recommendation Relating to Service of Process on Unincorporated Associations* (February 1976), published as Appendix III to this Report. For a legislative history of this recommendation, see this Report *supra*. The recommended legislation was enacted. See Cal. Stats. 1976, Ch. 888.

APPENDIX II

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

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

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| 6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957) | Not enacted. But see Cal. Stats. 1975, Ch. 461, enacting substance of this recommendation. |
| 7. <i>The Dead Man Statute</i> , 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. <i>Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere</i> , 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957) | Enacted. Cal. Stats. 1957, Ch. 490 |
| 9. <i>The Marital "For and Against" Testimonial Privilege</i> , 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. <i>Suspension of the Absolute Power of Alienation</i> , 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. <i>Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378</i> , 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957) | Enacted. Cal. Stats. 1957, Ch. 102 |
| 12. <i>Judicial Notice of the Law of Foreign Countries</i> , 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.
14. *Effective Date of Order Ruling on a Motion for New Trial*, 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. *Retention of Venue for Convenience of Witnesses*, 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957) Not enacted.
16. *Bringing New Parties Into Civil Actions*, 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957) Enacted. Cal. Stats. 1957, Ch. 1498
17. *Grand Juries*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959) Enacted. Cal. Stats. 1959, Ch. 501
18. *Procedure for Appointing Guardians*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959) Enacted. Cal. Stats. 1959, Ch. 500
19. *Appointment of Administrator in Quiet Title Action*, 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959) No legislation recommended.

20. *Presentation of Claims Against Public Entities*, 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. *Right of Nonresident Aliens to Inherit*, 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959); 11 CAL. L. REVISION COMM'N REPORTS 421 (1973) Enacted. Cal. Stats. 1974, Ch. 425.
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. But see Cal. Stats. 1972, Ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
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. But see CORP. CODE §§ 1001, 1002 (effective January 1, 1977) enacting substance of recommendation.

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); 12 CAL. L. REVISION COMM’N REPORTS 901 (1974); 13 CAL. L. REVISION COMM’N REPORTS 601 (1976) Not enacted. The Commission plans to submit a new recommendation to the 1977 Legislature.
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); 12 CAL. L. REVISION COMM'N REPORTS 609 (1974) Proposed resolution enacted. Cal. Stats. 1973, Res. Ch. 76. Legislation enacted. Cal. Stats. 1975, Ch. 25.
80. *Enforcement of Sister State Money Judgments*, 11 CAL. L. REVISION COMM'N REPORTS 451 (1973) Enacted. Cal. Stats. 1974, Ch. 211
81. *Prejudgment Attachment*, 11 CAL. L. REVISION COMM'N REPORTS 701 (1973) Enacted. Cal. Stats. 1974, Ch. 1516. See also Cal. Stats. 1975, Ch. 200.
82. *Landlord-Tenant Relations*, 11 CAL. L. REVISION COMM'N REPORTS 951 (1973) Enacted. Cal. Stats. 1974, Chs. 331, 332
83. *Pleading* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973) Enacted. Cal. Stats. 1972, Ch. 73
84. *Evidence—Judicial Notice* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1025 (1973) Enacted. Cal. Stats. 1972, Ch. 764
85. *Evidence—"Criminal Conduct" Exception*, 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973) Not enacted 1974. See recommendation to 1975 session (item 90 *infra*) which was enacted.

86. *Erroneously Compelled Disclosure of Privileged Information*, 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973) Enacted. Cal. Stats. 1974, Ch. 227
87. *Liquidated Damages*, 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973); 13 CAL. L. REVISION COMM'N REPORTS 2139 (1976) Vetoed 1976. The Commission plans to submit a new recommendation to the 1977 Legislature.
88. *Payment of Judgments Against Local Public Entities*, 12 CAL. L. REVISION COMM'N REPORTS 575 (1974) Enacted. Cal. Stats. 1975, Ch. 285
89. *View by Trier of Fact in a Civil Case*, 12 CAL. L. REVISION COMM'N REPORTS 587 (1974) Enacted. Cal. Stats. 1975, Ch. 301
90. *Good Cause Exception to the Physician-Patient Privilege*, 12 CAL. L. REVISION COMM'N REPORTS 601 (1974) Enacted. Cal. Stats. 1975, Ch. 318
91. *Improvement Acts*, 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974) Enacted. Cal. Stats. 1974, Ch. 426
92. *The Eminent Domain Law*, 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974) Enacted. Cal. Stats. 1975, Chs. 1239, 1240, 1275
93. *Eminent Domain—Conforming Changes in Special District Statutes*, 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974) Enacted. Cal. Stats. 1975, Chs. 581, 582, 584, 585, 586, 587, 1176, 1276

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| 94. <i>Oral Modification of Written Contracts</i> , 13 CAL. L. REVISION COMM'N REPORTS 301 (1976); 13 CAL. L. REVISION COMM'N REPORTS 2129 (1976) | Enacted. Cal. Stats. 1975, Ch. 7; Cal. Stats. 1976, Ch. 109. |
| 95. <i>Partition of Real and Personal Property</i> , 13 CAL. L. REVISION COMM'N REPORTS 401 (1976) | Enacted. Cal. Stats. 1976, Ch. 73 |
| 96. <i>Revision of the Attachment Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 801 (1976) | Enacted. Cal. Stats. 1976, Ch. 437 |
| 97. <i>Undertakings for Costs</i> , 13 CAL. L. REVISION COMM'N REPORTS 901 (1976) | Not enacted. |
| 98. <i>Admissibility of Copies of Business Records in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2051 (1976) | Not enacted. |
| 99. <i>Turnover Orders Under the Claim and Delivery Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 2079 (1976) | Enacted. Cal. Stats. 1976, Ch. 145 |
| 100. <i>Relocation Assistance by Private Condemnors</i> , 13 CAL. L. REVISION COMM'N REPORTS 2085 (1976) | Enacted. Cal. Stats. 1976, Ch. 143 |
| 101. <i>Condemnation for Byroads and Utility Easements</i> , 13 CAL. L. REVISION COMM'N REPORTS 2091 (1976) | Enacted in part (utility easements). Cal. Stats. 1976, Ch. 994 |

102. *Transfer of Out-of-State Trusts to California*, 13 CAL. L. REVISION COMM'N REPORTS 2101 (1976) Enacted. Cal. Stats. 1976, Ch. 144
103. *Admissibility of Duplicates in Evidence*, 13 CAL. L. REVISION COMM'N REPORTS 2115 (1976) Not enacted.
104. *Service of Process on Unincorporated Associations* (February 1976), published as Appendix III to this Report Enacted. Cal. Stats. 1976, Ch. 888

APPENDIX III

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Service of Process on
Unincorporated Associations

February 1976

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION

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GEORGE H. MURPHY

Ex Officio

February 27, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 9 of the Statutes of 1966 to study the law relating to partnerships and other unincorporated associations. The Commission herewith submits its recommendation on one aspect of this topic—service of process on unincorporated associations. The recommended legislation is necessary to conform the statutory provisions relating to designation of an agent for service of process and the manner of service of process on unincorporated associations to the provisions of the new General Corporation Law (Cal. Stats. 1975, Ch. 682).

Respectfully submitted,
JOHN N. McLAURIN
Chairman

RECOMMENDATION

relating to

SERVICE OF PROCESS ON UNINCORPORATED ASSOCIATIONS

A new General Corporation Law (Chapter 682 of the Statutes of 1975) was enacted by the 1975 Legislature to take effect on January 1, 1977. The new law renumbered and made substantive changes in the provisions of the old General Corporation Law relating to service of process. These provisions are incorporated by reference in the statutory provisions relating to service of process on foreign partnerships (Corp. Code § 15700) and unincorporated associations (Corp. Code §§ 24003-24007). The 1975 legislation did not make conforming revisions in the provisions relating to unincorporated associations.

The Commission has reviewed the provisions referred to above relating to foreign partnerships and unincorporated associations and recommends that the provisions be conformed to the new General Corporation Law.

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

An act to amend Sections 15700, 24003, and 24004 of the Corporations Code, relating to unincorporated associations.

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

Corporations Code § 15700 (amended)

SECTION 1. Section 15700 of the Corporations Code is amended to read:

15700. Every partnership, other than a commercial or banking partnership established and transacting business in a place without the United States, which is domiciled

without this state and has no regular place of business within this state, shall, within 40 days from the time it commences to do business in this state, file a statement in the office of the Secretary of State in accordance with Section 24003 designating some natural person or corporation as the agent of the partnership upon whom process issued by authority of or under any law of this state directed against the partnership may be served. A copy of such designation, duly certified by the Secretary of State, is sufficient evidence of such appointment.

Such process may be served in the manner provided in subdivision (e) of Section 24003 on the person so designated, or, in the event that no such person has been designated, or ~~the person designated cannot be found at the address as specified in the index referred to in Section 24004~~ *if the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation, or if such agent is a corporation and no person can be found with due diligence to whom the delivery authorized by subdivision (e) of Section 24003 may be made for the purpose of delivery to such corporate agent, or if the agent designated is no longer authorized to act*, then service may be made by personal delivery to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State of the process, together with a written statement signed by the party to the action seeking such service, or by his attorney, setting forth the last-known address of the partnership and a service fee of five dollars (\$5). The Secretary of State shall forth with give notice of such service to the partnership by forwarding the process to it by registered mail, return receipt requested, at the address given in the written statement.

Service on the person designated, or personal delivery of the process and statement of address together with a service fee of five dollars (\$5) to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State, pursuant to this section is a valid service on the partnership. The partnership so served shall appear within 30 days after service on the person designated or

within 30 days after delivery of the process to the Secretary of State, Assistant Secretary of State or a Deputy Secretary of State.

Comment. Section 15700 is amended to delete the reference to the address as specified in the index referred to in Section 24004 because the address of the corporate agent is no longer required to be specified in the index referred to in that section. Language taken from Corporations Code Section 2111 is inserted in lieu of the deleted language.

Corporations Code § 24003 (amended)

SEC. 2. Section 24003 of the Corporations Code is amended to read:

24003. (a) An unincorporated association may file with the Secretary of State on a form prescribed by ~~him~~ *the Secretary of State* a statement containing either of the following:

(1) A statement designating the location and complete address of the association's principal office in this state. Only one such place may be designated.

(2) A statement (i) designating the location and complete address of the association's principal office in this state in accordance with paragraph (1) or, if the association does not have an office in this state, designating the complete address of the association to which the Secretary of State shall send any notices required to be sent to the association under Sections 24005 and 24006, and (ii) designating as agent of the association for service of process any natural person residing in this state or any corporation which has complied with Section ~~3301.5~~ or Section ~~6103.5~~ 1505 and whose capacity to act as such agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall set forth ~~his~~ *the person's* complete business or residence address. If a corporate agent is designated, ~~the statement shall set forth the state or place under the laws of which such agent was incorporated and the name of the city, town, or village wherein it has the office at which the association designating it as such agent may be served, as set forth in the certificate filed by such corporate agent pursuant to~~

~~Section 3301.5, 3301.6, 6403.5, or 6403.6 no address for it shall be set forth.~~

(c) Presentation for filing of a statement and one copy, tender of the filing fee, and acceptance of the statement by the office of the Secretary of State constitutes filing under this section. The Secretary of State shall note upon the copy of the statement the file number and the date of filing the original and deliver or send the copy to the unincorporated association filing the statement.

(d) At any time, an unincorporated association that has filed a statement under this section may file a new statement superseding the last previously filed statement. If the new statement does not designate an agent for service of process, the filing of the new statement shall be deemed to revoke the designation of an agent previously designated. A statement filed under this section expires five years from December 31 following the date it was filed in the office of the Secretary of State, unless previously superseded by the filing of a new statement.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, ~~at the office of such corporate agent, in the city, town, or village named in the statement filed by the association under this section to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5 if such certificate has not been superseded, or otherwise to any person at such office named in the last certificate of the corporate agent filed pursuant to Section 3301.6 or 6403.6, constitutes 1505 at the office of such corporate agent shall constitute~~ valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed in Government Code Section 12185 for filing a designation of agent.

Comment. Section 24003 is amended to substitute a reference to Section 1505 which replaces former Sections 3301.5, 3301.6, 6403.5, and 6403.6. The requirement that the statement set

forth the state or place under the laws of which the agent was incorporated and the city, town, or village where it has the office has been deleted to conform to the comparable provision of the new General Corporation Law which does not continue this requirement. See Corp. Code § 1502(b). Subdivision (e) of Section 24003 is revised to conform to the language of the comparable provision of the new General Corporation Law. See Corp. Code § 1701.

Corporations Code § 24004 (amended)

SEC. 3. Section 24004 of the Corporations Code is amended to read:

24004. (a) The Secretary of State shall mark each statement filed under Section 24003 with a consecutive file number and the date of filing. He may destroy or otherwise dispose of any such statement four years after the statement expires. In lieu of retaining the original statement, the Secretary of State may retain a copy thereof in accordance with Government Code Section 14756.

(b) The Secretary of State shall index each statement filed under Section 24003 according to the name of the unincorporated association as set out in the statement and shall enter in the index the file number and the address of the association as set out in the statement and, if an agent for service of process is designated in the statement, the name of the agent and *his, if a natural person is designated as the agent, the address of such person.*

(c) Upon request of any person, the Secretary of State shall issue his certificate showing whether, according to his records, there is on file in his office, on the date and hour stated therein, any presently effective statement filed under Section 24003 for an unincorporated association using a specific name designated by the person making the request. If such a statement is on file, the certificate shall include the information required by subdivision (b) to be included in the index. The fee for such a certificate is two dollars (\$2).

(d) When a statement has expired under subdivision (d) of Section 24003, the Secretary of State shall enter

that fact in the index together with the date of such expiration.

(e) Four years after a statement has expired, the Secretary of State may delete the information concerning that statement from the index.

Comment. Section 24004 is amended to reflect the fact that Section 24003 has been amended to delete the requirement that the statement contain the address of the corporate agent.

Transitional Provision

SEC. 4. (a) As used in this section, a reference to "Section 1505 of the new law" means Section 1505 of the Corporations Code as enacted by Chapter 682 of the Statutes of 1975, effective January 1, 1977, and as in effect on that date; a reference to Section 3301.5, 3301.6, 6403.5, or 6403.6 means that section of the Corporations Code in effect prior to January 1, 1977.

(b) When any corporate agent for service of process has been designated by an unincorporated association prior to the effective date of this act and such designation of agent included the name of a city, town, or village wherein the corporate agent maintained an office, service on such agent may be effected at any office of the agent set forth in the certificate of the corporate agent filed pursuant to Section 1505 of the new law or filed pursuant to Section 3301.5, 3301.6, 6403.5, or 6403.6, whether or not such office is in such city, town, or village.

(c) Where an unincorporated association has designated, prior to the effective date of this act, a corporate agent for service of process who has complied with Section 3301.5 or Section 6403.5 and whose capacity to act as such agent has not terminated prior to the effective date of this act, the designation of such corporate agent shall not terminate after the effective date of this act until the agent files with the Secretary of State a written statement of resignation as such agent in compliance with Section 24005 or until the statement filed by the unincorporated association under Section 24003 is superseded or expires, whichever takes place earlier.

Comment. This section is drawn from Sections 2300 and 2317 of the new General Corporation Law. Cal. Stats. 1975, Ch. 682. Subdivision (c) is designed to avoid the need of an unincorporated association filing a new designation of a corporate agent merely because of the enactment of this act.

APPENDIX IV

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Sister State Money Judgments

April 1976

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

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GEORGE H. MURPHY
Ex Officio

April 22, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

Legislation relating to the enforcement of sister state money judgments was enacted in 1974 (Cal. Stats. 1974, Ch. 211) upon recommendation of the California Law Revision Commission. See *Recommendation Relating to Enforcement of Sister State Money Judgments*, 11 CAL. L. REVISION COMM'N REPORTS 451 (1973).

The Commission was directed by Resolution Chapter 45 of the Statutes of 1974 to study all aspects of the law relating to creditors' remedies. Pursuant to this directive, the Commission submits this recommendation proposing revisions in the statute relating to enforcement of sister state money judgments to deal with problems revealed by experience under that statute.

Respectfully submitted,

JOHN N. McLAURIN
Chairman

RECOMMENDATION

relating to

SISTER STATE MONEY JUDGMENTS

In 1974, upon recommendation of the Law Revision Commission, the Legislature enacted an expeditious registration procedure for enforcing sister state money judgments in California.¹ Pursuant to this procedure, a California judgment is entered on the basis of the sister state judgment in the amount stated in the judgment creditor's application.² The judgment debtor is afforded 30 days after being served with notice of entry of judgment within which to move to vacate the California judgment.³ Experience under the 1974 statute has revealed three problems which are discussed in this recommendation.

There is no procedure under the 1974 statute for including in the California judgment the amount of interest due on the sister state judgment from the date of its original entry in the sister state until the entry of the judgment in California.⁴ The manner of recovering this interest under the law as it now stands is not clear, but a court hearing surely would be required to determine the applicable rate of interest except where the rate is stated in the sister state judgment. The necessity of a court hearing to recover interest is counter to the purpose of the registration procedure which is to facilitate enforcement of sister state money judgments without requiring a court hearing. Accordingly, the Commission recommends that the 1974 statute be amended to provide that the judgment as entered in California shall include the amount of interest

¹ Code Civ. Proc. §§ 1710.10-1710.65. See *Recommendation Relating to Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973).

² Code Civ. Proc. § 1710.25.

³ Code Civ. Proc. § 1710.40.

⁴ The general rule is that the rate of interest on the sister state judgment is governed by the law of the sister state. *Parnham v. Parnham*, 32 Cal. App.2d 93, 89 P.2d 189 (1939); A. Ehrenzweig, *Conflict of Laws* § 195, at 511 (1962). See *Restatement (Second) of Conflict of Laws* § 101 (1971). Of course, after entry in California, the legal rate of interest on judgments in this state (seven percent) is applicable. See Cal. Const., Art. XX, § 22; Code Civ. Proc. § 1710.35 (judgment based on sister state money judgment, entered pursuant to registration provisions, has same effect as money judgment of superior court).

accrued on the sister state judgment at the legal rate of interest applicable in the sister state. The judgment creditor desiring to recover interest should be required to state in his application for entry of judgment in California the rate of interest applicable under the law of the sister state to the sister state judgment and the amount of accrued interest at such rate. The amount and the rate should be stated in the notice to the judgment debtor who would then have an opportunity to object by way of a motion to vacate.

The 1974 statute does not specifically provide for recovery of the filing fee for the application for entry of judgment in California. Accordingly, the Commission recommends that the judgment as entered in California include the amount of the filing fee.⁵

The 1974 statute does not specifically provide for the recovery of the fee for serving the notice of entry of judgment on the judgment debtor. The Commission recommends that the fee be made recoverable in the same manner as the statutory fees for service of a writ of execution under Section 1033.7 of the Code of Civil Procedure.⁶

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

An act to amend Sections 1710.15, 1710.25, 1710.30, and 1710.40 of the Code of Civil Procedure, relating to enforcement of judgments.

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

⁵ Costs of enforcing the judgment once it is entered, such as fees for issuance and levy of a writ of execution, are recoverable just as if the judgment was initially rendered in California. See Code Civ. Proc. §§ 1033.7 (memorandum of costs), 1710.35 (judgment based on sister state money judgment, entered pursuant to registration provisions, has same effect as money judgment of superior court).

⁶ Certain specified statutory fees incurred after judgment are recoverable under the first paragraph of Section 1033.7 by filing and serving on or mailing to the adverse party a verified memorandum of such costs within six months after they have been incurred. If the adverse party is dissatisfied with the costs as stated in the memorandum, within 10 days after service he may file a motion to tax costs. See Govt. Code § 26721 (basic fee for service of notice).

Code of Civil Procedure § 1710.15 (amended).**Application for entry of judgment**

SECTION 1. Section 1710.15 of the Code of Civil Procedure is amended to read:

1710.15. (a) A judgment creditor may apply for the entry of a judgment based on a sister state judgment by filing an application with the superior court for the county designated by Section 1710.20.

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

(1) A statement that an action in this state on the sister state judgment is not barred by the applicable statute of limitations.

(2) A statement, based on the applicant's information and belief, that no stay of enforcement of the sister state judgment is currently in effect in the sister state.

(3) A statement of the amount remaining unpaid under the sister state judgment, *a statement of the amount of interest accrued on the sister state judgment computed at the rate of interest applicable to the judgment under the law of the sister state, a statement of the rate of interest applicable to the judgment under the law of the sister state, and a citation to the law of the sister state establishing such rate of interest.*

(4) A statement that no action based on the sister state judgment is currently pending in any court in this state and that no judgment based on the sister state judgment has previously been entered in any proceeding in this state.

(5) Where the judgment debtor is an individual, a statement setting forth the name and last known residence address of the judgment debtor. Where the judgment debtor is a corporation, a statement of the corporation's name, place of incorporation, and whether the corporation, if foreign, has qualified to do business in this state under the provisions of Chapter 3 (~~commencing with Section 6103~~) of Part 11 21 (*commencing with Section 2100*) of Division 1 of Title 1 of the Corporations Code. Where the judgment debtor is a partnership, a statement of the name of the partnership, whether it is a foreign partnership, and, if it is a foreign partnership, whether it has filed a statement pursuant to Section 15700 of the Corporations Code

designating an agent for service of process. Except for facts which are matters of public record in this state, the statements required by this paragraph may be made on the basis of the judgment creditor's information and belief.

(6) A statement setting forth the name and address of the judgment creditor.

(c) A properly authenticated copy of the sister state judgment shall be attached to the application.

Comment. Section 1710.15 is amended to provide the manner of claiming interest on the sister state judgment. Paragraph (3) of subdivision (b) makes clear that the rate of interest applicable to the sister state judgment when a California judgment is entered under this chapter is the applicable rate under the law of the sister state. This continues prior law. See *Parnham v. Parnham*, 32 Cal. App.2d 93, 89 P.2d 189 (1939).

Code of Civil Procedure § 1710.25 (amended). Entry of judgment

SEC. 2. Section 1710.25 of the Code of Civil Procedure is amended to read:

1710.25. (a) Upon the filing of the application, the clerk shall enter a judgment based upon the application for the ~~amount shown therein to be~~ *total of the following amounts as shown therein:*

(1) *The amount remaining unpaid under the sister state judgment.*

(2) *The amount of interest accrued on the sister state judgment.*

(3) *The amount of the fee for filing the application for entry of the sister state judgment.*

(b) Entry shall be made in the same manner as entry of a judgment of the superior court.

Comment. Section 1710.25 is amended to provide that the clerk enters the judgment based on the aggregate of the principal amount of the sister state judgment and the interest which has run thereon under the laws of the sister state as stated in the judgment creditor's application. See Section 1710.15. In addition, the amendment makes clear that the judgment entered in this state includes the fee for filing the application under this chapter.

After entry of the California judgment, interest runs thereon at the legal rate applicable to money judgments initially

rendered in California. See Cal. Const., Art. XX, § 22; Section 1710.35 (upon entry, judgment has same effect as judgment of superior court). Costs of enforcing the judgment incurred after entry of the California judgment are recoverable in the usual manner. See Section 1033.7 (memorandum of costs).

Code of Civil Procedure § 1710.30 (amended). Notice of entry of judgment; cost of service

SEC. 3. Section 1710.30 of the Code of Civil Procedure is amended to read:

1710.30. (a) Notice of entry of judgment shall be served promptly by the judgment creditor upon the judgment debtor in the manner provided for service of summons by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2. Notice shall be in a form prescribed by the Judicial Council and shall inform the judgment debtor that he has 30 days within which to make a motion to vacate the judgment.

(b) *The fee for service of the notice of entry of judgment is an item of costs recoverable in the same manner as statutory fees for service of a writ as provided in Section 1033.7, but such fee may not exceed the amount allowed to a public officer or employee in this state for such service.*

Comment. Subdivision (b) is added to Section 1710.30 to provide the manner of recovering the cost of serving the notice of entry of judgment on the judgment debtor. This cost is recovered in the same manner as, for example, the statutory fees for the service of a writ of execution under Section 1033.7. See Govt. Code § 26721 (basic fee for service of a notice).

Code of Civil Procedure § 1710.40 (amended). Vacation of judgment

SEC. 4. Section 1710.40 of the Code of Civil Procedure is amended to read:

1710.40. (a) A judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment, *including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect. Where a judgment is vacated and the court determines that the judgment creditor is entitled to*

another and different judgment, the court shall order the entry thereof.

(b) Not later than 30 days after service of notice of entry of judgment pursuant to Section 1710.30, proof of which has been made in the manner provided by Article 5 (commencing with Section 417.10) of Chapter 4 of Title 5 of Part 2, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment under this section.

Comment. Subdivision (a) of Section 1710.40 is amended to make clear that the judgment debtor may seek to have the judgment entered in California vacated on the ground that the amount of interest allowed on the sister state judgment is incorrect. The second sentence is added to subdivision (a) to make clear that the court may enter a different judgment in appropriate cases, *e.g.*, where the principal amount of the judgment or the interest thereon has been incorrectly stated but it is clear that the judgment creditor is entitled to a judgment in California in a different amount. Compare Section 663.

APPENDIX V

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Damages in Action for Breach
of Lease**

May 1976

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

May 13, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
***Governor of California* and**
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make a study to determine whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised. In response to this directive, the Commission submitted recommendations to the 1970 and 1974 sessions of the Legislature. The recommendations resulted in the enactment of three statutes. See Cal. Stats. 1970, Ch. 89 (rights upon abandonment or termination of a lease of real property); Cal. Stats. 1974, Ch. 331 (disposition of personal property left on leased premises); Cal. Stats. 1974, Ch. 332 (abandonment of leased real property). The Commission retained the topic on its agenda for the study of additional aspects of the topic or new developments.

This new recommendation deals with the damages recoverable in an unlawful detainer proceeding which has been converted into an ordinary civil action for damages because the tenant has given up possession of the property before the trial of the unlawful detainer proceeding.

The Commission wishes to acknowledge the assistance of those persons who contributed to the development of this recommendation. The Commission is particularly indebted to

Ronald P. Denitz of Los Angeles and to Thomas W. Pulliam, Jr. and Robert E. Young, both of the San Francisco Neighborhood Legal Assistance Foundation.

Respectfully submitted,

JOHN N. MCLAURIN
Chairman

RECOMMENDATION

relating to

DAMAGES IN ACTION FOR BREACH OF LEASE

A lessor who seeks to evict a lessee who has breached the lease may obtain possession of the premises in an unlawful detainer proceeding.¹ Unlawful detainer is a summary proceeding. Its main object is restitution of the premises.² Unpaid rent and damages may be awarded up to the date of judgment,³ but damages accruing after judgment are not recoverable.⁴ The defendant's normal procedural rights are also restricted: for example, a cross-complaint is not allowed.⁵

Legislation recommended by the Law Revision Commission was enacted in 1970⁶ to add Sections 1951-1952.6 to the Civil Code relating to leases. Section 1951.2 permits the lessor, under certain circumstances, to recover damages for the rental loss for the balance of the term of the lease after the time of award.⁷ The section does not, however, extend to unlawful detainer proceedings.⁸

¹ See Code Civ. Proc. § 1174; 3 B. Witkin, *Summary of California Law*, Real Property § 529, at 2202 (8th ed. 1973). Possession may also be obtained in an action for ejectment or to quiet title, but these are rarely used to evict a tenant. M. Moskovitz, P. Honigsberg & D. Finkelstein, *California Eviction Defense Manual* 4 (1971) [hereinafter cited as *Moskovitz*]. See also 3 B. Witkin, *supra* §§ 523-524, at 2198-2199.

² *E.g.*, Markham v. Fralick, 2 Cal.2d 221, 227, 39 P.2d 804, 807 (1934); Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 721, 84 Cal. Rptr. 756, 760 (1970).

³ Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52, 54 (1952); *Moskovitz* § 13.33, at 125.

⁴ *E.g.*, Cavanaugh v. High, 182 Cal. App.2d 714, 722-723, 6 Cal. Rptr. 525, 530-531 (1960); Roberts v. Redlich, 111 Cal. App.2d 566, 569-570, 244 P.2d 933, 935 (1952).

⁵ *E.g.*, Knowles v. Robinson, 60 Cal.2d 620, 625, 387 P.2d 833, 836, 36 Cal. Rptr. 33, 36 (1963); *Moskovitz* § 9.37, at 90.

⁶ See Cal. Stats. 1970, Ch. 89; 9 Cal. L. Revision Comm'n Reports 153-174 (1969).

⁷ The lessor may only recover the amount by which the present value of the unpaid rent for the balance of the term after the time of the award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss as could reasonably have been avoided. In order for the lessor to recover such damages, there must be (1) a breach by the lessee, (2) either abandonment of the property by the lessee or termination by the lessor of the lessee's right to possession, and (3) either a provision in the lease for the recovery of such damages or, subject to any limitations in the lease, a reletting of the property by the lessor prior to the time of the award of the damages. See Civil Code § 1951.2, set out in the Exhibit to this recommendation.

⁸ Subdivision (a) of Section 1952 provides in part that "nothing in Sections 1951 to 1951.8, inclusive, affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer."

Thus, although prospective damages may be recovered in an action for damages,⁹ they may not be recovered in an unlawful detainer proceeding.¹⁰

If the tenant gives up possession after commencement of an unlawful detainer proceeding, the need for a summary remedy no longer exists.¹¹ The courts have held that the unlawful detainer proceeding is thereupon converted into an ordinary action for damages¹² and that the restrictions on the defendant's procedural rights no longer apply.¹³ Accordingly, since the action is no longer one for unlawful detainer, it follows that the lessor may in a proper case plead, prove, and recover prospective damages under Section 1951.2.

The Commission recommends that these judicial rulings be codified. There is no sound reason to require a lessor to bring a separate action for prospective damages when an unlawful detainer proceeding has been converted to an ordinary action for damages. The codifying statute should require, however, that the lessor amend his complaint to place the defendant on notice that prospective damages are being sought. In addition, the statute should:

(1) Make clear that the defendant has the right to seek affirmative relief and to assert all defenses after the action has been thus converted;

(2) Provide that the compulsory cross-complaint statute¹⁴ does not apply unless, after giving up possession, the defendant files (a) a cross-complaint or (b) an answer or an amended answer in response to an amended complaint seeking prospective damages for loss of future rent.

⁹ Subdivision (b) of Civil Code Section 1952 provides that the bringing of an unlawful detainer action "does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8"

¹⁰ See note 4 *supra*.

¹¹ *Green v. Superior Court*, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, 1179 n.18, 111 Cal. Rptr. 704, 715 n.18 (1974); *Moskovitz* § 9.38, at 91. See *Union Oil Co. v. Chandler*, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970); *Servais v. Klein*, 112 Cal. App. 26, 36, 296 P. 123, 127 (1931).

¹² See, e.g., *Union Oil Co. v. Chandler*, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970).

¹³ See, e.g., *Heller v. Melliday*, 60 Cal. App.2d 689, 697, 141 P.2d 447, 451-452 (1974); *Servais v. Klein*, 112 Cal. App. 26, 35-36, 296 P. 123, 127 (1931).

¹⁴ Code Civ. Proc. § 426.30(a).

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

An act to add Section 1952.3 to the Civil Code, relating to leases.

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

Civil Code § 1952.3 (added)

SECTION 1. Section 1952.3 is added to the Civil Code, to read:

1952.3. (a) If the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because the defendant has given up possession before trial, the case may proceed as an ordinary civil action.

(b) The lessor may obtain any relief to which he is entitled, including, where applicable, relief authorized by Section 1951.2. If the lessor seeks to recover damages described in paragraph (3) of subdivision (a) of Section 1951.2, the lessor shall first amend the complaint pursuant to Section 472 or 473 of the Code of Civil Procedure.

(c) The defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he is entitled. Subdivision (a) of Section 426.30 of the Code of Civil Procedure does not apply unless, after giving up possession of the property, the defendant (1) files a cross-complaint or (2) files an answer or an amended answer in response to an amended complaint filed pursuant to subdivision (b).

Comment. Subdivision (a) of Section 1952.3 codifies prior case law. If the tenant gives up possession of the property after commencement of an unlawful detainer proceeding, "the action thus becomes an ordinary one for damages." *Union Oil Co. v. Chandler*, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970). This is true only where possession is given up "before the trial of the unlawful detainer action." *Green v. Superior Court*, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, 1179 n.18, 111 Cal. Rptr. 704, 715 n.18 (1974). *Accord, Erba Corp. v. W. & B. Realty Co.*, 255 Cal. App.2d 773, 778, 63 Cal. Rptr. 462, 465 (1967); *Turem v. Texaco, Inc.*, 236 Cal. App.2d 758, 763, 46 Cal. Rptr. 389, 392 (1965). In this situation, the rules designed to preserve the summary nature of

the proceeding are no longer applicable. See, *e.g.*, *Cohen v. Superior Court*, 248 Cal. App.2d 551, 553–554, 56 Cal. Rptr. 813, 815–816 (1967) (no trial precedence when possession not in issue); *Heller v. Melliday*, 60 Cal. App.2d 689, 696–697, 141 P.2d 447, 451–452 (1943) (cross-complaint allowable after surrender); *Bell v. Haun*, 9 Cal. App. 41, 97 P. 1126 (1908) (defendant not in possession entitled to same time to answer as in civil actions generally). The limitation of subdivision (a) to unlawful detainer proceedings is not intended to preclude application of the rule stated in subdivision (a) in forcible entry or forcible detainer cases.

Subdivision (b) makes clear that, when the statutory conditions for the application of Section 1951.2 are met, the damages authorized by that section are among the remedies available to the lessor when an unlawful detainer proceeding has been converted to an ordinary civil action. The subdivision serves, among other purposes, the salutary purpose of avoiding multiplicity of actions. The statutory conditions for the application of Section 1951.2 are that there be a lease, breach of lease by the lessee, and either abandonment by the lessee before the end of the term or termination by the lessor of the lessee's right to possession. Civil Code § 1951.2(a).

If damages for loss of rent accruing after judgment are sought by the lessor pursuant to paragraph (3) of subdivision (a) of Section 1951.2, the additional conditions of subdivision (c) of that section must be met. And, if the lessor seeks such damages, the second sentence of subdivision (b) of Section 1952.3 requires the lessor to amend the complaint to state a claim for such relief. If the case is at issue, the lessor's application for leave to amend is addressed to the discretion of the court. See Code Civ. Proc. § 473. The court is guided by a "policy of great liberality in permitting amendments at any stage of the proceeding . . ." 3 B. Witkin, *California Procedure*, Pleading § 1040, at 2618 (2d ed. 1971).

If the lessor amends the complaint, the defendant has a right to answer "within 30 days after service thereof" or within such time as the court may allow. Code Civ. Proc. §§ 471.5, 586. The first sentence of subdivision (c) makes clear that the defendant may cross-complain and may plead any defenses to the lessor's action for damages. Under the second sentence of subdivision (c), the defendant is not obliged to "allege in a cross-complaint any related cause of action" (Code Civ. Proc. § 426.30) unless, after giving up possession of the property, the defendant files a cross-complaint or files an answer, or an amended answer, in response to the amended complaint. This will protect the defendant against inadvertent loss of a related cause of action.

EXHIBIT

Civil Code § 1951.2

1951.2. (a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:

(1) The worth at the time of award of the unpaid rent which had been earned at the time of termination;

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;

(3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; and

(4) Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

(b) The "worth at the time of award" of the amounts referred to in paragraphs (1) and (2) of subdivision (a) is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The worth at the time of award of the amount referred to in paragraph (3) of subdivision (a) is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1 percent.

(c) The lessor may recover damages under paragraph (3) of subdivision (a) only if:

(1) The lease provides that the damages he may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified

in the lease, exceeds the amount of such rental loss for the same period that the lessee proves could be reasonably avoided; or

(2) The lessor relet the property prior to the time of award and proves that in reletting the property he acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this paragraph is subject to any limitations specified in the lease.

(d) Efforts by the lessor to mitigate the damages caused by the lessee's breach of the lease do not waive the lessor's right to recover damages under this section.

(e) Nothing in this section affects the right of the lessor under a lease of real property to indemnification for liability arising prior to the termination of the lease for personal injuries or property damage where the lease provides for such indemnification.

APPENDIX VI

LETTER SUBMITTING REPORT ON ASSEMBLY BILL 1671

[Extract from Assembly Journal for January 22, 1976 (1975-76 Regular Session).]

Assembly Committee on Judiciary

January 22, 1976

The Honorable Leo McCarthy
Speaker of the Assembly
State Capitol, Sacramento, California

Dear Mr. Speaker: On January 20, 1976, the Assembly Judiciary Committee reported Assembly Bill 1671 to the Assembly with the recommendation "do pass as amended."

The committee herewith submit the report. The committee believes this report will prove helpful in understanding the intent of the bill.

Respectfully submitted,

JOHN J. MILLER, Chairman
Assembly Judiciary Committee

Above report referred to the Committee on Judiciary.

APPENDIX VII

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 1671

In order to indicate more fully its intent with respect to Assembly Bill 1671, the Assembly Committee on Judiciary makes the following report.

Except for the new and revised comments set out below, the comments contained under various sections of Assembly Bill 1671 as set out in *Recommendation of the California Law Revision Commission Relating to Partition of Real and Personal Property* (January 1975), 13 Cal. L. Revision Comm'n Reports 401 (1975), reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bill 1671.

The following new and revised comments also reflect the intent of the Assembly Committee on Judiciary in approving Assembly Bill 1671.

CODE OF CIVIL PROCEDURE

§ 392 (amended)

Comment. The provision formerly found in subdivision (1) (b) of Section 392 is continued in Section 872.110(b) (1) (partition).

§ 764 (repealed)

Comment. The portion of former Section 764 that provided for division of the property by the referee in accordance with the rights of the parties is continued in Section 873.210. The portion relating to employment of a surveyor is continued in Sections 873.110 and 873.130. The portion relating to designation of the divided portions by landmarks is not continued because it is obsolete. The portion of former Section 764 that provided for designation of public and private ways is superseded by Section 873.080, making comparable provision.

The portion of former Section 764 that provided for division in such a manner as to effectuate prior purported conveyances is continued in Section 873.230.

The portion of former Section 764 that provided for division in such a manner as to allocate improvements to the parties making the improvements is continued in Section 873.220.

§ 774 (repealed)

Comment. Former Section 774 is continued in Section 873.850.

§ 787 (repealed)

Comment. The portion of former Section 787 that provided for recordation of conveyances is continued in Section 873.790. The portion of former Section 787 that specified the effect of the recorded conveyances is continued in Sections 874.210–874.230. See Section 874.240.

§ 872.020. Scope of title

Comment. Section 872.020 is derived from the second sentence of former Section 752a. Owners of both real and personal property may maintain a partition action. See Section 872.210. This title does not apply to property divisions under The Family Law Act or in other types of cases specifically governed by other statutes.

It should be noted that there may be provisions of this title which, although phrased in general terms, are not applicable to personal property.

§ 872.040. Compliance with laws governing property transactions

Comment. Section 872.040 codifies the rule that the partition statute cannot be used to avoid any applicable laws governing property transactions. See, e.g., *Pratt v. Adams*, 229 Cal. App.2d 602, 40 Cal. Rptr. 505 (1964) (Subdivision Map Act). Whether a particular law, regulation, or ordinance is applicable in a partition action is determined by the terms or a construction of that law, regulation, or ordinance.

§ 872.110. Jurisdiction and venue

Comment. Subdivision (a) of Section 872.110 continues a portion of former Section 755. Subdivision (b)(1) continues language formerly found in Section 392 as to partition of real property and broadens it to apply to cases involving real and personal property. Subdivision (b)(2) is new. Compare Section 395 (venue).

§ 872.210. Persons authorized to commence partition action

Comment. Section 872.210 supersedes former Sections 752 and 752a.

Subdivision (a)(1) continues the first portion of former Section 752a relating to personal property. Under former law, successive estates in personal property were apparently subject to partition. See former Section 752a (law governing partition of realty applies to partition of personalty) and 4 L. Simes & A. Smith, *The Law of Future Interests* § 1777, at 108 n.28 (2d ed. 1956). Subdivision (a)(1) continues the right to partition

successive estates in personal property. See also Sections 872.020 (partition of personalty governed by provisions of partition statute) and 872.710(c) (right to partition successive estates in property). As to personal property held on an express trust, see Section 872.840.

Subdivision (a) (2) supersedes the first portion of former Section 752 relating to real property. The former provision, while covering many of the usual cases, was unduly restrictive. Under subdivision (a) (2), where property is owned by several persons, whether or not they are joint tenants or tenants in common, partition is available to sever their interests. Thus, subdivision (a) (2) permits partition of partnership property. It should be noted, however, that partition of partnership property is subject to the limitations of Section 872.730. Likewise, under subdivision (a) (2), where property is owned in successive estates, partition is available. Former law limited partition of such estates to actions by a life tenant against the remainderman. See *Akagi v. Ishioka*, 47 Cal. App.3d 426, 120 Cal. Rptr. 807 (1975). Subdivision (a) (2) removes any such limitations. It should be noted, however, that, unlike partition of concurrent interests which may be partitioned as of right (subject to the doctrine of waiver), partition of successive estates is permitted only if it is in the best interest of all the parties. See Section 872.710(c).

Subdivision (b) codifies the rule that community property is not subject to partition. See *Jacquemart v. Jacquemart*, 142 Cal. App.2d 794, 299 P.2d 281 (1956). Community, quasi-community, and quasi-marital property are subject to division under The Family Law Act. See Civil Code §§ 4452 (quasi-marital property) and 4800 (community and quasi-community property). It should be noted that subdivision (b) precludes only severance of the community interests of spouses; it does not preclude partition of other estates or interests in the property that may exist concurrently or successively with the community interests. Subdivision (b) promotes a policy to make the family law court the sole forum for resolution of disputes relating to marital property. One consequence of this policy is that community interests in property cannot be severed absent a dissolution proceeding or a proceeding for legal separation (which under Civil Code Section 4508 requires consent of both parties). Whether community interests in property should be severable during marriage without consent of both parties is an issue the California Law Revision Commission has not addressed; the Commission believes that this issue is more appropriately resolved within the context of The Family Law Act.

The provision formerly found in Section 752 for partition by a lienholder "on a parity with that on which the owner's title is

based” is not continued by Section 872.210. The provision was special legislation of extremely limited application. See, *e.g.*, *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 197 P.2d 537 (1948); *Elbert, Ltd. v. Clare*, 40 Cal.2d 498, 254 P.2d 20 (1953). Moreover, it was an exception to the rule that only the holder of a substantial property interest is entitled to demand partition. In some cases, foreclosure of the lien will result in a tenancy in common relationship. See *Elbert, Ltd. v. Nolan, supra*. This act provides a one-year grace period for persons affected by the repeal of this provision.

§ 872.230. Contents of complaint

Comment. Section 872.230 is new. In addition to the information required by this section, other information may be necessary. See, *e.g.*, Section 872.220 (information relating to title report).

Subdivision (a) requires a description of the property that is the subject of the action. It should be noted that several properties may be joined in one complaint even though located in different counties. See, *e.g.*, *Murphy v. Superior Court*, 138 Cal. 69, 70 P. 1070 (1902). And, real and personal property may be joined in one action. Section 872.240. As to joinder of property under varying ownership, see *Middlecoff v. Cronise*, 155 Cal. 185, 100 P.232 (1909).

Subdivision (b) requires an allegation of all the plaintiff's interest in the property. For interests sufficient to maintain the action, see Section 872.210. Where the plaintiff has a lien on the property as well as an interest sufficient to maintain the action, he must allege his lien as well as his other interest.

Subdivision (c) supersedes the first portion of former Section 753. Unlike the former provision that required all interests to be set out regardless of whether the interests would be affected, subdivision (c) limits the requirement to only those interests the plaintiff reasonably believes will be materially affected by the partition action. Incorporation of a title report should be sufficient to satisfy this requirement as to recorded interests but not as to unrecorded interests known to the plaintiff. It should be noted that there may be interests of record in personal property filed to perfect a security interest under the Commercial Code.

Partition of some or all of the interests in the property may be obtained. Subdivision (d) requires the plaintiff to indicate which estate or estates are intended to be affected by the action. The estates in real property include estates of inheritance, for life, and for years. Civil Code § 761. For provisions relating to parties defendant, see Article 4 (commencing with Section 872.510).

Subdivision (e) requires an allegation of facts justifying a sale of the property where the plaintiff seeks sale. Should the plaintiff fail to seek sale at the time of filing the complaint, he may do so thereafter by amending the complaint subject to the general rules governing amendment. See Sections 471.5, 472, and 473. The defendant may request sale by appropriate pleading in the answer. See Section 872.410.

§ 872.310. Summons

Comment. Section 872.310 supersedes former Section 756.

The provision of former Section 756 that the summons must contain a description of the property is not continued since the property will already be described in the complaint that accompanies the summons. See Section 872.230(a).

The provision of former Section 756 that the summons be directed to all persons "named" as defendants is continued in subdivision (a) which incorporates the general provisions governing the contents of summons in civil actions. See Section 412.20(a)(2) (requiring the summons to contain the names of the parties to the action).

Subdivision (b) makes clear that, where unknown parties (Sections 872.520, 872.550, or otherwise by court order) or heirs (Section 872.530(b)) are involved, service on such parties must be by publication. This continues in part the first sentence of former Section 757. For additional provisions relating to service by publication, see Sections 872.320 and 872.330.

§ 872.330. Publication as to certain defendants

Comment. Section 872.330 is new. It is derived from Section 1250.125 (eminent domain).

§ 872.430. Claim for affirmative relief

Comment. Section 872.430 is new. It avoids the need of the defendant to file a cross-complaint for affirmative relief. Compare Section 431.30(c) (affirmative relief may not be claimed in the answer).

§ 872.510. Joinder of defendants

Comment. Section 872.510 supersedes former Section 754 (no person having a lien or "conveyance" need be made a party unless of record). Under Section 872.510, only persons having interests in the estate or estates as to which partition is sought need be joined. This provision is elaborated in the succeeding sections of this article. It should be noted that "interest" includes liens and that joinder of additional parties may be necessary under Section 389 (mandatory joinder).

For the effect of failure to join the holder of a recorded interest, see Section 874.220; for the effect of failure to join holders of interests actually known to the plaintiff or reasonably apparent from an inspection of the property, see Section 874.230.

§ 872.530. Where defendant is deceased

Comment. Section 872.530 is new. It is derived from Section 1250.220(b) (eminent domain).

§ 872.550. Joinder of “all persons unknown”

Comment. Section 872.550 is new. It is derived from Section 1250.220(c) (eminent domain) and provides a means whereby the plaintiff may give the partition action an in rem effect. For provisions relating to service by publication, see Sections 872.320 and 872.330. For the effect of the judgment, see Section 874.210.

§ 872.710. Court determination of right to partition

Comment. Subdivision (a) of Section 872.710 continues in substance the portion of former Section 763 which provided for partition “upon the requisite proofs being made.” It applies to both contested and uncontested trials. In order to make the determination that the plaintiff has the right to partition, the court must find that the plaintiff has an interest in the property sufficient to maintain the action. See Section 872.210. In addition, the court must find the existence of any special conditions prerequisite to partition of interests in particular types of property. See, *e.g.*, Civil Code § 1354 (limitations on partition of interests in condominium property).

Subdivision (b) is based on existing case law. See generally 3 B. Witkin, *Summary of California Law*, Real Property § 227 (8th ed. 1973). Subdivision (b) does not determine whether a purported waiver of the right to partition is valid but only that a valid waiver is a sufficient defense to the right of partition. The validity of a waiver is determined by case law. The introductory proviso of subdivision (b) refers to one situation where partition of concurrent interests is not a matter of right—partnership property. See Section 872.730. Subdivision (b) does not affect the law relating to partition of cotenancy property on which a homestead has been declared. See, *e.g.*, *Squibb v. Squibb*, 190 Cal. App. 2d 766, 12 Cal.Rptr. 346 (1961) (partition available to one cotenant where homestead declared on interest of other cotenant); contrast *Walton v. Walton*, 59 Cal. App. 2d 26, 138 P.2d 54 (1943) (partition not available to husband where homestead declared on husband’s separate interest by wife).

Subdivision (c) is new. It is designed to give the court fairly broad discretion in the case of successive estates.

§ 872.730. Partition of partnership property

Comment. Section 872.730 is new; it is an exception to the rule of Section 872.710 that partition as to concurrent interests is a matter of right. Section 872.730 codifies prior case law to the effect that partition is an appropriate remedy where the affairs of the partnership are otherwise sufficiently settled and what remains is the division or sale of the property. See, *e.g.*, *Hughes v. Devlin*, 23 Cal. 501 (1863); *Logoluso v. Logoluso*, 233 Cal. App. 2d 523, 43 Cal. Rptr. 678 (1965).

§ 873.010. Court authority concerning referee

Comment. Section 873.010 sets out some, but not all, of the court's powers with respect to the referee.

Subdivision (a), providing for court appointment of a single referee, supersedes provisions of former Section 763 that required the consent of the parties for the appointment of a single referee.

Subdivision (b) (1) is new. Whether a bond is required depends on the circumstances of the case.

Subdivision (b) (2) is new; it gives express recognition to the instructions procedure. It is a valuable tool for resolving ambiguities and matters not otherwise covered and, if properly used, serves to expedite the action. See also Section 873.070 (petition for instructions).

Subdivision (b) (3) states the substance of former Section 768 in providing for court allowance of fees and expenses of referees. See Section 874.010 and Comment thereto (costs incurred in partition action).

Subdivision (b) (4), permitting the court to fix the date of commencement of the lien of the referee (see Section 874.120), is new. It protects the referee in case of later settlement and dismissal of the action. For authority of the court to fix the date of commencement of liens of third persons furnishing services, see Section 873.110.

Subdivision (b) (5) is new. It recognizes the need for and practice of the court to receive and pass upon the account and final report of the referee and thereafter to discharge the referee. This applies particularly in, but is not limited to, sales transactions.

Subdivision (b) (6) restates the substance of the introductory portion of former Section 766. It broadens this provision to apply to the referee for sale as well as for division.

Subdivision (b) (7) is new; for specific provisions authorizing appointment of a new referee, see Sections 872.630 (b) (new

referee for determination of interests of lienholders) and 873.290 (b) (new referee for preparation of new report on division). See also Sections 873.730 and 873.740 (authority of court to order new sale).

§ 873.260. Liens

Comment. Section 873.260 continues the substance of the first portion of former Section 769. As under the former section, the lien that is continued will be subordinate to charges on the property for its just proportion of the costs of partition. See Section 874.120.

§ 873.820. Application of proceeds of sale

Comment. Section 873.820 continues the substance of former Section 771 and extends it to the sale of unencumbered as well as encumbered property. The provision formerly found in Section 771, requiring payment of liens prior to the lien upon which the owner's title is based, is not continued since the provision formerly found in Section 752 for partition by a lienholder is not continued. See Comment to Section 872.210.

The preference for payment of the expenses of sale in subdivision (a) is new. For the costs of partition (subdivision (b)), see Chapter 8 (commencing with Section 874.010). Subdivision (c) provides for payment of liens on the property, regardless whether the lienholder is a party, unless the property has been sold subject to the lien. In case of a dispute concerning payment of a lien, the proceeds may be deposited in court pursuant to Section 873.810 pending resolution of the dispute.

§ 873.850. Where proceeds have not been allocated between parties

Comment. Section 873.850 continues the substance of former Section 774.

§ 874.110. Payment by parties

Comment. Section 874.110 supersedes portions of former Section 796. While subdivision (a) requires payment by the parties, it should be noted that, in the case of sale of the property, the proceeds are to be applied first to discharge the costs of partition before disbursement to the parties. Section 873.820.

Subdivision (b) requires the judgment to list only amounts remaining unpaid rather than all amounts apportioned to the parties under the former provision. See also former Section 798.

The judgment referred to in this section and in Sections 874.130 and 874.140 is the judgment entered at the conclusion of the case in the trial court.

§ 874.210. Persons bound by judgment

Comment. Section 874.210 supersedes portions of former Sections 766 and 787. See also Section 872.540 (judgment does not affect certain oil and gas interests).

Subdivision (a) makes clear that all parties to the action are bound by the judgment, including the heirs of a decedent joined pursuant to Section 872.530 and unknown persons joined pursuant to Section 872.550. Subdivision (a) supersedes former Section 766 (1), (3) and the first portion of former Section 787.

Subdivision (b) continues the substance of former Section 766 (2).

Subdivision (c) supersedes the last portion of former Section 787. For an exception to subdivision (c), see Section 874.230 (unrecorded interests known to plaintiff).

Subdivision (d) supersedes former Section 766(4) and the middle portion of former Section 787.

§ 874.230. Unrecorded interests known to plaintiff

Comment. Section 874.230 is new. It is intended to implement the requirement of Section 872.510 that the plaintiff join all persons “actually known” to the plaintiff or “reasonably apparent from an inspection of the property,” who have or claim interests in the property or estate as to which partition is sought.

Section 874.230 is an exception to the rule stated in Section 874.210 (c) that the judgment binds all persons having unrecorded interests in the property. It should be noted that Section 874.230 makes the judgment not conclusive only with respect to the share of the plaintiff. The portions of the property allocated to other parties in case of a division, or the entire property in case of a sale to a bona fide purchaser, are free of the unrecorded interests.

§ 874.240. Conveyance or transfer has binding effect of judgment

Comment. Section 874.240 continues the substance of former Section 787 which provided the effect of a conveyance of the property in the partition action.

PROBATE CODE**§ 1103 (amended)**

Comment. Section 1103 is amended to conform to the general partition standard for sale or division of property. See Code Civ. Proc. §§ 872.810 and 872.820.

APPENDIX VIII

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 2864

[Extract from Senate Journal for April 22, 1976 (1975-76 Regular Session).]

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 2864

In order to indicate more fully its intent with respect to Assembly Bill 2864, 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 2864 as set out in *Recommendation of the California Law Revision Commission Relating to Revision of the Attachment Law* (November 1975) reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bill 2864.

The following revised comments also reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 2864.

§483.010. Cases in which attachment authorized

Comment. Section 483.010 is amended to permit attachment in an action against a defendant that is not an individual without a showing that the defendant was engaged in a trade, business, or profession or that the goods, services, or money furnished were used primarily for the defendant's personal, family, or household purposes. Consequently, an attachment may be issued against a business corporation or a partnership or other unincorporated association on a contract claim or claims where the total amount claimed is \$500 or more, exclusive of costs, interest, and attorney's fees. In addition, unlike former Section 537.2, Section 483.010, as amended, permits attachment on such claims against corporations and partnerships and other unincorporated associations which are not organized for profit or engaged in an activity for profit. Under Section 483.010 as amended, the court is not faced with the potentially difficult and complex problem of determining whether a corporation, partnership, or association is engaged in a trade, business, or profession. However, subdivision (c) provides that, if the defendant is an individual, an attachment may be issued only if the contract claim "arises out of the conduct by the individual of a trade, business, or profession" and only if the goods, services, or money furnished were not used primarily for the defendant's personal, family, or household purposes. *Cf. Advance Transformer Co. v. Superior Court*, 44 Cal. App.3d 127, 142, 118 Cal. Rptr. 350, 360 (1974) (construing former Sections 537.1 and 537.2 as "limiting the attachment to situations in which the claim arises out of defendant's conduct of his business").

Subdivision (b) is amended to permit the issuance of an attachment on a secured claim where the security has decreased in value to less than the amount owing on the claim. Prior to this amendment, an attachment would have been issuable on such claims only where the security had

become valueless. See *Western Board of Adjusters, Inc. v. Covina Publishing, Inc.*, 9 Cal. App.3d 659, 88 Cal. Rptr. 293 (1970), and 2 B. Witkin, *California Procedure*, Provisional Remedies § 138, at 1561-1562 (2d ed. 1970), concerning the situation where security has without any act of the plaintiff become valueless as security.

§489.310. Undertaking for release of attachment

Comment. Subdivision (a) of Section 489.310 is amended to restrict the procedure for releasing or preventing attachment by the giving of an undertaking to the county where the action is pending. This amendment conforms the undertaking for release procedure to other sections that require applications to be made to the court where the action is pending. See, e.g., Sections 482.100 (postlevy claims of exemption based on change in circumstances), 485.610 (claims of exemption after levy of ex parte writ), 488.555 (motion for release of excessive attachment), 490.090 (procedure for recovery for wrongful attachment).

Subdivision (b) is amended to require a description of property in the defendant's application only where the description serves a purpose, i.e., where only a portion of attached property is sought to be released or, in a case where the property is sought to be protected from being attached, where the amount of the undertaking offered is less than the amount of the attachment. Where there are several defendants and all of them do not join in the application, a more extensive statement concerning the nature of the title to the property is required by subdivision (d). Note that the last sentence of subdivision (d) precludes release where a defendant who has not joined in the application has a joint interest in the property.

The amendment of subdivision (c) is technical.

§490.010. Acts constituting wrongful attachment

Comment. The amendments of subdivisions (a) and (b) of Section 490.010 are technical and make no substantive change. The plaintiff's failure to increase the amount of an undertaking when ordered to do so is not a wrongful attachment. Section 489.130. It should be noted that an excessive attachment is a form of abuse of process. *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 347-351, 438 P.2d 345, 351-354, 66 Cal. Rptr. 697, 703-706 (1968). See Section 490.060 (common law remedies not limited).

§491.010. Examination of third person indebted to or having property of defendant

Comment. Subdivision (a) of Section 491.010 is amended to provide for the manner of appearance by corporations, partnerships, and associations at examination proceedings under this chapter. Subdivision (a) is also amended to provide for the plaintiff's application and supporting affidavit. See Section 482.040 (general requirements for affidavits). Former Section 545 did not specify the procedure for obtaining the order for an examination or the manner of appearance by corporations, partnerships, and associations.

Subdivision (b) requires the plaintiff to give the defendant notice of the examination of a third person. The amendment of subdivision (c) is technical.

APPENDIX IX

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Wage Garnishment

October 1976

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

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
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GEORGE H. MURPHY
Ex Officio

October 21, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised. The scope of this study was expanded by Resolution Chapter 45 of the Statutes of 1974 to include all aspects of the law relating to creditors' remedies. This recommendation deals with one aspect of the creditors' remedies study—wage garnishment.

The Commission has submitted recommendations relating to wage garnishment procedure and related matters to prior sessions of the Legislature. See *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971) (recommended legislation—Senate Bill 88 of 1972 Regular Session—not enacted; upon recommendation of Senate Judiciary Committee, bill was referred to Senate Committee on Rules to be assigned to a proper committee for interim study); *Recommendation Relating to Wage Garnishment and Related Matters*, 11 CAL. L. REVISION COMM'N REPORTS 101 (1973) (recommended legislation—Assembly Bill 101 of 1973–74 Regular Session—not enacted; bill passed Assembly, was reported favorably by Senate Judiciary Committee, but died in Senate Finance Committee during final days of 1974 session); *Recommendation Relating to Wage Garnishment Exemptions*, 12 CAL. L. REVISION COMM'N REPORTS 901 (1974)

(recommended legislation—Assembly Bill 90 of 1975–76 Regular Session—passed Assembly but was held in Senate Judiciary Committee).

In 1975, the Commission published a new recommendation relating to this subject. See *Recommendation Relating to Wage Garnishment Procedure*, 13 CAL. L. REVISION COMM'N REPORTS 601 (1976). In preparing this new recommendation, the Commission considered the objections made to its earlier recommendations. However, the Commission did not request that the recommended legislation be introduced at the 1976 session of the Legislature so that the State Bar could complete its study of the recommendation. The Commission has reviewed the comments of the State Bar Committee on Relations of Debtor and Creditor and the comments of other interested persons and has made some revisions in its recommendation. The revisions are noted in the recommendation herewith submitted.

Respectfully submitted,
JOHN N. MCLAURIN
Chairman

RECOMMENDATION

relating to

WAGE GARNISHMENT

Introduction

In 1975, the Law Revision Commission published a *Recommendation Relating to Wage Garnishment Procedure*, 13 Cal. L. Revision Comm'n Reports 601 (1976). The Commission decided to defer the introduction of the proposed legislation included in the 1975 recommendation until after the Commission had reviewed the comments of the State Bar Committee on Relations of Debtor and Creditor and the comments of other interested persons.

The Commission has reviewed these comments and plans to request that a bill relating to wage garnishment procedure be introduced at the 1977-78 legislative session. Except for a few changes, the bill will be the same in substance as the proposed legislation in the Commission's 1975 recommendation. Reference should be made to that recommendation for a discussion of the bill. The significant changes the bill makes in the legislation set out in the 1975 recommendation are discussed below.

The Comments to a number of sections require revision to reflect the changes made in the legislation contained in the 1975 recommendation. The revised Comments and one new Comment are set out as an Exhibit to this recommendation. The remaining Comments set out in the 1975 recommendation need no revision and continue to apply to the bill that will be introduced at the 1977-78 legislative session.

Fee for Services of Levying Officer

In the prior recommendation, the Commission proposed that service of an earnings withholding order should generally be by mail. The Commission stated that the savings that would result from this scheme would permit authorization of a flat fee of \$6.50 for the duties of the levying officer in place of the mileage fee prescribed by former law. Since that recommendation was made,

legislation has been passed that provides generally for a flat fee of \$8.50 for service of various process.¹ The Commission recommends that a flat fee of \$8.50 be provided to cover all the duties of a levying officer under a wage garnishment.

Continuing Levy Procedure

The prior recommendation noted that a judgment creditor seeking to collect his judgment from the wages of a public employee was required to use the abstract of judgment procedure which did not provide for a continuing levy. Accordingly, the Commission recommended that the wages of public employees be subject to garnishment in the same manner as private employees. A bill was enacted at the 1976 session of the Legislature to accomplish this proposal.²

Time for Payment by Employer

The prior recommendation would have required employers to pay the amounts withheld from the judgment debtor's earnings over to the levying officer once a month. The Commission has modified this proposal to permit the employer to pay over to the levying officer more frequently than once a month if the employer elects to do so. If the employer elects to pay more frequently than once a month, the proposed section would require the employer to make such payment not later than 10 days after the close of the pay period from which the earnings are withheld. The employer would have 15 days within which to pay over if he elects to pay over monthly. The requirement of existing law that the levying officer pay over amounts received to the judgment creditor at least once every 30 days should be continued.

Exemptions

The Commission recommends the same formula as proposed in its prior recommendation for determining the amount of an employee's earnings that are exempt. However, since the prior recommendation was made, there have been changes in the federal income tax withholding

¹ See Govt. Code §§ 26721-26748, *as amended by* Cal. Stats. 1975, Ch. 368.

² Cal. Stats. 1976, Ch. 1294 (amending Code Civ. Proc. § 710).

tables. Accordingly, new illustrative tables have been prepared comparing (1) the amounts that would be withheld on a wage garnishment under the proposed statute and under existing law and (2) the net disposable earnings after garnishment under the two schemes. These tables are printed at the end of this text.

Procedure for Determining Exemption Claims

The Commission recommends that the main features of the existing exemption procedure be continued but that the procedure be streamlined by eliminating the five-day period between the filing of the judgment creditor's counteraffidavit with the levying officer and the making of the motion for an order determining the exemption provided in Section 690.50(e). Under the recommended procedure, a judgment creditor who desires to oppose the exemption claim would have to file within 10 days after the claim of exemption is sent by the levying officer to the judgment creditor (1) a notice of opposition to the claim of exemption with the levying officer and (2) a notice of motion for an order determining the claim of exemption. This procedure would eliminate the right of the judgment debtor to make a motion for a hearing—a right rarely exercised under existing law because the property claimed to be exempt is released from levy if the judgment creditor fails to make a motion for a hearing within the time allowed.³

Employer's Service Charge

The Commission has recommended that the employer be permitted to withhold an additional dollar as a service charge each time the employer is required to withhold pursuant to an earnings withholding order. The Commission has modified this proposal to add the limitation that such service charges may not exceed five dollars per month for any employee. This limitation would have effect where the employee is paid more frequently than weekly or, in some cases, where the employee's earnings are subject to two withholding orders.

³ E. Jackson, *California Debt Collection Practice* § 19.22 (Cal. Cont. Ed. Bar 1968).

Withholding Orders for Support

Withholding orders for support should be given priority over other earnings withholding orders as proposed in the prior recommendation. However, the Commission has deleted the provision of the prior recommendation that required that attorney's fees incurred in attempting to collect delinquent amounts payable under a judgment for support for a child or spouse be given the same priority as the delinquent support payments.

Withholding Orders for Taxes

The Commission recognized in its prior recommendation that protection of the public fisc justifies the preferential treatment of withholding orders for taxes but also noted that this principle does not justify summarily depriving a tax debtor of the means for support of the debtor's family. In accordance with this policy, the Commission recommends that, where the state itself issues a withholding order for taxes, the order should be limited to the amount that would be withheld under an earnings withholding order issued to enforce a money judgment, rather than twice such amount as was earlier recommended. If the state desires to withhold a greater amount of the tax debtor's earnings, it may seek a withholding order for taxes from a court.

Where a withholding order for taxes has been issued erroneously, the state should be required to refund to the employee any service charges deducted by the employer.

Notice Where Withholding Order Superseded

In any situation where an earnings withholding order having priority or a wage assignment for support issued under Civil Code Section 4701 is served on the employer and the employer is required to cease withholding pursuant to an earnings withholding order served earlier, the employer should be required to send notice to the levying officer who served the earlier order or to the state in the case of a superseded withholding order for taxes. This notice will advise the levying officer or other person who received the payments under the earlier earnings withholding order why no further payments will be sent

and will avoid the need for such person to contact the employer to determine why the employer has stopped sending the payments.

Administration and Enforcement

The Judicial Council should be authorized in the statute to prescribe forms in languages other than English. The general authority to adopt rules would enable the Judicial Council to prescribe rules concerning the circumstances under which such forms should be used.

TABLE 1. COMPARISON OF AMOUNTS WITHHELD UNDER WAGE GARNISHMENT

GROSS EARNINGS (weekly/ annual)	AMOUNTS WITHHELD				
	PROPOSED STATUTE	EXISTING LAW—CONSUMER CREDIT PROTECTION ACT			
		SINGLE PERSON (claiming 0 tax exemptions)		MARRIED & 2 CHILDREN (4 tax exemptions)	MARRIED & 6 CHILDREN (8 tax exemptions)
		Under Public Retirement	No Public Retirement		
\$75/\$3,900	-	-	-	\$0.86	\$0.86
80/ 4,160	-	-	-	5.52	5.52
90/ 4,680	-	-	\$2.24	14.84	14.84
95/ 4,940	-	\$2.34	5.89	19.49	19.49
100/ 5,200	-	5.11	8.95	23.28	23.28
102/ 5,304	\$5.00	7.07	10.81	23.80	23.80
105/ 5,460	6.00	8.27	12.41	24.37	24.45
110/ 5,720	8.00	11.53	15.97	25.34	25.61
120/ 6,240	11.00	17.64	22.68	27.24	27.94
135/ 7,020	16.00	23.90	25.38	30.08	31.43
150/ 7,800	21.00	25.99	27.70	32.83	34.93
175/ 9,100	27.00	29.96	32.05	37.45	40.20
200/10,400	30.00	33.36	35.82	41.57	44.55
250/13,000	38.00	40.53	43.74	50.44	53.32
300/15,600	45.00	46.77	50.73	59.43	62.03
400/20,800	58.00	57.56	63.02	75.32	79.07
500/26,000	69.00	67.60	74.56	89.58	93.93

Note. Deductions have been made for federal and state income tax withholding, social security contributions, and state disability insurance (except for employees under public retirement). Except where specifically indicated in the table, no deduction has been made for contributions to public retirement systems. Where taken into account, the retirement deductions are based on the rate for local government employees who are miscellaneous members of the Public Employees' Retirement System. See Govt. Code § 20603(a). The income tax deductions are based on withholding tables for 1976. The federal social security tax effective in 1977 is 5.85% on the first \$16,500 of annual gross earnings. The state disability insurance contribution rate currently is 1% on the first \$9,000 of annual gross earnings. The amounts shown as disposable earnings in this table are based on a full deduction for social security and disability insurance even though, under present law, in the higher earnings brackets this amount would not be deducted during the entire year. The amounts to be withheld are computed using a \$2.30 minimum wage, effective January 1, 1976.

TABLE 2. COMPARISON OF NET DISPOSABLE EARNINGS AFTER GARNISHMENT

GROSS EARNINGS (weekly/annual)	NET DISPOSABLE EARNINGS																
	SINGLE PERSON (0 tax exemptions)						MARRIED & 2 CHILDREN (4 tax exemptions)						MARRIED & 6 CHILDREN (8 tax exemptions)				
	Under Public Retirement			No Public Retirement			Existing Law			Proposed Statute			Existing Law		Proposed Statute		
\$75/\$1,900	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	Existing Law	Proposed Statute	
80/ 4,160	61.39	61.39	64.12	64.12	\$60.76	\$60.76	69.00	69.00	69.00	69.00	69.00	69.00	\$69.00	\$69.00	69.00	\$69.86	
90/ 4,680	67.94	67.94	69.00	69.00	69.00	71.24	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	83.84	83.84
95/ 4,940	69.00	71.34	69.00	74.89	69.00	74.89	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	88.49	88.49
100/ 5,200	69.00	74.11	69.00	77.95	69.00	77.95	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	93.15	93.15
102/ 5,304	69.00	71.07	69.00	74.81	69.00	74.81	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	90.21	90.21
105/ 5,460	69.00	71.27	69.00	75.41	69.00	75.41	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	91.81	91.81
110/ 5,720	69.00	72.53	69.00	76.97	69.00	76.97	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	93.15	93.15
120/ 6,240	69.00	75.64	69.00	80.68	69.00	80.68	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	69.00	97.98	97.98
135/ 7,020	71.71	79.61	76.17	85.55	76.17	85.55	76.17	76.17	76.17	76.17	76.17	76.17	76.17	76.17	76.17	100.78	100.78
150/ 7,800	78.00	82.99	83.13	89.83	83.13	89.83	83.13	83.13	83.13	83.13	83.13	83.13	83.13	83.13	83.13	104.32	104.32
175/ 9,100	89.91	92.87	96.16	101.21	96.16	101.21	96.16	96.16	96.16	96.16	96.16	96.16	96.16	96.16	96.16	109.75	109.75
200/10,400	100.10	103.46	107.48	113.30	107.48	113.30	107.48	107.48	107.48	107.48	107.48	107.48	107.48	107.48	107.48	118.73	118.73
250/13,000	121.61	124.14	131.24	136.98	131.24	136.98	131.24	131.24	131.24	131.24	131.24	131.24	131.24	131.24	131.24	133.81	133.81
300/15,600	140.34	142.11	152.22	157.95	152.22	157.95	152.22	152.22	152.22	152.22	152.22	152.22	152.22	152.22	152.22	148.20	148.20
400/20,800	172.70	172.26	189.08	194.10	189.08	194.10	189.08	189.08	189.08	189.08	189.08	189.08	189.08	189.08	189.08	175.28	175.28
500/26,000	202.81	201.41	223.69	229.25	223.69	229.25	223.69	223.69	223.69	223.69	223.69	223.69	223.69	223.69	223.69	203.15	203.15
																237.23	237.23
																281.82	281.82

Note. This table assumes that the employee is under social security and, except for employees under public retirement, is also under state disability insurance. Disposable earnings would be slightly higher if the employee is not under social security or state disability insurance. Except where indicated, no deduction has been made for contributions to public employment retirement systems. Table 2 is derived from Table 1.

EXHIBIT

NEW AND REVISED COMMENTS

Code of Civil Procedure

§ 710 (technical amendment)

Comment. Section 710 is amended to refer to Chapter 2.5 (commencing with Section 723.010) which supersedes former Section 682.3.

§ 723.020. Exclusive procedure for withholding earnings

Comment. Section 723.020 makes clear that, with the exception of wage assignments for support under Civil Code Section 4701, the Employees' Earnings Protection Law is the exclusive judicial method of compelling an employer to withhold earnings. Attachment of earnings before judgment is abolished by Section 487.020(c). For provisions relating to voluntary wage assignments, see Labor Code Section 300. This chapter has no effect on judgment collection procedures that do not involve the withholding of an employee's earnings. See, *e.g.*, Section 690.18 (retirement funds). However, where an employee's earnings are sought to be garnished, the creditor must comply with the provisions of this chapter. This rule applies to public entities as well as private persons. This chapter, for example, imposes limitations on the state's ability to garnish wages for tax delinquencies pursuant to its warrant and notice procedures. See Article 4 (commencing with Section 723.070).

The Employees' Earnings Protection Law has no effect on matters that are preempted by the federal law, such as federal bankruptcy proceedings—including proceedings under Chapter XIII of the Bankruptcy Act—and federal tax collection procedures. *E.g.*, Int. Rev. Code of 1954, § 6334(c). Nor does this chapter apply to deductions which an employer is authorized by statute to make for such items as insurance premiums and payments to health, welfare, or pension plans. See, *e.g.*, Govt. Code § 1158; Labor Code §§ 224, 300. Finally, this chapter does not affect the procedures for the examination of a debtor of the judgment debtor provided in Chapter 2 (Sections 717–723) of this title. See Comment to Section 723.154.

§ 723.022. Employer's duty to withhold; withholding period

Comment. Section 723.022 states the basic rules governing the employer's duty to withhold pursuant to an earnings withholding order.

Subdivision (b) requires the employer to withhold from all earnings of an employee payable for any pay period of such employee which *ends* during the "withholding period." See also Section 723.150 (Judicial Council shall adopt rules regarding the pay period to which commissions, bonuses, and the like are attributable). The "withholding period" is described in subdivision (a). It should be noted that *only* earnings for a pay period ending during the withholding period are subject to levy. Earnings for prior periods, even though still in the possession of the employer, are not subject to the order. An employer may not, however, defer or accelerate any payment of earnings to an employee with the intent to defeat or diminish the satisfaction of a judgment pursuant to this chapter. See Section 723.153.

Under subdivision (a), the withholding period generally commences 10 calendar days (not working or business days) after service of an earnings withholding order is completed. See Section 723.101 (when service completed). For example, if an order is served on Friday, the withholding period would commence on the second following Monday. See Code Civ. Proc. § 12. The 10-day delay affords the employer time to process the order within his organization, *i.e.*, deliver the order to the employer's bookkeeper, make bookkeeping adjustments, and so on. The introductory clause to subdivision (b) recognizes certain exceptions to this general rule. An employer is not generally required to withhold pursuant to two orders at the same time; thus, a subsequent order will not be given effect. See Section 723.023 (priority of orders) and Comment thereto. Moreover, withholding may be delayed beyond the normal 10-day period where a prior assignment of wages is in effect. See Labor Code § 300(c) and Comment thereto. However, this delay does not affect the date the withholding period terminates under subdivision (a) (1).

The withholding period does not end until the first of the events described in paragraphs (1) through (4) of subdivision (a) occurs; thus, the employer has a *continuing* duty to withhold.

Paragraph (1) provides a general expiration date 130 days after the date of service; thus, the employer will usually be required to withhold for 120 days.

Paragraph (2) requires the employer to stop withholding when he has withheld the full amount specified in the order.

Paragraph (3) reflects the fact that the court may order the termination of the earnings withholding order. See Section 723.105(g). Of course, in some situations, the court will only modify the prior order, and the employer then must comply with the order as modified for the remainder of the withholding period.

Paragraph (4) requires the employer to stop withholding when he is served with a notice of termination. See Section 723.101 (manner of service). A notice of termination is served where the levying officer is notified of the satisfaction of the judgment or where the judgment debtor has claimed an exemption for the entire amount of earnings but the judgment creditor has failed within the time allowed to file with the levying officer a notice of opposition to claim of exemption and a notice of the hearing on the exemption. See Sections 723.027 (satisfaction of judgment) and 723.105(f) (grounds for termination of withholding order by levying officer). The judgment creditor has an affirmative duty to inform the levying officer of the satisfaction of the judgment. See Section 723.027. Service of an order for the collection of state taxes suspends the duty of an employer to withhold pursuant to a prior order (other than an order for support). See Section 723.077 (tax orders). However, this is only a suspension. After the tax order is satisfied, if the withholding period for the prior order has not ended, the employer must again withhold pursuant to the prior order. Similarly, the duty to withhold is not terminated by the layoff, discharge, or suspension of an employee and, if the employee is rehired or returns to work during the withholding period, the employer must resume withholding pursuant to the order. Finally, the termination of certain types of orders—orders for the collection of state taxes and support orders—are governed by separate rules. See Sections 723.030 (support orders), 723.078 (tax orders).

Sometimes an order will be terminated without the employer's prior knowledge. Subdivision (c) makes clear that an employer will not be subject to liability for having withheld and paid over amounts pursuant to an order prior to service of a written notice of termination of the order. In such a case, the employee must look to the judgment creditor for the recovery of amounts previously paid to the judgment creditor. See Section 723.154 (employer entitled to rely on documents actually served). See

also Section 723.105(i) (recovery from levying officer or judgment creditor of amounts received after order terminated).

An earnings withholding order may also be affected by federal bankruptcy proceedings. See the Comment to Section 723.020.

§ 723.024. Employer's service charge for withholding

Comment. Section 723.024 authorizes, but does not require, an employer to deduct an additional dollar as a service charge each time he is required to withhold a portion of his employee's earnings pursuant to an earnings withholding order. For example, if the employee is paid weekly and an amount is withheld each week pursuant to the earnings withholding order, the employer may deduct an additional service charge of one dollar each week. A similar one-dollar charge is authorized under Civil Code Section 4701 (wage assignment for support). However, under prior law, there was no provision authorizing an employer to make a service charge in connection with wage garnishments generally. The second sentence, which limits the total of service charges against one employee to five dollars per month, would apply where the employee is paid more frequently than weekly or, in some cases, where the employee's earnings are subject to two withholding orders.

§ 723.027. Creditor required to notify levying officer when judgment satisfied; notice of termination

Comment. Section 723.027 requires the judgment creditor to give notice of satisfaction of the judgment to the levying officer if the earnings withholding order has not yet terminated. See Section 723.022 (withholding period). In some cases, the employer will be aware of the satisfaction by virtue of the employer's having withheld the amount necessary to satisfy the judgment. See Section 723.022(a)(2). In this case, Section 723.027 does not apply. However, the judgment may be satisfied by additional payments from the debtor or through other debt collection procedures instituted by the judgment creditor. If this is the case, Section 723.027 applies, and the judgment creditor has the duty to notify the levying officer promptly of the satisfaction so that the levying officer may serve a notice of termination on the employer. Service of the notice of termination is to be made on the person, and at the address, indicated in the employer's return. See Sections 723.101(c) and 723.126(b)(6). As to the general duty of a creditor to furnish a debtor a satisfaction of

judgment, see Section 675. Failure to perform the duty imposed by this section may make the judgment creditor liable in an action for abuse of process. See *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 347–351, 438 P.2d 345, 351–354, 66 Cal. Rptr. 697, 703–706 (1968).

§ 723.028. Withholding order for costs and interest

Comment. Section 723.028 makes clear that a judgment creditor must apply for another earnings withholding order to recover costs and interest that accrue following the application for a prior order. To illustrate: A creditor obtains a judgment which his debtor does not pay. The creditor applies for and secures an earnings withholding order directed to the debtor's employer. The application and order require payment of only those amounts owing at the time of the application for this order. See Sections 723.121 (application for issuance of earnings withholding order) and 723.125 (content of earnings withholding order). After the application for this order, further costs may, and interest on the judgment will, accrue. If the creditor wishes to recover these amounts by wage garnishment, he must apply for another earnings withholding order, following the same procedure as before. This later application and order are subject to the same general requirements as any other withholding order. Of course, the earnings withholding order for costs and interest may only be issued if a writ of execution is outstanding. See Section 723.102. It is not entitled to any priority over the orders of other creditors, and the creditor is required to comply with the waiting period prescribed by Section 723.107.

Service of an earnings withholding order for costs and interest, like service of a second earnings withholding order to collect the principle amount due on the judgment, is a "garnishment for the payment of one judgment" under Labor Code Section 2929(b) which forbids the discharge of an employee for wage garnishment on one judgment.

§ 723.031. Effect of wage assignment for support

Comment. Section 723.031 states the effect of a wage assignment for support made pursuant to Section 4701 of the Civil Code on an earnings withholding order.

Subdivision (a) makes clear that nothing in this chapter affects the wage assignment for support, and subdivision (b) makes clear that the wage assignment has priority (as provided in

Section 4701) over any earnings withholding order, including a withholding order for support under Section 723.030. Under subdivision (b), the employer is required to notify the levying officer who earlier served an earnings withholding order if that order is completely superseded by the wage assignment. It should be noted that "levying officer" means the state agency where a withholding order for taxes is superseded. See Section 723.073.

Subdivisions (b) and (d) of Section 723.031 make clear that, where a wage assignment for support under Section 4701 of the Civil Code is in effect, the amount withheld from the debtor's earnings pursuant to such wage assignment is deducted from the amount that otherwise would be withheld pursuant to the withholding table prepared by the Judicial Council on an earnings withholding order to enforce an ordinary money judgment or that otherwise would be withheld where a portion of the debtor's earnings have been determined to be exempt under Section 723.051. Suppose, for example, that a wage assignment for support under Section 4701 is in effect which requires that \$40 per week be withheld. Assume that the table prepared pursuant to Section 723.050 limits the amount that may be withheld to \$56. To determine the maximum amount that may be withheld pursuant to the earnings withholding order (absent any exemption allowed under Section 723.051), the \$40 withheld pursuant to the wage assignment for support is subtracted from the \$56, leaving \$16 as the maximum amount that may be withheld pursuant to the earnings withholding order. For a special rule applicable when the earnings withholding order is on a judgment for delinquent amounts payable for child or spousal support, see Sections 723.030 and 723.052. The rule stated in subdivision (d) of Section 723.031 is required to avoid conflict with the federal Consumer Credit Protection Act. That act requires that the amount withheld pursuant to a wage assignment under Section 4701 of the Civil Code be included in determining whether any amount may be withheld pursuant to an earnings withholding order on an ordinary judgment. See subdivision (c) of Section 302 of the act, 15 U.S.C. § 1672(c) (1970) ("garnishment" means "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt") and [1969-1973 Transfer Binder] Lab. L. Rep. (CCH) para. 30,813.

Under subdivision (e), the amount that could be withheld pursuant to a withholding order for taxes would be computed in

the same manner as for an ordinary earnings withholding order using the withholding tables prepared by the Judicial Council pursuant to Section 723.050 unless the withholding order for taxes is obtained under Section 723.076.

§ 723.050. Standard exemption

Comment. Section 723.050 provides the standard exemption applicable to all earnings withholding orders other than earnings withholding orders on writs issued for the collection of delinquent amounts payable on a judgment for child or spousal support (Sections 723.030 and 723.052) or certain withholding orders for taxes (Section 723.076). See also Sections 723.031 (wage assignments for support), 723.051 (exemption obtained by special hardship showing), 723.074(b) (agency issued withholding order for taxes in lesser amount), 723.075(c) (exemption obtained by special hardship showing to agency which issued withholding order for taxes), 723.105(f) (modification or termination of earnings withholding order where exemption claims are unopposed).

Section 723.050 reflects policies similar to those underlying Sections 302 and 303 of the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1672-1673 (1970). Thus, in determining the amount of the debtor's earnings subject to garnishment, under both this section and the federal law, certain basic amounts withheld pursuant to law are first deducted. However, federal law requires the deduction of all amounts actually "required by law to be withheld." For example, the amount actually withheld for federal income tax purposes from the debtor's earnings is deducted in determining his earnings subject to garnishment ("available earnings"). Thus, a debtor claiming a greater number of exemptions will have less income withheld and therefore more subject to garnishment. This produces the anomalous situation that a debtor with a large family and greater needs may have more earnings garnished than a single debtor with the same gross income and with more limited needs. Moreover, the federal statute does not elaborate upon what are considered to be "amounts required by law to be withheld." To alleviate these problems, Section 723.050 specifies the amounts to be deducted in determining the portion of the debtor's earnings which are subject to garnishment ("available earnings"). These items are related to the types of deductions made under federal law; *i.e.*, they are based on the amounts withheld for federal and state income taxes, social security, and state disability insurance.

See paragraphs (1)–(4) of subdivision (a). As of December 31, 1976, the social security tax rate is 5.85 percent (see I.R.C. § 3101); the state disability insurance rate is one percent (Unemp. Ins. Code §§ 984, 2901). The amount deducted to determine available earnings is fixed according to a formula and is not necessarily the amount actually deducted from the debtor's earnings. One of the major benefits of this scheme is that it permits tables to be prepared which indicate the exact amount to be withheld from any given amount of gross earnings. Subdivision (d) directs the Judicial Council to prepare tables which will be distributed to employers required to withhold earnings. See Section 723.103(b). An employer therefore generally need not make any computations but will simply withhold pursuant to an earnings withholding order the amount listed in the tables provided.

Subdivision (c) directs the Judicial Council to formulate rules for computing the amount to be withheld for pay periods other than a week. Such rules regarding pay periods of less than a week must be consistent with federal requirements under the Consumer Credit Protection Act.

Both the federal scheme and Section 723.050 make some provisions for the effect of inflation. The federal statute, however, merely provides a floor based on the federal minimum wage. That is, the federal statute does not permit the creditor to reduce the debtor's weekly disposable earnings below an amount equal to 30 times the federal minimum wage. As the federal minimum wage is increased, this floor is increased accordingly. (Under the federal law in effect on December 31, 1976, if a debtor's disposable earnings are less than \$69 per week, no garnishment is permitted; if his disposable earnings are between \$69 and \$92, all his disposable earnings above \$69 are subject to garnishment; if his disposable earnings are more than \$92 a week, 25 percent of his disposable earnings are subject to garnishment.) This floor is not an exemption excluded from every debtor's earnings. In contrast, paragraph (5) of subdivision (a) provides a basic minimum exemption that is always deducted in determining available earnings. Moreover, subdivision (b) provides a formula that precludes withholding less than \$5. From \$10 to \$45 available earnings, a 50-percent rule is applicable and, above \$45 available earnings, \$23 plus 25 percent of the available earnings in excess of \$45 may be withheld.

Where a wage assignment for support under Section 4701 of the Civil Code is in effect, the amount withheld from the debtor's earnings pursuant to such wage assignment is deducted from the

amount that otherwise would be withheld pursuant to the withholding table prepared by the Judicial Council on an earnings withholding order on an ordinary money judgment. See Section 723.031 and Comment thereto. The amount that may be withheld pursuant to an administratively issued earnings withholding order for taxes when a wage assignment under Section 4701 of the Civil Code is in effect is computed in the same manner using the same withholding table prepared by the Judicial Council pursuant to Section 723.050. See Section 723.031 and the Comment thereto.

§ 723.051. Additional amounts necessary for support exempt

Comment. Section 723.051 is based on the hardship exemption formerly provided by subdivision (b) of former Section 690.6. However, Section 723.051 makes clear that this exemption is not intended to be used for the maintenance of a life style appropriate to the judgment debtor's station in life or for an accustomed standard of living while the judgment debtor owes money on unsatisfied judgments. Both the judgment debtor with a family and one without a family may claim the exemption under Section 723.051. For a special provision applicable where the earnings withholding order is on a writ issued for the collection of delinquent support payments, see Section 723.052.

Subdivision (b) of former Section 690.6 prevented the judgment debtor from claiming the hardship exemption if the debt sought to be collected was incurred "by the debtor, his or her spouse, or his or her family for the common necessities of life." This exception to the hardship exemption has been eliminated. Likewise, the limitation of the hardship exemption under former Section 690.6 to earnings received "within 30 days next preceding the date of a withholding by the employer under Section 682.3" has been eliminated. Section 723.051 continues the former exception to the hardship exemption under Section 690.6 where the garnishment is on a judgment for a debt incurred for personal services rendered by any employee or former employee of the judgment debtor.

§ 723.052. Exemption when order is earnings withholding order for support

Comment. Section 723.052 retains the substance of the former law applicable to a wage garnishment for the collection

of delinquent amounts payable for child or spousal support. The federal limitations do not apply to such a garnishment. See subdivision (b) of Section 303 of the federal Consumer Credit Protection Act, 15 U.S.C. § 1673(b) (1970). Accordingly, this case was covered by the exemption of one-half of the judgment debtor's earnings provided by subdivision (a) of former Section 690.6. Section 723.052 makes clear that, in applying the 50-percent-of-earnings exemption, the amount withheld from the earnings of the judgment debtor pursuant to a wage assignment for support under Section 4701 of the Civil Code is included in computing the 50 percent of the judgment debtor's earnings that may be withheld. For example, if 30 percent of the judgment debtor's earnings are withheld pursuant to a wage assignment for support, an additional 20 percent may be withheld pursuant to the earnings withholding order on the writ issued for the collection of delinquent amounts payable for child or spousal support.

Subdivision (b) makes the 50-percent-of-earnings standard provided by subdivision (a) subject to the power of the court to make an order that more or less of the earnings of the judgment debtor be withheld where the earnings withholding order is on a writ issued for the collection of delinquent amounts payable for child or spousal support. Upon the motion of any interested party, the court shall make an equitable division of the judgment debtor's earnings between, for example, his first wife and children and himself and his second family. This continues the substance of prior law. See *Rankins v. Rankins*, 52 Cal. App.2d 231, 126 P.2d 125 (1942).

For rules relating to the priority to be given a withholding order for support, see Section 723.030.

§ 723.072. Withholding order for taxes; notice and opportunity for review of liability before order issued

Comment. Section 723.072 provides that no withholding order for taxes may be issued unless the state tax liability either appears on the face of the taxpayer's tax return or has been determined in an administrative proceeding in which the taxpayer had notice and an opportunity for administrative review. See *Greene v. Franchise Tax Board*, 27 Cal. App.3d 38, 103 Cal. Rptr. 483 (1972). However, no review of the taxpayer's tax liability is permitted in court proceedings under this chapter. See Section 723.082. Under subdivision (b) (2), the time for making a request for review of an assessment or determination

depends on the appropriate procedures applicable to a particular agency.

Subdivision (d) recognizes that few state tax liabilities are reduced to judgment.

§ 723.074. Agency issued withholding order for taxes

Comment. Section 723.074 specifies the procedure to be followed when the state taxing agency itself issues the withholding order for taxes. In such case, no application to a court for the order is required. Under an order issued pursuant to Section 723.074, the employer may be required to withhold the same amount as if the earnings withholding order were issued at the behest of a judgment creditor. The state taxing agency provides the employer with withholding tables prescribing the amount to be withheld pursuant to orders issued under this section. See Sections 723.073, 723.103(b). The tables are the ones prepared by the Judicial Council pursuant to Section 723.050. The amount determined according to the applicable table must be withheld by the employer unless the order itself specifies a lesser amount or the amount to be withheld is reduced pursuant to subdivision (c) of Section 723.075. As to the effect of a wage assignment for support under Section 4701 of the Civil Code, see subdivision (e) of Section 723.031 and the Comment thereto.

§ 723.075. Notice to taxpayer; reduction in amount withheld

Comment. Section 723.075 requires service of a copy of the order and a notice informing the employee of the effect of the order and the employee's right to hearings and other remedies. See Section 723.080 (manner of service). These papers are served on the employer who is required to deliver them to the employee. Cf. Section 723.104 (ordinary earnings withholding orders).

The state is required by subdivision (c) to provide for an administrative hearing for the determination of the employee's application for modification of the amount to be withheld under the withholding order for taxes. The state is to apply the standard of Section 723.051 to the determination of the application for modification, and such determination is subject to review by way of administrative mandamus. See Section 1094.5; *County of Tuolumne v. State Board of Equalization*, 206 Cal. App.2d 352, 373, 24 Cal. Rptr. 113, 127 (1962).

Subdivision (d) is the same in substance as the last two sentences of subdivision (a) of Section 723.104. See the Comment to that section for a discussion of the comparable provision.

§ 723.076. Court issued withholding order for taxes

Comment. Section 723.076 provides a procedure whereby the taxing agency can obtain an order, after court hearing, that requires the employer to withhold all of the employee's earnings in excess of the amount necessary for the support of the taxpayer or his family. An order may be obtained under Section 723.076 that requires the withholding of more than the amount that the state taxing agency could require the employer to withhold pursuant to an order issued by the agency itself under Section 723.074. This grant of authority is not intended as a directive that such authority be used generally. This extreme remedy could be harsh in its application and should be used sparingly.

Provision is made in subdivision (f) of Section 723.076 for a temporary order directing the employer to hold any earnings of the employee then or thereafter due. Such orders should be used only in rare and unusual cases. The temporary order prevents the employer from paying to the employee all or a specified portion of the employee's earnings for a limited period in order to permit the court to act on the state's application for an earnings withholding order for taxes.

§ 723.083. Refund of employer's service charge

Comment. Section 723.083 requires the state to refund the employer's service charge to the employee if the withholding order for taxes is issued in error or there is no tax liability.

§ 723.084. Warrant or notice deemed withholding order for taxes

Comment. Section 723.084 deals with the situation where it is not clear whether an employer-employee relationship exists. The warrant, notice of levy, or notice or order to withhold may be issued on the assumption the taxpayer is an independent contractor. However, so that the taxpayer cannot avoid the withholding by claiming that he is an employee and that his earnings may be withheld only pursuant to an earnings withholding order, Section 723.084 provides that the warrant, notice, or order may require that it be treated as an earnings withholding order if the taxpayer is an employee. The contents

of the forms (except for a court issued withholding order for taxes) are prescribed by the state. See Section 723.081. The form for the court issued withholding order for taxes is prescribed by the Judicial Council. See Section 723.120.

§ 723.100. Judicial Council authorized to prescribe practice and procedure

Comment. Article 5 outlines generally the procedure for issuance and review of an earnings withholding order; however, Section 723.100 authorizes the Judicial Council to provide by rule for the practice and procedure in proceedings under this chapter. The state tax agency prescribes the rules of procedure for administrative hearings under Article 4 (withholding orders for taxes). The Judicial Council also prescribes the forms to be used under this chapter. See Section 723.120. *But see* Section 723.081 (forms used in connection with withholding orders for taxes—other than the form of a court issued order—are prescribed by state).

§ 723.102. Application for issuance of earnings withholding order

Comment. Subdivision (a) of Section 723.102 requires a judgment creditor to apply for an earnings withholding order to the levying officer in the county where the order is to be served. The form prescribed by the Judicial Council must be used for the application. See Section 723.120. See also Section 723.121 (contents of application). As a prerequisite to applying for the earnings withholding order, the judgment creditor must have obtained the issuance of a writ of execution to the county where the order is to be served. See also Section 723.101 (place where service may be made). An earnings withholding order shall be promptly issued on the ex parte application of a judgment creditor. The debtor may claim an exemption as provided in Section 723.105, have such order modified or terminated, and even recover from the creditor amounts withheld and paid over pursuant to such order; but this does not affect the initial issuance of the order. The earnings withholding order will be effective only if served before the time for the return of the writ under subdivision (a) of Section 683 has expired. See Section 723.103(c).

For special provisions regarding the issuance of a withholding order for taxes, see Article 4 (commencing with Section 723.070).

§ 723.104. Delivery of papers to employee; employer's return

Comment. Section 723.104 imposes certain duties on an employer who is served with an earnings withholding order. The section applies to all earnings withholding orders, including those for support and taxes. See Sections 723.030(a) (support), 723.072(a) (taxes).

Subdivision (a) requires the employer to deliver to the employee a copy of the order and a notice advising the employee of his rights. See also Section 723.075 (withholding order for taxes). There is a special provision, however, concerning the time for such delivery when the order is a jeopardy withholding order for taxes. See Sections 723.073, 723.075(b). See also Section 723.076(f) (notice of temporary earnings holding order).

The last two sentences of subdivision (a) make clear that an employer is not liable for civil damages for failure to give the employee the notice concerning the employee's rights. Section 723.104 does not preclude the Labor Commissioner from taking action under the Labor Code if the employer consistently fails to give employees the notice required under subdivision (a). Moreover, although the employer is not civilly liable, the employer may be subject to punishment for contempt. This would be appropriate where the employer fails to give the employee notice out of malice or willful neglect but would not be appropriate where the employer merely inadvertently fails to give the notice.

Subdivision (b) requires the employer to fill out and mail an employer's return to the levying officer who served the earnings withholding order. In the case of a withholding order for taxes, the return is made to the state agency seeking to collect the tax. See Section 723.073. Under subdivision (b), if the earnings withholding order is ineffective (see Comment to Section 723.023), the employer must state in the return that the order will not be complied with for this reason and also return the order. The form of the return is prescribed by the Judicial Council. See Section 723.120. See also Sections 723.126 (contents of return), 723.081 (form of return for withholding order for taxes is prescribed by state).

§ 723.105. Judgment debtor's claim of exemption

Comment. Section 723.105 outlines generally the procedure

for the hearing of a judgment debtor's claim for the exemption under Section 723.051. Section 690.50 is not applicable.

A judgment debtor is not limited as to the time within which a claim of exemption must be made. However, unless there has been a material change in the debtor's income or needs, an exemption may be claimed only once during the period the order is in effect. See subdivision (a). A similar limitation applies to a judgment creditor; if a withholding order is terminated by the court, the judgment creditor may not apply for the issuance of an earnings withholding order directed to the same employer for the same debtor for 130 days following the date of service of a prior terminated order or 60 days after the date of termination, whichever is later, unless the court orders otherwise or there is a material change in circumstances. See subdivision (h).

A claim of exemption is made by the debtor by filing an original and one copy of the claim of exemption and a financial statement. Subdivision (b). The form of these documents is prescribed by the Judicial Council. See Section 723.120. See also Sections 723.123 and 723.124 (contents of documents). Upon receipt of these documents, the levying officer is required to send the copies of the application and financial statement to the creditor, together with a notice of the claim of exemption which advises the creditor of the effect of the claim. See subdivision (c).

The judgment creditor who contests the claim of exemption must file a notice of opposition and a notice of motion for an order determining the claim of exemption within 10 days after the levying officer mails notice of claim of exemption. See subdivisions (d), (e). If these notices are not filed, the levying officer serves on the employer a notice terminating the order or, if the claim of exemption lists an amount the judgment debtor believes should be withheld pursuant to the order (see Section 723.123), the levying officer serves on the employer a modified order in the amount indicated in the claim of exemption. Subdivision (f). Service of the notice of termination or modified order is to be made on the person, and at the address, indicated in the employer's return. See Sections 723.101(c) and 723.126(b)(6).

The 10-day period provided by subdivision (e) for the judgment creditor to file the documents there specified commences to run from the date of "mailing" of the notice of claim of exemption. This specific provision is intended to take precedence over the general provisions of Section 1013 (extra time to act after mail "service"). *Cf. Labarthe v. McRae*, 35 Cal.

App.2d 734, 97 P.2d 251 (1939) (provision for running of time for notice of intention to move for new trial from receipt of notice of entry of judgment controls over Section 1013). And the five-day period for service of the notice of hearing is not subject to Section 1013. See *Welden v. Davis Auto Exchange*, 153 Cal. App.2d 515, 521-522, 315 P.2d 33, 37 (1957).

The form of the notice of opposition is prescribed by the Judicial Council. See Section 723.120. See also Section 723.128 (contents of notice).

If the notice of opposition to the claim of exemption and the notice of motion for an order determining the claim of exemption are timely filed, the hearing is held within 15 days from the filing of the notice of motion. The judgment creditor must also serve a copy of the notice of opposition on the judgment debtor and file proof of service. See also Section 723.123 (judgment debtor states present mailing address in claim of exemption).

After hearing, the court may order that the earnings withholding order be modified or even terminated. The date fixed for termination of the order may precede the date of the hearing. See subdivision (g). The court may order that amounts withheld in excess of the amount determined to be proper be paid to the judgment debtor. See subdivision (g). Where the date of termination is made retroactive, an employer may have already withheld and paid over pursuant to the earnings withholding order prior to receipt of notice of termination. Subdivision (c) of Section 723.022 makes clear that the employer is not liable to the debtor for such amounts, and subdivision (i) of Section 723.105 authorizes the debtor to recover such amounts from the levying officer or, if paid to the creditor, from the creditor. Where amounts have been withheld but not yet paid over to the levying officer, the employer is required to pay those amounts to the employee-judgment debtor. See subdivision (i).

Subdivision (j) continues the rule that an appeal may be taken from the court's order allowing or denying the claim of exemption in whole or in part. See Section 690.50(m). However, the rule formerly provided by the third sentence (deleted by amendment) of subdivision (j) of Section 690.50 that an appeal by the judgment creditor prevented the release of the withheld earnings of the judgment debtor is not continued. Under subdivision (j) of Section 723.105, until such time as the order modifying or terminating the earnings withholding order is set aside or modified, the order allowing the claim of exemption in

whole or in part is given the same effect as if the appeal had not been taken.

Subdivision (k) makes clear that this section does not apply to exemption claims made where a withholding order for taxes has been served pursuant to Article 4 (commencing with Section 723.070). See Section 723.075. Nor does this section apply to a withholding order for support; the exemption in the case of such an order is determined under Section 723.052 which specifies the procedure for claiming the exemption.

§ 723.121. Application for earnings withholding order

Comment. The form for the application for an earnings withholding order is prescribed by the Judicial Council. See Section 723.120.

§ 723.122. Notice to employee

Comment. The form for the notice to the employee is prescribed by the Judicial Council (see Section 723.120) or, in the case of a notice of a withholding order for taxes, by the state (see Section 723.081). For the notice to the employee in the case of a withholding order for taxes, see Section 723.075. See also Section 723.076(f) (temporary earnings holding order). Under Section 723.122, the Judicial Council may, for example, provide a statement that informs the employee where to seek legal advice.

§ 723.123. Form of claim of exemption

Comment. The form for the claim of exemption is prescribed by the Judicial Council. See Section 723.120. The “present mailing address” may or may not be the judgment debtor’s residence address.

§ 723.124. Judgment debtor’s financial statement

Comment. The form for the financial statement is prescribed by the Judicial Council. See Section 723.120.

§ 723.126. Employer’s return

Comment. Section 723.126 specifies the information to be included in the employer’s return. The form for the return is prescribed by the Judicial Council (see Section 723.120) or, in the case of a return in connection with a withholding order for taxes, by the state (see Section 723.081).

§ 723.128. Judgment creditor's notice of opposition

Comment. Section 723.128 specifies the information to be included in the judgment creditor's notice of opposition to the claim of exemption. The form is prescribed by the Judicial Council. See Section 723.120.

§ 723.129. Availability of forms

Comment. Section 723.129 implements the last sentence of subdivision (d) of Section 723.122.

§ 723.150. Rules

Comment. Section 723.150 requires that rules be adopted for the administration of this chapter. Such rules include specific requirements regarding the treatment of various forms of prepaid and deferred earnings such as, but not limited to, commissions, bonuses, retroactive pay increases, vacation benefits, prepaid earnings, advances, and draw account payments. Such rules should be consistent with federal requirements under Title III of the Consumer Credit Protection Act of 1968, 15 U.S.C. §§ 1671-1677 (1970). See Section 723.151. The rules may also prescribe the circumstances under which forms in languages other than English may or must be used.

§ 723.154. Remedies of judgment creditor; limitation of employer's liability

Comment. Section 723.154 authorizes suit by a creditor against an employer both where the employer fails to withhold properly and where he fails to pay over amounts withheld. This remedy is independent of the procedure provided in Chapter 2 (Sections 717-723) of this title, and Section 723.154 makes clear that supplemental proceedings under Chapter 2 are not a prerequisite to suit by the creditor against the employer. Whether or not the court, in a Chapter 2 proceeding, can order the employer to withhold and pay over as required by an earnings withholding order issued under the Employees' Earnings Protection Law is a matter not dealt with in the Employees' Earnings Protection Law.

Subdivision (b) makes clear that an employer is protected from liability where he complies with an order or written notice which appears proper on its face. Occasionally, through mistake,

inadvertence, or even deliberate misconduct, an employer may be sent an order or notice which appears valid but which has been improperly obtained or served. For example, a creditor may fail to observe the 10-day moratorium on service of a second earnings withholding order. See Section 723.107 and Comment thereto. The employer is not required in such circumstances to go beyond the document itself and is not subject to liability where he complies with its directions and is not actively participating in a fraud. The remedy of the injured party in such a case is to proceed against the person who falsified the document or who improperly obtained the document or caused it prematurely to be served.

This section also makes clear that, where an employer is complying with a prior order, he is not liable for failing to comply with a subsequent valid order—even though the prior order is in fact invalid—unless he is actively participating in a fraud.

Government Code

§ 26750 (added). Fee under Employees' Earnings Protection Law

Comment. Section 26750 provides for a one-time fee of \$8.50 for performance of the levying officer's duties under the Employees' Earnings Protection Law, Code of Civil Procedure Sections 723.010–723.154.

Operative Date

Comment. The operative date of this act is delayed until January 1, 1979, to allow sufficient time for state and local public officials and the public to become familiar with the new law and to develop the necessary forms and procedures.

APPENDIX X

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Liquidated Damages

December 1976

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

December 6, 1976

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study whether the law relating to liquidated damages should be revised. The Commission submitted a recommendation on this subject to the 1976 legislative session. See *Recommendation Relating to Liquidated Damages*, 13 CAL. L. REVISION COMM'N REPORTS 2139 (1976). Proposed legislation (Assembly Bill 3169) introduced to effectuate that recommendation passed the Legislature but was vetoed by the Governor. This new recommendation has been revised in response to the objections stated in the Governor's veto message.

Respectfully submitted,
JOHN N. McLAURIN
Chairman

RECOMMENDATION

relating to

LIQUIDATED DAMAGES

Introduction

Existing California law permits the parties to a contract, in some circumstances, to agree on the amount or the manner of computation of damages recoverable for breach.¹ Two requirements must be satisfied. Sections 1670 and 1671 of the Civil Code² permit the enforcement of a liquidated damages provision only where the actual damages “would be impracticable or extremely difficult to fix.” In addition, the courts have developed a second requirement that the provision must reflect a “reasonable endeavor” to estimate actual damages.³ The judicial decisions interpreting and applying these requirements severely limit the use of liquidated damages provisions.⁴ In contrast to Civil Code Sections 1670 and 1671, which reflect some bias against liquidated damages provisions, recently enacted statutes such as Section 2718 of the Commercial

¹ For a discussion of the varying forms a liquidated damages clause may take, see background study, Sweet, *Liquidated Damages in California*, 60 Cal. L. Rev. 84 (1972), reprinted in 11 Cal. L. Revision Comm'n Reports at 1229 (1973) (hereinafter referred to as “Background Study”).

² Sections 1670 and 1671, which were enacted in 1872 and have not since been amended, read:

1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

³ *McCarthy v. Tally*, 46 Cal.2d 577, 584, 297 P.2d 981, 986 (1956); *Better Food Mkts., Inc. v. American Dist. Tel. Co.*, 40 Cal.2d 179, 187, 253 P.2d 10, 15 (1953). See also *Garrett v. Coast & S. Fed. Sav. & Loan Ass'n*, 9 Cal.3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973); *Clermont v. Secured Inv. Corp.*, 25 Cal. App.3d 766, 102 Cal. Rptr. 340 (1972).

⁴ See Background Study, *supra* note 1.

Code⁵ encourage the use of such provisions.⁶

A liquidated damages provision may serve several useful functions.⁷ The parties to a contract may include a liquidated damages provision in order to avoid the cost, difficulty, and delay of proving damages in court. When the provision is phrased in such a way as to indicate that the breaching party will pay a specified amount if a particular breach occurs, troublesome problems involved in proving causation and foreseeability are avoided. Also, through a liquidated damages provision, the parties are able by agreement to avoid what they may consider to be the inequities of the normal rules of damages. In many cases, the parties may feel that, if they agree on damages in advance, it is unlikely that either will later dispute the amount of damages recoverable as a result of breach.

A party who fully intends to perform his obligations under a contract may desire a liquidated damages provision because the amount of the damage caused by a breach by the other party cannot be proved under damage rules normally used in a judicial proceeding. He may fear that, without an enforceable provision liquidating the damages, the other party will lack incentive to perform since any damages he causes will not be sufficiently provable to be collected. There is also a danger that, without a liquidated damages provision, the defaulting party may recover the full contract price because losses due to the breach are not provable.

⁵ The pertinent portion of Section 2718 provides:

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

⁶ For provisions authorizing liquidated damages in marketing contracts, see Corp. Code § 13353; Food & Agri. Code § 54264. For provisions authorizing late payment charges, see Bus. & Prof. Code § 10242.5 (certain real estate loans); Civil Code §§ 1803.6 (retail installment sales), 2954.4 (loan on single-family, owner-occupied dwelling), 2982 (automobile sales finance act); Fin. Code §§ 14852 (credit unions), 18249, 18250, and 18631 (industrial loan companies), 22480(a)(5) (personal property brokers). See also Govt. Code § 54348 (services of local agency enterprise); Pub. Res. Code § 6224 (failure to pay State Lands Commission); Sts. & Hwys. Code § 6442 (Improvement Act of 1911). For provisions authorizing liquidated damages in certain public construction contracts, see Educ. Code § 90226; Govt. Code §§ 14376, 53069.85; Sts. & Hwys. Code §§ 5254.5, 10503.1.

⁷ The following discussion draws heavily upon the Background Study, *supra* note 1.

A party to a contract may seek to limit his possible liability for his own breach by use of a liquidated damages provision. This is especially important if he is engaged in a high risk enterprise.⁸

Use of liquidated damages provisions in appropriate cases also may improve judicial administration and conserve judicial resources. Enforcement of liquidated damages provisions will encourage greater use of such provisions and should result in fewer contract breaches, fewer law suits, and less extended trials.

While liquidated damages provisions may serve these and other useful functions, there are dangers inherent in their use. There is the risk that a liquidated damages provision will be used oppressively by a party able to dictate the terms of an agreement. And there is the risk that such a provision may be used unfairly against a party who does not fully appreciate the effect of the provision. This risk is of particular concern where consumers are involved.

The Commission believes that the use of liquidated damages provisions is beneficial and should be encouraged where the contracting parties have relatively equal bargaining power. In such cases, the provisions serve many useful and socially desirable purposes, particularly including avoidance of the cost, the uncertainty, and the delay of litigating the issue of damages. However, the limitations of existing law should be retained and additional protection provided in cases where the parties have substantially unequal bargaining power. Typical of such cases are transactions involving the sale or leasing of personal property or services to consumers or the sale or leasing of residential housing.

Recommendations

Having concluded that the existing law does not permit the use of a liquidated damages provision in some cases where such a provision would serve a useful and desirable

⁸ See, e.g., *Better Food Mkts., Inc. v. American Dist. Tel. Co.*, 40 Cal.2d 179, 253 P.2d 10 (1953) (\$50 liquidation of damages clause in a contract for burglar alarm system upheld).

function, the Commission makes the following recommendations.

General Principles Governing Liquidated Damages

Specific statutes governing the validity of liquidated damages provisions that now apply to particular types of contracts—such as Commercial Code Section 2718—should be retained without change. Absent such specific statutes, in order to continue the protection now given to significantly weaker and less experienced contracting parties, the rule expressed in Civil Code Sections 1670 and 1671 should continue to apply where the contract is a consumer contract (one for the retail purchase or rental by the consumer of personal property or services, primarily for personal, family, or household purposes, or the lease of residential real property) and the liquidated damages are sought to be recovered from the consumer.

A new statutory provision should be enacted to apply to contracts made by parties in nonconsumer cases absent a specific statute that applies to the particular type of contract. In this situation, a contractual stipulation of damages that is reasonable should be valid. The party seeking to invalidate the provision should have the burden of proving that it is unreasonable. Reasonableness should be judged in light of the circumstances confronting the parties at the time of the making of the contract and not by the judgment of hindsight. To permit consideration of the damages suffered would defeat one of the primary purposes of liquidated damages which is to avoid litigation of the amount of actual damages. This new statutory provision would, with respect to those situations to which it is applicable, reverse the basic disapproval of liquidated damages provisions expressed in Sections 1670 and 1671 and in the judicial decisions. Under the new provision, parties with relatively equal bargaining power would be able to develop and agree to a reasonable liquidated damages provision with assurance that the provision will be held valid. The new statutory provision would not, however, apply against the consumer in a consumer transaction.

Real Property Leases

The concurrent resolution directing the Law Revision Commission to study liquidated damages referred specifically to the use of liquidated damages provisions in real property leases.⁹ The Commission has concluded that no special rules applicable to real property leases are necessary; the general rules recommended above will deal adequately with any liquidated damages problems in connection with such leases. Thus, the existing restrictive provisions of Sections 1670 and 1671 will continue to apply where a liquidated damages provision in a lease is sought to be enforced against a lessee of residential property. On the other hand, a liquidated damages provision in a lease that does not involve residential property will be valid unless shown to be unreasonable.

Land Purchase Contracts

The parties to a contract for the sale and purchase of real property may desire to include in the contract a provision liquidating the damages if the buyer fails to complete the purchase. In some cases, the parties may agree that a payment made by the buyer constitutes liquidated damages if the buyer fails to complete the sale. The validity of such provisions under existing law is uncertain.¹⁰

Separate signing or initialing of liquidated damages clause; size of type. A new section should be enacted to provide that a liquidated damages clause fixing the damages if the buyer fails to complete the purchase of real property is invalid unless the provision is separately signed or initialed by each party to the contract.¹¹ If the liquidated

⁹ See Cal. Stats. 1969, Res. Ch. 224, at 3888 (directing the Commission to study whether "the law relating to liquidated damages in contracts and, particularly, in leases, should be revised").

¹⁰ See Background Study, *supra* note 1, at 95-100.

¹¹ The Commission's recommendation in large part would conform to existing practice. The Real Estate Purchase Contract and Receipt for Deposit, approved in form only for use in "simple transactions" by the California Real Estate Association and the State Bar of California, contains the following provision:

If Buyer fails to complete said purchase as herein provided by reason of any default of Buyer, Seller shall be released from his obligation to sell the property to Buyer and may proceed against Buyer upon any claim or remedy which he

damages provision is included in a printed contract, it should be invalid unless it is set out in at least 10-point type or in contrasting red print in at least eight-point bold type.¹² These requirements will alert the parties to the fact that the liquidated damages clause is included in the contract.

Residential housing. Carefully drafted statutory limitations are needed to protect the defaulting buyer of residential housing against oppressive use of a liquidated damages provision. A provision liquidating damages for the buyer's default in a contract for the sale of residential property (a dwelling consisting of not more than four residential units, one of which the buyer intends to occupy) should be valid only if it designates all or part of the buyer's payment as liquidated damages. In such contracts, only the amount *actually paid* by the buyer in the form of cash or check (including a postdated check) should be considered valid liquidated damages even where the liquidated damages clause designates a larger amount. This recommendation recognizes that in most cases even the unsophisticated buyer of residential housing expects that he will lose the deposit actually made if he does not go through with the deal. Nevertheless, the buyer of residential property should be protected from forfeiting an unreasonably large amount as liquidated damages. If the amount paid as liquidated damages does not exceed three percent of the purchase price, the buyer should have the burden of establishing that the amount is unreasonable. If the amount paid exceeds three percent of the purchase

may have in law or equity; provided, however, that by placing their initials here. Buyer:() Seller:(). Buyer and Seller agree that it would be impractical or extremely difficult to fix actual damages in case of Buyer's default, that the amount of the deposit is a reasonable estimate of the damages, and that Seller retain the deposit as his sole right to damages.

See R. Bernhardt, *California Real Estate Sales Transactions* § 4.67 (Cal. Cont. Ed. Bar Supp. 1976).

¹² This requirement is based on comparable provisions in recently enacted statutes. See Civil Code § 2984.1 (contrasting red print in at least eight-point bold type required in contract provision regarding insurance coverage in conditional sales contract). For statutes requiring provisions in 10-point bold type, see Civil Code §§ 1803.2 and 1803.7 (certain provisions of retail installment contracts), 1916.5 (variable interest provision), 2984.3 (buyer's acknowledgment of delivery of copy of conditional sales contract).

price, the party seeking to uphold the provision (generally the seller) should have the burden of establishing that the amount is reasonable. Reasonableness of the amount actually paid as liquidated damages should be judged in light of the circumstances existing at the time the contract was made, but the court should also be required to consider the price, terms, and other circumstances of any sale or contract for sale of the residential property occurring within six months after the buyer's default. Requiring the court to consider the subsequent sale will avoid a windfall to the seller. Such a windfall is a possibility in the case of a rising market. The six-month limitation recognizes that the relevance of a subsequent sale of the property to the reasonableness of the amount paid as liquidated damages decreases as the time between the buyer's default and the subsequent sale increases. The weight to be given to the subsequent sale depends upon the price, terms, and all the other circumstances of the subsequent sale.

Other types of real property. Where the contract is for the sale and purchase of real property (other than residential housing described above), a provision in the contract liquidating the damages should be valid if it satisfies the formal requirements as to signing or initialing and size or color of type unless the provision is shown to be unreasonable under the circumstances existing at the time the contract was made.

These more liberal provisions, which will apply only to real estate purchase contracts other than for residential housing, will provide parties in commercial transactions with assurance that a reasonable liquidated damages provision will be held valid.

Requirement for subsequent payments. Frequently a payment is made at the time of the agreement to sell and to purchase real property and a second payment is made at the time the escrow is opened. In the case of a contract to sell and purchase residential housing, if the parties agree that all or a portion of any payment after the first one may also be retained by the seller as liquidated damages, a

signing or initialing of a separate liquidated damages provision should be required for each such subsequent payment.

Right to obtain specific performance. Where a valid liquidated damages provision is included in a contract, retention of the buyer's payment is the seller's sole right to damages for the buyer's failure to purchase the property. Theoretically, the seller still has the alternative remedy of specific performance,¹³ but in most instances the difficulties in obtaining specific performance make it an unsatisfactory and unused remedy.¹⁴ Nevertheless, a provision is included in the recommended legislation to make clear that a liquidated damages provision does not affect any right a party may have to obtain specific performance.

Public Works Construction Contracts

Several statutes relating to public works construction contracts require or permit the inclusion in such contracts of liquidated damages provisions for late completion of the construction project but do not provide a standard for determining the validity of such provisions.¹⁵ Liquidated damages provisions for late completion in such contracts should be valid unless shown to be manifestly unreasonable under the circumstances existing at the time the contract was made.

Operative Date

Because the recommended legislation establishes new requirements for the form of a liquidated damages provision in a printed contract to purchase and sell real

¹³ Civil Code § 3389. See also Hetland, "Land Contracts," in *California Real Estate Secured Transactions* § 3.21 (Cal. Cont. Ed. Bar 1970).

¹⁴ See Bernhardt, "Liability for Breach," in *California Real Estate Sales Transactions* §§ 11.62-11.67 (Cal. Cont. Ed. Bar 1967); Hetland, "Land Contracts," in *California Real Estate Secured Transactions* §§ 3.21-3.33, 3.52-3.53 (Cal. Cont. Ed. Bar 1970).

¹⁵ Educ. Code § 90226 (contracts with state university and colleges); Govt. Code §§ 14376 (state public works contracts) and 53069.85 (contracts with cities, counties, and districts); Sts. & Hwys. Code § 5254.5 (contracts under Improvement Act of 1911). A similar section should be added to govern the validity of such liquidated damages provisions in contracts with the University of California.

property, the operative date of the recommended legislation should be deferred until July 1, 1978. Deferring the operative date six months will provide time within which to develop and print the necessary form contracts.

Application to Existing Contracts

The recommended legislation should not apply to contracts made before its operative date.

Technical Revisions

Additional technical revisions are recommended. These are explained in the Comments which follow the sections of the recommended legislation. One technical revision made by the recommended legislation is to place the liquidated damages sections in a separate title. An outline of revised Title 4 and new Title 4.5 is set out below.¹⁶

TITLE 4. UNLAWFUL CONTRACTS

- § 1667. Unlawfulness defined
- § 1668. Contracts contrary to policy of law
- § 1669. Contracts in restraint of marriage

TITLE 4.5. LIQUIDATED DAMAGES

Chapter 1. General Provisions

- § 1671. General requirements for liquidated damages

Chapter 2. Default on Real Property Purchase Contract

- § 1675. Contracts to purchase residential property
- § 1676. Contracts to purchase other real property
- § 1677. Separate signing or initialing; additional requirement for printed contracts
- § 1678. Residential property; separate signing or initialing for subsequent payments
- § 1679. Chapter applies only to liquidated damages for failure to purchase property
- § 1680. Right to obtain specific performance
- § 1681. Real property sales contracts excluded

¹⁶ It is necessary to renumber existing Civil Code Section 1676 as Section 1669 in order to accommodate new Title 4.5. No change is made in the wording of the existing section.

Proposed Legislation

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

An act to amend Sections 1671, 1951.5, and 3358 of, to add Section 1669 to, to add a title heading to Part 2 (commencing with Section 1549) of Division 3, immediately preceding Section 1671 of, to add a chapter heading to Title 4.5 (commencing with Section 1671) of Part 2 of Division 3 of, to add Chapter 2 (commencing with Section 1675) to Title 4.5 of Part 2 of Division 3 of, and to repeal Sections 1670 and 1676 of, the Civil Code, to amend Section 90226 of, and to add Article 5 (commencing with Section 92050) to Chapter 1 of Part 57 of Division 9 of Title 3 of, the Education Code, to amend Sections 14376 and 53069.85 of the Government Code, and to amend Section 5254.5 of the Streets and Highways Code, relating to legal obligations, including liquidated damages.

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

Civil Code § 1669 (technical addition)

SECTION 1. Section 1669 is added to the Civil Code, to read:

1669. Every contract in restraint of the marriage of any person, other than a minor, is void.

Comment. Section 1669 continues without change former Section 1676.

Civil Code § 1670 (repealed)

SEC. 2. Section 1670 of the Civil Code is repealed.

~~1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.~~

Comment. Section 1670 is repealed but its substance is continued in subdivision (d) of Section 1671.

Title and Chapter Headings (added)

SEC. 3. A title heading is added to Part 2 (commencing with Section 1549) of Division 3 of the Civil Code, immediately preceding Section 1671 thereof, to read:

TITLE 4.5. LIQUIDATED DAMAGES

SEC. 4. A chapter heading is added to Title 4.5 (commencing with Section 1671) of Part 2 of Division 3 of the Civil Code, immediately preceding Section 1671, to read:

CHAPTER 1. GENERAL PROVISIONS**Civil Code § 1671 (amended). General requirements for liquidated damages**

SEC. 5. Section 1671 of the Civil Code is amended to read:

1671. (a) *This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.*

(b) *Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.*

(c) *The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either:*

(1) *A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or*

(2) *A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.*

(d) *In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that ~~The~~ the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.*

Comment. Section 1671 is amended to provide in subdivision (b) a new general rule favoring the enforcement of liquidated damages provisions except against a consumer in a consumer case. In a consumer case, the prior law under former Sections 1670 and 1671, continued in subdivision (d), still applies.

Subdivision (a). Subdivision (a) makes clear that Section 1671 does not affect other statutes that govern liquidation of damages for breach of certain types of contracts. *E.g.*, Civil Code §§ 1675–1681 (default on contract to purchase real property); Com. Code § 2718 (sales transactions under the Commercial Code). For provisions relating to late payment charges and liquidated damages for late completion, see, *e.g.*, Bus. & Prof. Code § 10242.5 (certain real estate loans); Civil Code §§ 1803.6 (retail installment sales), 2954.4 (loan on single-family, owner-occupied dwelling), 2982 (automobile sales finance); Educ. Code §§ 90226 (construction contracts for state university and colleges), 92050 (construction contracts for University of California); Fin. Code §§ 14852 (credit unions), 18249, 18250, 18631 (industrial loan companies), 22480(a)(5) (personal property brokers); Govt. Code §§ 14376 (state public works contracts), 53069.85 (contracts with cities, counties, and districts), 54348 (penalty for nonpayment of local agency charges); Pub. Res. Code § 6224 (penalty for nonpayment to State Lands Commission); Sts. & Hwys. Code §§ 5254.5 (liquidated damages under Improvement Act of 1911), 6442 (penalty for nonpayment under Improvement Act of 1911), 10503.1 (liquidated damages under Municipal Improvement Act of 1913). These other statutes—not Section 1671—govern the situations to which they apply. Of course, where there are exceptions to the coverage of some provision governing liquidated damages in certain types of contracts, Section 1671 does apply. *E.g.*, Fin. Code §§ 18191 (exception to Sections 18249 and 18250), 22053 (exception to Section 22480). Note that Section 1676, which provides a rule governing liquidated damages for the

buyer's default on a contract for the sale of nonresidential real property, incorporates subdivision (b) of Section 1671.

It should be noted that Section 1671 (a) makes Section 1671 not applicable where the validity of the liquidated damages provision is governed by federal law or a regulation adopted pursuant thereto. For example, the Federal Home Loan Bank Board has issued a regulation which prescribes the maximum late payment charge that may be made with respect to home loans made after July 31, 1976, by federally chartered savings and loan associations. 41 Fed. Reg. 18,287 (1976) (to be codified in 12 C.F.R. § 545.6-11).

Subdivision (b). Subdivision (b) provides that a reasonable liquidated damages provision is valid, but subdivision (d) rather than subdivision (b) applies where liquidated damages are sought to be recovered from the consumer in a consumer case. See subdivision (c).

In the cases where subdivision (b) applies, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damages provision. The subdivision limits the circumstances that may be taken into account in the determination of reasonableness to those in existence "at the time the contract was made." The validity of the liquidated damages provision depends upon its reasonableness at the time the contract was made and not as it appears in retrospect. Accordingly, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision. For a contrary rule, see Com. Code § 2718 (damages may be liquidated at an amount which is reasonable in the light of "anticipated or actual harm") and Civil Code § 1675(e)(2) (subsequent sale as bearing on reasonableness of provision liquidating damages to seller in case of default by buyer of residential property).

Unlike subdivision (d), subdivision (b) gives the parties considerable leeway in determining the damages for breach. *All* the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, such matters as the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the

time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract.

Subdivision (c). Subdivision (c) makes the prior law under former Sections 1670 and 1671, continued in subdivision (d), applicable where liquidated damages are sought to be recovered from the consumer in a contract for the retail purchase, or rental, of personal property or services, primarily for personal, family, or household purposes, or for the lease of real property to be used as a dwelling by the party or persons dependant on the party for support. Of course, where the party seeking to avoid the liquidated damages provision is the nonconsumer party, subdivision (b) is applicable.

Subdivision (d). Subdivision (d) continues without substantive change the requirements of former Sections 1670 and 1671. The revision made in the former language of these sections is not intended to alter the substance of those sections as interpreted by the courts. For a discussion of the former law continued in subdivision (d), see Sweet, *Liquidated Damages in California*, 60 Cal. L. Rev. 84 (1972), reprinted in 11 Cal. L. Revision Comm'n Reports at 1229 (1973).

Deposits. Instead of promising to pay a fixed sum as liquidated damages in case of a breach, a party to a contract may provide a deposit as security for the performance of his contractual obligations. If the parties provide that the deposit shall be liquidated damages for a breach of the contract, the question whether the deposit may be retained in case of a breach is determined in accordance with the standard provided in subdivision (b) or subdivision (d), whichever applies. See also Sections 1675–1681 (real property purchase contract). On the other hand, if the parties do not intend that the deposit shall constitute liquidated damages in the event of a breach, the deposit is merely a fund to secure the payment of actual damages if any are determined. See, e.g., Civil Code § 1950.5 (payment or deposit to secure performance of rental agreement). Compare Civil Code § 1951.5 (liquidation of damages authorized in real property lease).

Civil Code § 1676 (technical repeal)

SEC. 6. Section 1676 of the Civil Code is repealed.

~~1676. Every contract in restraint of the marriage of any person, other than a minor, is void.~~

Comment. Section 1676 is continued without change in Section 1669.

CHAPTER 2. DEFAULT ON REAL PROPERTY PURCHASE CONTRACT

SEC. 7. Chapter 2 (commencing with Section 1675) is added to Title 4.5 of Part 2 of Division 3 of the Civil Code, to read:

CHAPTER 2. DEFAULT ON REAL PROPERTY PURCHASE CONTRACT

Civil Code § 1675 (added). Contract to purchase residential property

1675. (a) As used in this section, “residential property” means real property primarily consisting of a dwelling that meets both of the following requirements:

(1) The dwelling contains not more than four residential units.

(2) At the time the contract to purchase and sell the property is made, the buyer intends to occupy the dwelling or one of its units as his residence.

(b) A provision in a contract to purchase and sell residential real property which provides that all or any part of a payment made by the buyer shall constitute liquidated damages to the seller upon the buyer’s failure to complete the purchase of the property is valid to the extent that payment in the form of cash or check (including a postdated check) is actually made if the provision satisfies the requirements of Sections 1677 and 1678 and of subdivision (c) or (d) of this section.

(c) If the amount actually paid pursuant to the liquidated damages provision does not exceed three percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that such amount is unreasonable as liquidated damages.

(d) If the amount actually paid pursuant to the liquidated damages provision exceeds three percent of the purchase price, the provision is invalid unless the party

seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages.

(e) For the purposes of subdivisions (c) and (d), the reasonableness of an amount actually paid as liquidated damages shall be determined by taking into account both of the following:

(1) The circumstances existing at the time the contract was made.

(2) The price and other terms and circumstances of any subsequent sale or contract to sell and purchase the same property if such sale or contract is made within six months of the buyer's default.

Comment. Section 1675 governs the validity of a provision that all or any part of a payment made by the buyer shall constitute liquidated damages for the buyer's default in a contract to purchase and sell residential property as defined in subdivision (a). The section is an exception to the general provisions of Section 1671. It should be noted that there are additional requirements concerning the form and execution of the liquidated damages provision: The liquidated damages provision is valid only if it is separately signed or initialed by the parties as required by Sections 1677 and 1678 and, if the contract is printed, the provision satisfies the type size requirements of Section 1677. Section 1675 does not apply to real property sales contracts as defined in Section 2985. See Section 1681.

Under Section 1675, a provision liquidating the damages if the buyer defaults is valid only to the extent that the buyer has actually paid in the form of cash or a check (including a postdated check) the amount of the liquidated damages. Hence, if the liquidated damages provision specifies liquidated damages for the buyer's default in an amount greater than the amount actually paid by the buyer, the provision is valid only to the extent of the amount actually paid; the seller may not enforce the greater amount specified in the provision. Where the amount paid is greater than the amount specified as liquidated damages, only the amount so specified may be retained as liquidated damages for the buyer's default. Section 1675 recognizes that generally the buyer of residential housing, including the buyer who does not read the contract or does not understand it, expects to lose the "earnest money" deposit if the purchase of the property is not completed.

Subdivisions (c) and (d) are designed to protect the buyer of residential housing from forfeiting an unreasonably large amount as liquidated damages for the failure to complete the purchase of the property. If the amount paid is not in excess of three percent, the buyer has the burden of establishing that the amount is unreasonable in order to invalidate the liquidated damages provision. If the amount paid exceeds three percent of the purchase price, the party seeking to uphold the provision (generally the seller) has the burden of establishing that such amount was reasonable. Under subdivision (d), a buyer may seek to uphold a liquidated damages provision where the amount paid is three percent or more of the purchase price in order to limit the buyer's liability where the seller may be able to show higher actual damages in the absence of a valid provision.

Subdivision (e) provides the standard for determining the reasonableness of an amount paid as liquidated damages. Reasonableness is to be judged at the time the contract was made, but the court is also required to consider the price, terms, and other circumstances of a sale or contract for the sale of the property within six months after the buyer's default. The circumstances to be considered by the court in determining reasonableness include, but are not limited to, items such as the cost of taxes, interest, and insurance during the period after the original contract to purchase the property was made and any additional broker fees which are a result of the buyer's default. As to the interpretation of "under the circumstances existing at the time the contract was made," see the discussion in the Comment to Section 1671.

Section 1675 does not apply to contract provisions concerning anything other than liquidated damages for the buyer's failure to purchase the property. See Section 1679. Section 1675 does not, for example, apply to a provision liquidating the damages if the seller fails to perform. Nor does the section affect the seller's right to obtain specific performance. See Section 1680.

Where a liquidated damages provision is valid under this section, the limitations of Section 3307 (damages for breach of agreement to purchase real estate) do not apply.

Civil Code § 1676 (added). Contract to purchase other real property

1676. Except as provided in Section 1675, a provision in a contract to purchase and sell real property liquidating the

damages to the seller if the buyer fails to complete the purchase of the property is valid if it satisfies the requirements of Section 1677 and the requirements of subdivision (b) of Section 1671.

Comment. Section 1676 applies the standard of subdivision (b) of Section 1671 to a liquidated damages provision for the buyer's default in a contract to purchase and sell real property other than residential property as defined in subdivision (a) of Section 1675. See Comment to Section 1671. Hence, if the applicable requirements of Section 1677 are satisfied, the liquidated damages provision is valid unless the buyer establishes that the provision was unreasonable under the circumstances existing at the time the contract was made. See the discussion in the Comment to Section 1671 for an interpretation of this standard.

The liquidated damages provision is not valid unless it is separately signed or initialed by the parties and, if the contract is printed, the provision satisfies certain type size requirements. See Section 1677.

Section 1676 does not apply to contract provisions concerning anything other than liquidated damages for the buyer's failure to purchase the property. See Section 1679. Section 1676 does not, for example, apply to a provision liquidating damages if the seller fails to perform. Nor does the section affect the seller's right to obtain specific performance. See Section 1680. Section 1676 does not apply to real property sales contracts as defined in Section 2985. See Section 1681.

Where a liquidated damages provision is valid under this section, the limitations of Section 3307 (damages for breach of agreement to purchase real estate) do not apply.

**Civil Code § 1677 (added). Separate signing or
initialing; additional requirement for
printed contracts**

1677. A provision in a contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to purchase the property is invalid unless:

(a) The provision is separately signed or initialed by each party to the contract; and

(b) If the provision is included in a printed contract, it is set out either in at least 10-point bold type or in contrasting red print in at least eight-point bold type.

Comment. Section 1677 establishes formal requirements for execution of a provision liquidating the damages if the buyer defaults in his agreement to purchase real property. The provision is invalid unless separately signed or initialed by each party to the contract. This requirement is adapted from the Real Estate Purchase Contract and Receipt for Deposit, approved in form only for use in “simple transactions” by the California Real Estate Association and the State Bar of California. The requirement is extended to all contracts providing for the forfeiture of payments as liquidated damages to the seller if the buyer fails to complete the purchase. This will make it more likely that the parties will appreciate the consequences of this important provision. See also Section 1678 (separate signing or initialing for subsequent payments in the case of residential property). The requirement of a separate signing or initialing provided by this section does not apply to anything other than liquidated damages for the buyer’s failure to purchase the property.

Section 1677 also establishes minimum type size for a provision in a printed contract to purchase and sell real property liquidating the damages to the seller if the buyer fails to purchase the property. The type size requirements are designed to provide further assurance that the parties will be aware of the consequences of the liquidated damages provision. The provision for contrasting red print in at least eight–point bold type is taken from Section 2984.1 of the Civil Code (contract provision regarding insurance coverage in conditional sales contract). The alternative provision, requiring at least 10–point bold type, is comparable to that found in various other recently enacted statutes. *E.g.*, Civil Code §§ 1803.2 and 1803.7 (retail installment contracts), 1916.5 (variable interest provision), 2984.3 (buyer’s acknowledgment of delivery of copy of conditional sale contract).

**Civil Code § 1678 (added). Residential property;
separate signing or initialing for subsequent
payments**

1678. If more than one payment made by the buyer is to constitute liquidated damages under Section 1675, the amount of any payment after the first payment is valid as liquidated damages only if (1) the total of all such payments satisfies the requirements of Section 1675 and (2) a separate

liquidated damages provision satisfying the requirements of Section 1677 is separately signed or initialed by each party to the contract for each such subsequent payment.

Comment. Section 1678 is included to protect the buyer of residential property by requiring a separately signed or initialed agreement whenever any payment made after the first payment is to be liquidated damages if the buyer fails to purchase real property. The section recognizes that frequently a deposit is made at the time the agreement to sell and to purchase the property is made and a second payment is made at the time the escrow is opened. The payment made at the time the escrow is opened (or at some other time) can be retained by the seller as liquidated damages only if there is a valid agreement so providing and there is a separate signing or initialing for the subsequent payment. The standard provided by Section 1675 is applied to the total of all payments—the first and any subsequent payments—designated as liquidated damages by the contract.

Civil Code § 1679 (added). Chapter applies only to liquidated damages for failure to purchase property

1679. This chapter applies only to a provision for liquidated damages to the seller if the buyer fails to purchase real property. The validity of any other provision for liquidated damages in a contract to purchase and sell real property is determined under Section 1671.

Comment. Section 1679 makes clear that this chapter does not apply to contract provisions concerning anything other than liquidated damages for the buyer's failure to purchase the property. The chapter does not apply, for example, to a provision liquidating the damages if the seller fails to perform. Such damages are covered by Section 1671. Nor does the chapter affect the seller's right to obtain specific performance. See Section 1680.

Civil Code § 1680 (added). Right to obtain specific performance

1680. Nothing in this chapter affects any right a party to a contract for the purchase and sale of real property may have to obtain specific performance.

Comment. Section 1680 makes clear that this chapter does not affect the rule under existing California law that the right of

the seller to obtain specific performance of a contract for the purchase of real property is not affected by the inclusion in the contract of a provision liquidating the damages to the seller if the buyer defaults on his agreement to purchase the property. See Section 3389, *People v. Ocean Shore R.R.*, 90 Cal. App.2d 464, 203 P.2d 579 (1949), and other cases interpreting Section 3389.

Civil Code § 1681 (added). Real property sales contracts excluded

1681. This chapter does not apply to real property sales contracts as defined in Section 2985.

Comment. Section 1681 makes clear that this chapter does not apply to real property sales contracts as defined in Section 2985 (commonly called installment land contracts). No change is made in the law that governs the extent to which payments made pursuant to such contracts may be forfeited upon the buyer's default.

Civil Code § 1951.5 (technical amendment)

SEC. 8. Section 1951.5 of the Civil Code is amended to read:

1951.5. ~~Sections 1670 and~~ Section 1671, relating to liquidated damages, ~~apply~~ *applies* to a lease of real property.

Comment. Section 1951.5 is amended to reflect the repeal of Section 1670. It should be noted that Section 1671 has been amended to change the rules governing the validity of liquidated damages provisions in certain cases. See Section 1671 and Comment thereto.

Civil Code § 3358 (technical amendment)

SEC. 9. Section 3358 of the Civil Code is amended to read:

3358. ~~Notwithstanding the provisions of this Chapter, Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides; except in the cases specified in the Articles on Exemplary Damages and Penal Damages, and in Sections 3319, 3339, and 3340.~~

Comment. Section 3358 is amended to replace the former listing of specific provisions with a general reference to statutes that constitute an exception to the rule stated. The former listing of specific provisions was incomplete. See the Comment to Section 1671. See also Sections 3294, 3339, 3340, 3346–3348.

**Education Code § 90226 (amended). Contracts under
California State University and Colleges
Contract Law**

SEC. 10. Section 90226 of the Education Code is amended to read:

90226. Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. *The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made.* A contract for a road project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, such provision, if used, to be included in the specifications and to clearly set forth the basis for such payment.

Comment. Section 90226 is amended to provide a standard for determining the validity of a liquidated damages provision for late completion of a contract governed by this section. Prior to this amendment, the standard for determining the validity of such contract provisions was unclear. Civil Code Section 1671 does not apply to contracts under this section. See Civil Code § 1671(a) (general provisions not applicable where special statute provides standard for determining validity of liquidated damages provision).

**Education Code § 92050 (added). Contracts of
University of California**

SEC. 11. Article 5 (commencing with Section 92050) is added to Chapter 1 of Part 57 of Division 9 of Title 3 of the Education Code, to read:

Article 5. Construction Contracts

92050. The Regents of the University of California may include or cause to be included in a contract for a construction project for the University of California a provision establishing the time within which the whole or any specified portion of the work contemplated shall be completed. The provision may provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the Regents of the University of California a specified sum of money, to be deducted from any payments due or to become due to the contractor. The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made. A contract for such a project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time. Such provisions, if used, shall be included in the specifications and shall clearly set forth the basis for such payments. Nothing in this section restricts the authority of the Regents of the University of California to include any other provision concerning liquidated damages in any contract for a construction project.

Comment. Section 92050 is added to provide a standard for determining the validity of a liquidated damages provision for late completion of a contract for a construction project for the University of California. Section 92050 is comparable to Government Code Sections 14376 and 53069.85 and Streets and Highways Code Section 5254.5. Civil Code Section 1671 does not apply to the liquidated damages provisions for late completion in contracts under Section 92050. See Civil Code § 1671(a) (general provisions not applicable where special statute provides standard for determining validity of liquidated damages provision). The last sentence of Section 92050 makes clear that the section does not restrict the authority of the Regents of the University of California to include any other provision concerning liquidated damages in a construction contract. Such other provisions are governed by Civil Code Section 1671.

Government Code § 14376 (amended). Contracts under State Contract Act

SEC. 12. Section 14376 of the Government Code is amended to read:

14376. Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. *The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made.* A contract for a road project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, such provision, if used, to be included in the specifications and to clearly set forth the basis for such payment.

Comment. Section 14376 is amended to provide a standard for determining the validity of a liquidated damages provision for late completion of a contract governed by this section. Prior to this amendment, the standard for determining the validity of such contract provisions was unclear. Civil Code Section 1671 does not apply to contracts under this section. See Civil Code § 1671(a) (general provisions not applicable where special statute provides standard for determining validity of liquidated damages provision).

Government Code § 53069.85 (amended). Local public works contracts

SEC. 13. Section 53069.85 of the Government Code is amended to read:

53069.85. The legislative body of a city, county or district may include or cause to be included in contracts for public projects a provision establishing the time within which the whole or any specified portion of the work contemplated shall be completed. The legislative body may provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to such agency

involved a specified sum of money, to be deducted from any payments due or to become due to the contractor. *The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made.* A contract for such a project may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time. Such provisions, if used, shall be included in the specifications upon which bids are received, which specifications shall clearly set forth the provisions.

Comment. Section 53069.85 is amended to provide a standard for determining the validity of a liquidated damages provision for late completion of a contract governed by this section. Prior to this amendment, the standard for determining the validity of such contract provisions was unclear. Civil Code Section 1671 does not apply to contracts under this section. See Civil Code § 1671(a) (general provisions not applicable where special statute provides standard for determining validity of liquidated damages provision).

**Streets & Highways Code § 5254.5 (amended).
Improvement Act of 1911**

SEC. 14. Section 5254.5 of the Streets and Highways Code is amended to read:

5254.5. At any time prior to publication and posting notice inviting bids, the legislative body by resolution, may determine that in the event that the contractor, contracting owners included, does not complete the work within the time limit specified in the contract or within such further time as the legislative body shall have authorized, the contractor or contracting owners, as the case may be, shall pay to the city liquidated damages in the amount fixed by the legislative body in said resolution. *The amount so fixed is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made.* If such determination is made, the plans or specifications and the contract shall contain provisions in accordance therewith.

Any moneys received by the city on account of such liquidated damages shall be applied as follows:

(1) If received prior to confirmation of the assessment, such moneys shall be applied as a contribution against the assessment.

(2) If received after the confirmation of the assessment, such moneys shall be applied in the manner provided in Section 5132.1 for the disposition of excess acquisition funds.

(3) If a contribution has theretofore been made or ordered by any agency, the legislative body may order a refund to the contributing agency in the proportion which said contribution bears to the total costs and expenses of the work.

Comment. Section 5254.5 is amended to provide a standard for determining the validity of a liquidated damages provision for late completion of a contract under this section. Prior to this amendment, the standard for determining the validity of such contract provisions was unclear. Civil Code Section 1671 does not apply to contracts under this section. See Civil Code § 1671(a) (general provisions not applicable where special statute provides standard for determining validity of liquidated damages provision).

Operative Date

SEC. 15. This act shall become operative on July 1, 1978.

Comment. The deferred operative date will allow time for development and printing of form contracts for the purchase and sale of real property. The act establishes requirements for the form of such contracts.

Application to existing contracts

SEC. 16. This act applies only to contracts made on or after July 1, 1978.

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Oral Modification of Contracts (November 1975)
Liquidated Damages (November 1975)

Annual Report (December 1976) includes following recommendations:

Service of Process on Unincorporated Associations (February 1976)
Sister State Money Judgments (April 1976)
Damages in Action for Breach of Lease (May 1976)

- Wage Garnishment (October 1976)
Liquidated Damages (December 1976)
Selected Legislation Relating to Creditors' Remedies (January 1975) [out of print]
Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments (December 1975) [out of print] *
Recommendation and Study Relating to Oral Modification of Written Contracts (January 1975)
Recommendation Relating to:
 Partition of Real and Personal Property (January 1975)
 Wage Garnishment Procedure (April 1975)
 Revision of the Attachment Law (November 1975)
 Undertakings for Costs (November 1975)
 Nonprofit Corporation Law (November 1976)

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