

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report



December 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

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 17 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1984.

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SUMMARY OF WORK OF COMMISSION

Recommendations to 1984 Legislative Session

The California Law Revision Commission plans to submit important recommendations to the 1984 session of the Legislature in the fields of probate law and procedure and family law.

Some of the probate law recommendations are designed to reduce the cost and delay of probate. These recommendations relate to independent administration of estates and distribution of estates without administration. Other probate law recommendations relate to wills, intestate succession, creditor's right to reach payments from a trust, requirements for execution of witnessed wills, filing notice of wills, recording affidavit of death, and simultaneous deaths.

The recommendations relating to family law deal with such matters as marital property presumptions and transmutations, disposition of community property, liability of marital property for debts, reimbursement of educational expenses, and liability of stepparent for child support.

Other recommendations deal with dismissal of a civil action for lack of prosecution, severance of joint tenancy, quiet title and partition judgments, dormant mineral rights, creditors' remedies, and statutory forms for powers of attorney. Recommendations on other matters will be submitted if work on them is completed in time to permit their submission to the 1984 session.

Recommendations Enacted by 1983 Legislative Session

In 1983, 12 of 14 bills recommended by the Commission were enacted. One bill will be acted upon by the Legislature in 1984. A comprehensive statute relating to wills and intestate succession was enacted. This statute is the first phase of the Commission's study and revision of the California Probate Code. Other bills enacted in 1983 dealt with:

- Durable power of attorney for health care decisions
- Missing persons
- Division of marital property
- Limited conservatorship proceedings
- Disclaimer of testamentary and other interests
- Emancipated minors
- Claims against public entities
- Bonds and undertakings

- Nonprobate transfers
- Vacation of public streets
- Creditors' remedies

Commission recommendations enacted by the 1983 session affected 701 sections of the California statutes: 332 new sections were enacted, 130 sections were amended, and 239 sections were repealed.

Commission Plans for 1984

During 1984, the Commission plans to devote its attention primarily to securing the enactment of legislation recommended to the 1984 Legislature and to the preparation of legislation relating to probate law and procedure and to family law. Other topics will be considered to the extent time and resources permit.

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
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Chairperson

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BEATRICE P. LAWSON

November 28, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
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 1983.

I am pleased to report that at the 1983 legislative session 12 of 14 bills introduced to implement the Commission's recommendations were enacted. Final action on one bill will be taken by the Legislature in 1984.

I would like to give special recognition to Senator Barry Keene and Assemblyman Alister McAlister who serve as the legislative members of the Commission. As the newly appointed Senate Member of the Commission, Senator Keene introduced the Commission recommended bill relating to the durable power of attorney for health care. This important bill was enacted in 1983. Senator Keene also did much to secure passage of Commission recommended measures in the Senate. Assemblyman McAlister was the author of 11 of the Commission recommended measures enacted in 1983.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

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ANNUAL REPORT FOR THE YEAR 1983

INTRODUCTION

The California Law Revision Commission¹ was created in 1953 (as the permanent successor to the Code Commission) with the responsibility for a continuing substantive review of California statutory and decisional law.² The Commission studies the California law to discover defects and anachronisms and recommends legislation to make needed reforms.

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

- (1) Intensively studying complex and sometimes 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 consists of:

—A Member of the Senate appointed by the Committee on Rules.

—A Member of the Assembly appointed by the Speaker.

—Seven members appointed by the Governor with the advice and consent of the Senate.

—The Legislative Counsel who is an ex officio member.

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has a calendar of 22 topics.³

Commission recommendations have resulted in the enactment of legislation affecting 8,264 sections of the California statutes:

¹ See Gov't Code §§ 10300-10340 (statute establishing Law Revision Commission).

² See 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954 at 7 (1957).

³ See list of topics under "Calendar of Topics for Study" *infra*.

3,557 sections have been added, 1,899 sections amended, and 2,808 sections repealed. Of the 158 Commission recommendations submitted to the Legislature, 144 (91%) have been enacted into law either in whole or in substantial part.⁴

The Commission's recommendations and studies are published as pamphlets and later in hardcover volumes. A list of past publications and information on where and how copies may be obtained may be found at the end of this Report.

1984 LEGISLATIVE PROGRAM

The Commission plans to recommend legislation on the following subjects to the 1984 Legislature:

- (1) Liability of marital property for debts.⁵
- (2) Marital property presumptions and transmigrations.⁶
- (3) Awarding temporary use of family home.⁷
- (4) Disposition of community property.⁸
- (5) Reimbursement of educational expenses.⁹
- (6) Special appearance in family law proceedings.¹⁰
- (7) Liability of stepparent for child support.¹¹
- (8) Statutory forms for durable powers of attorney.¹²
- (9) Distribution of decedent's estate without administration.¹³
- (10) Independent administration of decedent's estate.¹⁴
- (11) Execution of witnessed wills.¹⁵

⁴ See list of recommendations and legislative action in Appendix I *infra*.

⁵ See *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984).

⁶ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

⁷ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

⁸ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

⁹ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

¹⁰ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

¹¹ See *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

¹² See *Recommendation Relating to Statutory Forms For Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984).

¹³ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

¹⁴ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

¹⁵ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

- (12) Simultaneous deaths.¹⁶
- (13) Notice of will.¹⁷
- (14) Garnishment of amounts payable to trust beneficiary.¹⁸
- (15) Bonds for personal representatives.¹⁹
- (16) Wills and intestate succession.²⁰
- (17) Recording affidavit of death.²¹
- (18) Uniform Transfers to Minors Act.²²
- (19) Dismissal for lack of prosecution.²³
- (20) Severance of joint tenancy.²⁴
- (21) Effect of quiet title and partition judgments.²⁵
- (22) Dormant mineral rights.²⁶
- (23) Creditors' remedies.²⁷
- (24) Rights among cotenants in and out of possession of real property.²⁸
- (25) Statutes of limitation for felonies.²⁹

Other recommendations will be submitted if work on them is completed in time to permit their submission to the 1984 session of the Legislature.

¹⁶ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

¹⁷ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

¹⁸ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

¹⁹ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

²⁰ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

²¹ See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984).

²² This recommendation will be separately published.

²³ See *Revised Recommendation Relating to Dismissal for Lack of Prosecution* (June 1983), published as Appendix XII to this Report.

²⁴ See *Recommendation Relating to Severance of Joint Tenancy* (November 1983), published as Appendix XIII to this Report.

²⁵ See *Recommendation Relating to Effect of Quiet Title and Partition Judgments* (September 1983), published as Appendix XIV to this Report.

²⁶ See *Recommendation Relating to Dormant Mineral Rights* (September 1983), published as Appendix XV to this Report.

²⁷ See *Recommendation Relating to Creditors' Remedies* (November 1983), published as Appendix XVI to this Report.

²⁸ See *Recommendation Relating to Rights Among Cotenants In Possession and Out of Possession of Real Property* (September 1983), published as Appendix XVII to this Report.

²⁹ This recommendation will be separately published.

MAJOR STUDIES IN PROGRESS

Probate Code

The 1980 session of the Legislature directed the Commission to make a study of the Probate Code. A number of recommendations arising out of this study were submitted to the 1983 Legislature. See the discussion under "Legislative History of Recommendations Submitted to 1983 Legislative Session" *infra*.

The Commission proposes for enactment in 1984 recommendations relating to additional aspects of probate law and related areas—such as independent administration of estates, distribution of estates without administration, execution of witnessed wills, simultaneous deaths, filing notice of will, garnishment of amounts payable from trusts, bonds for personal representatives, recording affidavit of death, Uniform Transfers to Minors Act, and wills and intestate succession. See *Recommendations Relating to Probate Law*, 17 Cal. L. Revision Comm'n Reports 401 (1984). The Commission will also submit a recommendation proposing the enactment of statutory forms for powers of attorney. See *Recommendation Relating to Statutory Forms for Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984).

The Commission has retained the following expert consultants to assist the Commission in its study of probate law: Professor Paul E. Basye, Hastings College of the Law, Professor Gail B. Bird, Hastings College of the Law, Professor James L. Blawie, University of Santa Clara Law School, Professor Jesse Dukeminier, U.C.L.A. Law School, Professor Susan F. French, U.C. Davis School of Law, Professor Edward C. Halbach, Jr., U.C. Berkeley Law School, and Professor Russell D. Niles, Hastings College of the Law. The Commission is working in close cooperation with the Estate Planning, Trust and Probate Law Section of the State Bar, and the Probate and Trust Law Section of the Los Angeles County Bar Association.

Family Law

A major topic that has been under active study by the Commission is the law relating to community property. Several recommendations arising out of this study were submitted to the 1983 Legislature. See the discussion under "Legislative History of Recommendations Submitted to 1983 Legislative Session" *infra*. In 1983, the Legislature expanded the scope of this topic to include all aspects of family law.

A recommendation was submitted to the 1983 Legislature relating to the liability of various kinds of community property and separate property to third-party creditors for debts and tort obligations of either or both spouses. See Assembly Bill No. 1460; *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984). Final action on this bill will be taken by the Legislature in 1984.

The Commission plans to submit for enactment at the 1984 session recommendations relating to other aspects of family law—such as marital property presumptions and transmutations, disposition of community property, reimbursement of educational expenses, special appearance in family law proceedings, awarding temporary use of the family home, and liability of stepparent for child support. Recommendations on these aspects of family law may be found in the Commission's *Recommendations Relating to Family Law*, 17 Cal. L. Revision Comm'n Reports 201 (1984).

The Commission is working closely with the Property Division Committee of the State Bar Family Law Section. Professor William A. Reppy, Jr., Duke Law School, is the Commission's principal consultant on this topic. Professor Bruce Wolk, U.C. Davis Law School, serves as a special consultant on the tax aspects of the family law study.

Statutes of Limitation for Felonies

The Commission was directed by the 1981 Legislature to study whether the law relating to statutes of limitation for felonies should be revised. The Commission retained Professor Gerald F. Uelmen, Loyola Law School, Los Angeles, as a consultant on this topic. Professor Uelmen prepared a background study for the Commission. See Uelmen, *Making Sense Out of the California Criminal Statute of Limitations*, 15 Pac. L.J. 35 (1983). The Commission plans to submit a recommendation on this topic to the 1984 Legislature.

CALENDAR OF TOPICS FOR STUDY

Topics Authorized for Study

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

¹ Section 10335 of the Government Code provides that the Commission shall study, in addition to those topics which it recommends and which are approved by the Legislature, any topics which the Legislature by concurrent resolution refers to it for study.

Topics Under Active Consideration

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

Creditors' remedies. Whether the law relating to 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.²

The Commission plans to submit a recommendation on this topic to the 1984 legislative session. See *Recommendation Relating to Creditors' Remedies* (November 1983), published as Appendix XVI to this Report.

Probate Code. Whether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code.³

The Commission plans to submit a number of recommendations on this topic to the 1984 legislative session. For additional information on this topic, see discussion under "Major Studies in Progress" *supra*.

Real and personal property. Whether the law relating to real and personal property (including, but not limited to, a Marketable Title Act, covenants, servitudes, conditions, and restrictions on land use or relating to land, possibilities of reverter, powers of termination, Section 1464 of the Civil Code, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon termination or abandonment of a lease, powers of appointment, and related matters) should be revised.⁴

The Commission plans to submit several recommendations on this topic to the 1984 legislative session. See *Recommendation*

² Authorized by 1983 Cal. Stats. res. ch. 40. See also 1974 Cal. Stats. res. ch. 45; 1972 Cal. Stats. res. ch. 27; 1957 Cal. Stats. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 15 (1957).

³ Authorized by 1980 Cal. Stats. res. ch. 37.

⁴ Authorized by 1983 Cal. Stats. res. ch. 40. In 1983, the Legislature consolidated previously authorized aspects of real and personal property law into one topic.

Relating to Effect of Quiet Title and Partition Judgments (September 1983), published as Appendix XIV to this Report; *Recommendation Relating to Dormant Mineral Rights* (September 1983), published as Appendix XV to this Report; *Recommendation Relating to Rights Among Cotenants In Possession and Out of Possession of Real Property* (September 1983), published as Appendix XVII to this Report; *Recommendation Relating to Severance of Joint Tenancy* (November 1983), published as Appendix XIII to this Report.

Professor James L. Blawie, University of Santa Clara Law School, has prepared an analysis of the areas and problems that might be covered by this study. Professors Paul E. Basye, Hastings College of the Law, Jesse Dukeminier, U.C.L.A. Law School, Susan F. French, U.C. Davis Law School, and Professor Russell D. Niles, Hastings College of the Law, also serve as expert consultants.

Family law. Whether the law relating to family law (including, but not limited to, community property) should be revised.⁵

The Commission plans to submit a number of recommendations on this topic to the 1984 legislative session. For additional information on this topic, see "Major Studies in Progress" *supra*.

Involuntary dismissal for lack of prosecution. Whether the law relating to involuntary dismissal for lack of prosecution should be revised.⁶

The Commission plans to submit a recommendation on this subject to the 1984 legislative session. See *Revised Recommendation Relating to Dismissal for Lack of Prosecution* (June 1983), published as Appendix XII to this Report.

Statutes of limitation for felonies. Whether the law relating to statutes of limitations applicable to felonies should be revised.⁷

The Commission plans to submit a recommendation on this topic to the 1984 legislative session.

For additional information on this topic, see "Major Studies in Progress" *supra*.

⁵ Authorized by 1983 Cal. Stats. res. ch. 40. See also 1978 Cal. Stats. res. ch. 65; 16 Cal. L. Revision Comm'n Reports 2019 (1982); 14 Cal. L. Revision Comm'n Reports 22 (1978).

⁶ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 23 (1978).

⁷ Authorized by 1981 Cal. Stats. ch. 909, § 3.

Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.⁸

The Commission plans to submit a recommendation on this topic to the 1984 legislative session. See *Recommendation Relating to Statutory Forms For Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984).

Other Topics Authorized for Study

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

Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised.⁹

Class actions. Whether the law relating to class actions should be revised.¹⁰

Offers of compromise. Whether the law relating to offers of compromise should be revised.¹¹

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.¹²

Procedure for removal of invalid liens. Whether a summary procedure should be provided by which property owners can remove doubtful or invalid liens from their property, including a provision for payment of attorneys fees to the prevailing party.¹³

Special assessment liens for public improvements. Whether acts governing special assessments for public improvements should be simplified and unified.¹⁴

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.

⁸ Authorized by 1979 Cal. Stats. res. ch. 19. See also 14 Cal. L. Revision Comm'n Reports 217 (1978).

⁹ Authorized by 1971 Cal. Stats. res. ch. 75.

¹⁰ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 524 (1974).

¹¹ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 525 (1974).

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

¹³ Authorized by 1980 Cal. Stats. res. ch. 37.

¹⁴ Authorized by 1980 Cal. Stats. res. ch. 37.

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.

Child custody, adoption, guardianship, 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.¹⁵

Evidence. Whether the Evidence Code should be revised.¹⁶

Arbitration. Whether the law relating to arbitration should be revised.¹⁷

Modification of contracts. Whether the law relating to modification of contracts should be revised.¹⁸

Governmental liability. Whether the law relating to sovereign or governmental immunity in California should be revised.¹⁹

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.²⁰

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised.²¹

Parol evidence rule. Whether the parol evidence rule should be revised.²²

Pleadings in civil actions. Whether the law relating to pleadings in civil actions and proceedings should be revised.²³

¹⁵ Authorized by 1972 Cal. Stats. res. ch. 27. See also 10 Cal. L. Revision Comm'n Reports 1122 (1971); 1956 Cal. Stats. res. ch. 42; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 29 (1957).

¹⁶ Authorized by 1965 Cal. Stats. res. ch. 130.

¹⁷ Authorized by 1968 Cal. Stats. res. ch. 110. See also 8 Cal. L. Revision Comm'n Reports 1325 (1967).

¹⁸ Authorized by 1974 Cal. Stats. res. ch. 45. See also 1957 Cal. Stats. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, "1957 Report" at 21 (1957).

¹⁹ Authorized by 1977 Cal. Stats. res. ch. 17. See also 1957 Cal. Stats. res. ch. 202.

²⁰ Authorized by 1971 Cal. Stats. res. ch. 74. See also 1970 Cal. Stats. res. ch. 46; 1965 Cal. Stats. res. ch. 130.

²¹ Authorized by 1973 Cal. Stats. res. ch. 39. See also 1969 Cal. Stats. res. ch. 224.

²² Authorized by 1971 Cal. Stats. res. ch. 75. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).

²³ Authorized by 1980 Cal. Stats. res. ch. 37.

Topics for Future Consideration

The Commission now has a number of major studies on its calendar. The topics authorized for study were expanded by the 1983 Legislature to cover all aspects of family law and to cover the broad topic of real and personal property. Because of the substantial and numerous topics already on its calendar, the Commission does not at this time recommend any additional topics for inclusion on its calendar of topics.

FUNCTION AND PROCEDURE OF COMMISSION

The principal duties of the Law Revision Commission¹ 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,² bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.

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

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.⁴

The Commission's work on a recommendation is commenced after a background study has been prepared. In some cases, the study is prepared by a member of the Commission's staff, but some 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

¹ Gov't Code §§ 10300-10340 (statute establishing Law Revision Commission).

² The Commission's Executive Secretary serves as an Associate Member of the National Conference of Commissioners on Uniform State Laws.

³ See Gov't 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. Gov't Code § 10331.

⁴ See Gov't Code § 10335. In addition, Code of Civil Procedure Section 703.120 requires the Commission to review statutes providing for exemptions from enforcement of money judgments each 10 years and to recommend any needed revisions. The Commission is also directed by statute to study the topic of the statutes of limitations for felonies. 1981 Cal. Stats. ch. 909, § 3.

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. Expert consultants are also retained to advise the Commission at meetings.

The background study is given careful consideration by the Commission and, after making its preliminary decisions on the subject, the Commission ordinarily distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what recommendation, if any, the Commission 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 pamphlet.⁵ In some cases, the background study is published in the pamphlet containing the recommendation.⁶

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 reports⁷ to reflect amendments⁸ 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

⁵ 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.

⁶ Background studies may be published in law reviews. For background studies published in law reviews in 1983, see Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927 (1983); Uelmen, *Making Sense Out of the California Criminal Statute of Limitations*, 15 Pac. L.J. 35 (1983). For a list of background studies published in law reviews prior to 1983, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971), 11 Cal. L. Revision Comm'n Reports 1008 n.5 & 1108 n.5 (1973), 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976), and 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982).

⁷ 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 an example of such a report, see Appendix III to this Report.

⁸ 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.

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.⁹ 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 anticipate judicial conclusions as to the significance of existing case authorities.¹⁰ 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.¹¹

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.¹² 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.¹³ The annual reports and the recommendations and studies of the Commission are republished in a set of hardcover 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. These volumes are available at most county law libraries and at some other libraries. Some hardcover volumes are out-of-print, but others are available for purchase.¹⁴

⁹ *E.g.*, *Van Arsdale v. Hollinger*, 68 Cal.2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968). See also *Milligan v. City of Laguna Beach*, 34 Cal.3d 829, ___ Cal. Rptr. ___, ___ P.2d ___ (1983) (legislative committee comment). The Comments are published by both the Bancroft-Whitney Company and the West Publishing Company in their editions of the annotated codes.

¹⁰ See, *e.g.*, *Arellano v. Moreno*, 33 Cal. App.3d 877, 109 Cal. Rptr. 421 (1973).

¹¹ The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (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 1974 Cal. Stats. ch. 227.

¹² See Gov't Code § 10333.

¹³ For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouilly, *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).

¹⁴ See "Publications of the California Law Revision Commission" *infra*.

PERSONNEL OF COMMISSION

As of November 28, 1983, the membership of the Law Revision Commission was:

	<i>Term Expires</i>
David Rosenberg, Davis, <i>Chairperson</i>	October 1, 1985
Debra S. Frank, Los Angeles, <i>Vice Chairperson</i>	October 1, 1983
Barry Keene, Petaluma, <i>Senate Member</i>	*
Alister McAlister, Fremont, <i>Assembly Member</i>	*
Robert J. Berton, San Diego, <i>Member</i>	October 1, 1983
Roslyn P. Chasan, Palos Verdes Estates, <i>Member</i>	October 1, 1983
James H. Davis, Los Angeles, <i>Member</i>	October 1, 1985
John B. Emerson, Los Angeles, <i>Member</i>	October 1, 1985
Beatrice P. Lawson, Los Angeles, <i>Member</i>	October 1, 1983
Bion M. Gregory, Sacramento, <i>ex officio Member</i>	†

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

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

In March 1983, Senator Barry Keene was appointed by the Senate Rules Committee to serve as the Senate Member of the Law Revision Commission.

In November 1983, Debra S. Frank was elected Chairperson and David Rosenberg was elected Vice Chairperson of the Commission. Their one-year terms commence December 31, 1983.

As of November 28, 1983, the staff of the Commission was:

Legal

John H. DeMouly
Executive Secretary

Robert J. Murphy III
Staff Counsel

Nathaniel Sterling
Assistant Executive Secretary

Stan G. Ulrich
Staff Counsel

Administrative-Secretarial

Juan C. Rogers
Administrative Assistant

Eugenia Ayala
Word Processing Technician

Victoria V. Matias
Word Processing Technician

During 1983, the following Stanford Law School and University of Santa Clara Law School students were employed as part-time, intermittent legal assistants: Susan M. Ahlrichs, Adele P. Athenour, Robert G.P. Cruz, Steven L. Levine, Diane S. Makar, and Robert A. Shives, Jr.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1983 LEGISLATIVE SESSION

The Commission recommended 14 bills and one concurrent resolution for enactment at the 1983 session. The concurrent resolution was adopted and 12 of the bills were enacted.

Estate Planning and Probate

Seven bills relating to estate planning, probate, and related matters were recommended by the Commission for enactment at the 1983 session.

Durable power of attorney for health care decisions. Senate Bill 762, which became Chapter 1204 of the Statutes of 1983, was introduced by Senator Barry Keene to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984). See also *Report of Assembly Committee on Judiciary on Senate Bill 762*, Assembly J. (September 15, 1983) at 9579, reprinted as Appendix X to this Report. The bill was enacted after numerous substantive, technical, and clarifying amendments were made.

Wills and intestate succession. Assembly Bills 25 and 68 were introduced by Assemblyman Alister McAlister to effectuate the Commission's recommendation on this subject. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

Assembly Bill 68 was amended into Assembly Bill 25, and Assembly Bill 25 then was enacted as Chapter 842 of the Statutes of 1983. A number of substantive, technical, and clarifying amendments were made before Assembly Bill 25 was enacted. The Senate Judiciary Committee adopted a special report revising the official comments to Assembly Bill 25. See *Report of Senate Committee on Judiciary on Assembly Bills 25 and 68*, Senate J. (July 14, 1983) at 4867, reprinted as Appendix VIII to this Report. See also *Revised Comments for Sections of Former Divisions 1, 2, and 2b of the Probate Code Superseded by Assembly Bill 25*, published as Appendix IX to this Report.

Missing persons. Assembly Bill 24, which became Chapter 201 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982). See also *Report*

of Senate Committee on Judiciary on Assembly Bill 24, Senate J. (May 26, 1983) at 3027, reprinted as Appendix III to this Report. The bill was enacted after a number of amendments were made.

Limited conservatorship proceedings. Assembly Bill 27, which became Chapter 72 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Notice in Limited Conservatorship Proceedings*, 16 Cal. L. Revision Comm'n Reports 199 (1982). The bill was enacted as introduced.

Disclaimers. Assembly Bill 28, which became Chapter 17 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 207 (1982). The bill was enacted after technical amendments were made.

Emancipated minors. Assembly Bill 29, which became Chapter 6 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Emancipated Minors*, 16 Cal. L. Revision Comm'n Reports 183 (1982). The bill was enacted as introduced.

Nonprobate transfers. Assembly Bill 53, which became Chapter 92 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation relating to this subject. See *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bill 53*, Senate J. (June 6, 1983) at 3245, reprinted as Appendix VI to this Report. The bill was enacted after it was amended so that it applied only to credit unions and industrial loan companies.

Family Law

Three bills relating to family law were recommended by the Commission for enactment at the 1983 session.

Division of marital property. Assembly Bill 26, which became Chapter 342 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property*

at *Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982). After its introduction, numerous substantive amendments were made to this bill based on the Commission's continuing study of its initial recommendations. The Commission's revised recommendations accompanying this bill are outlined in *Report of Senate Committee on Judiciary on Assembly Bill 26*, Senate J. (July 14, 1983) at 4865, reprinted as Appendix VII to this Report.

Liability of marital property for debts. Assembly Bill 1460 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984). The Legislature has not taken final action on this bill as it was still pending in the Assembly Committee on Judiciary at the close of the 1983 session. Final legislative action will be taken in 1984.

Support after death of support obligor. Assembly Bill 835 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation relating to this subject. See *Recommendation Relating to Effect of Death of Support Obligor* (May 1983), published as Appendix XI to this Report. The bill passed the Assembly but was defeated when it failed to receive enough favorable votes by the Senate Committee on Judiciary.

Claims Against Public Entities

Assembly Bill 30, which became Chapter 107 of the Statutes of 1983, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation relating to this subject. See *Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity*, 16 Cal. L. Revision Comm'n Reports 2251 (1982). The bill was enacted after technical amendments were made.

Creditors' Remedies

Assembly Bill 99, which became Chapter 155 of the Statutes of 1983, was introduced by Assemblyman McAlister to make substantive, technical, and clarifying revisions to legislation relating to enforcement of judgments and prejudgment attachment enacted upon Commission recommendation at the 1982 session. See *Recommendation Relating to Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bill 99*, Senate J. (May 26, 1983) at 3029, reprinted as Appendix IV to

this Report; letters clarifying intent of Assembly Bill 99, Senate J. (June 20, 1983) at 3802, and Assembly J. (June 22, 1983) at 6077, both reprinted as Appendix V to this Report. The bill was enacted after a number of substantive, technical, and clarifying amendments were made.

Vacation of Public Streets

Assembly Bill 69, which became Chapter 52 of the Statutes of 1983, was introduced by Assemblyman McAlister at the request of the Commission to:

(1) Amend Streets and Highways Code Section 8313 to provide that submission of a report of a proposed vacation of a street, highway, or public service easement comply with applicable law governing a general or master plan.

(2) Amend Streets and Highways Code Section 8333 to authorize the legislative body of a local agency to summarily vacate a public service easement if it has been superseded by relocation and there is no other public facility located within the easement.

Bonds and Undertakings

Assembly Bill 31, which became Chapter 18 of the Statutes of 1983, was introduced to make technical amendments and restore provisions chaptered out of legislation enacted upon Commission recommendation at the 1982 session relating to bonds and undertakings. See *Recommendation Relating to Conforming Changes to the Bond and Undertaking Law*, 16 Cal. L. Revision Comm'n Reports 2239 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bill 31*, Senate J. (April 7, 1983) at 1126, reprinted as Appendix II to this Report. The bill was enacted after technical amendments were made.

Resolution Approving Topics for Study

Assembly Concurrent Resolution 2, introduced by Assemblyman McAlister and adopted as Resolution Chapter 40 of the Statutes of 1983, continues the Commission's authority to study topics previously authorized and gives the Commission authority to study family law and the law relating to real and personal property. This new authorization expands former authority to study specific aspects of the new topics.

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 prepared¹ and has the following to report:

(1) One decision of the United States Supreme Court holding a statute of this state unconstitutional has been found.

In *Kolender v. Lawson*, 103 S.Ct. 1855 (1983), the court held the vagrancy statute (Penal Code Section 647(e)) unconstitutional on its face under the Due Process clause of the Fourteenth Amendment of the United States Constitution for failure to clarify the requirement that a suspect provide "credible and reliable identification."

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

(3) Four decisions of the California Supreme Court held statutes of this state unconstitutional.

In *People v. Roder*, 33 Cal.3d 491 (1983), the court held that Penal Code Section 496 prescribed a mandatory presumption of guilty knowledge on the part of dealers in second-hand goods, and was thus unconstitutional by virtue of relieving the prosecution of its burden of proving every element of the offense beyond a reasonable doubt. However, the court held that the presumption of Section 496 should not be struck down in its entirety; in order to preserve its constitutionality, the presumption should be construed as a legislatively prescribed permissive inference, on which a jury should be instructed in an appropriate case.

In *American Bank & Trust Co. v. Community Hospital*, 33 Cal.3d 674 (1983), the court held unconstitutional the provision of the Medical Injury Compensation Reform Act (Code of Civil Procedure Section 667.7) that permits a judgment for periodic payment of future damages to be awarded against a provider of health care services on the grounds that it violates state and

¹ This study has been carried through 34 Cal.3d 529 (Advance Sheet No. 25, September 20, 1983) and 103 S. Ct. 3574 (Advance Sheet No. 18A, August 1, 1983)

federal equal protection guarantees, insofar as the provision applies to judgments against hospitals.

In *In re Reed*, 33 Cal.3d 914 (1983), the court held Penal Code Section 290 unconstitutional as cruel or unusual punishment under Section 17 of Article 1 of the California Constitution insofar as the statute requires registration of persons convicted of soliciting "lewd or dissolute conduct" under Penal Code Section 647 (a).

In *People v. Dillon*, 34 Cal.3d 441 (1983), the court held that the punishment of the defendant by a sentence to life imprisonment as a first degree murderer by operation of the felony murder rule (Penal Code Section 189) under the circumstances of the case was a violation of Section 17 of Article 1 of the California Constitution prohibiting cruel or unusual punishment.

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 Authorized for Study" *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 unconstitutional.

APPENDIX I

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. 1955 Cal. Stats. 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. 1955 Cal. Stats. 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. 1957 Cal. Stats. 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. 1957 Cal. Stats. 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. 1957 Cal. Stats. ch. 540
6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see Code Civ. Proc. § 612.4, 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. 1957 Cal. Stats. 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.

Recommendation	Action by Legislature
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. 1959 Cal. Stats. 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. 1957 Cal. Stats. 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. 1957 Cal. Stats. ch. 249
13. <i>Choice of Law Governing Survival of Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957)	No legislation recommended.
14. <i>Effective Date of Order Ruling on a Motion for New Trial</i> , 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959)	Enacted. 1959 Cal. Stats. ch. 468
15. <i>Retention of Venue for Convenience of Witnesses</i> , 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957)	Not enacted.
16. <i>Bringing New Parties Into Civil Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957)	Enacted. 1957 Cal. Stats. ch. 1498
17. <i>Grand Juries</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959)	Enacted. 1959 Cal. Stats. ch. 501
18. <i>Procedure for Appointing Guardians</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959)	Enacted. 1959 Cal. Stats. ch. 500
19. <i>Appointment of Administrator in Quiet Title Action</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959)	No legislation recommended.
20. <i>Presentation of Claims Against Public Entities</i> , 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959)	Enacted. 1959 Cal. Stats. chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., ART. XI, § 10 (1960)

Recommendation	Action by Legislature
21. <i>Right of Nonresident Aliens to Inherit</i> , 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959); 11 CAL. L. REVISION COMM'N REPORTS 421 (1973)	Enacted. 1974 Cal. Stats. ch. 425
22. <i>Mortgages to Secure Future Advances</i> , 2 CAL. L. REVISION COMM'N REPORTS at C-1 (1959)	Enacted. 1959 Cal. Stats. ch. 528
23. <i>Doctrine of Worthier Title</i> , 2 CAL. L. REVISION COMM'N REPORTS at D-1 (1959)	Enacted. 1959 Cal. Stats. ch. 122
24. <i>Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving</i> , 2 CAL. L. REVISION COMM'N REPORTS at E-1 (1959)	Not enacted. But see 1972 Cal. Stats. ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. <i>Time Within Which Motion for New Trial May Be Made</i> , 2 CAL. L. REVISION COMM'N REPORTS at F-1 (1959)	Enacted. 1959 Cal. Stats. ch. 469
26. <i>Notice to Shareholders of Sale of Corporate Assets</i> , 2 CAL. L. REVISION COMM'N REPORTS at G-1 (1959)	Not enacted. But see CORP. CODE §§ 1001, 1002, enacting substance of recommendation.
27. <i>Evidence in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961)	Not enacted. But see EVID. CODE § 810 <i>et seq.</i> enacting substance of recommendation.
28. <i>Taking Possession and Passage of Title in Eminent Domain Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961)	Enacted. 1961 Cal. Stats. chs. 1612, 1613
29. <i>Reimbursement for Moving Expenses When Property Is Acquired for Public Use</i> , 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961)	Not enacted. But see GOVT. CODE § 7260 <i>et seq.</i> enacting substance of recommendation.
30. <i>Rescission of Contracts</i> , 3 CAL. L. REVISION COMM'N REPORTS at D-1 (1961)	Enacted. 1961 Cal. Stats. ch. 589
31. <i>Right to Counsel and Separation of Delinquent From Nondelinquent Minor In Juvenile Court Proceedings</i> , 3 CAL. L. REVISION COMM'N REPORTS at E-1 (1961)	Enacted. 1961 Cal. Stats. ch. 1616

Recommendation	Action by Legislature
32. <i>Survival of Actions</i> , 3 CAL. L. REVISION COMM'N REPORTS at F-1 (1961)	Enacted. 1961 Cal. Stats. ch. 657
33. <i>Arbitration</i> , 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961)	Enacted. 1961 Cal. Stats. ch. 461
34. <i>Presentation of Claims Against Public Officers and Employees</i> , 3 CAL. L. REVISION COMM'N REPORTS at H-1 (1961)	Not enacted 1961. See recommendation to 1963 session (item 39 <i>infra</i>) which was enacted.
35. <i>Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere</i> , 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961)	Enacted. 1961 Cal. Stats. ch. 636
36. <i>Notice of Alibi in Criminal Actions</i> , 3 CAL. L. REVISION COMM'N REPORTS at J-1 (1961)	Not enacted.
37. <i>Discovery in Eminent Domain Proceedings</i> , 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967)	Enacted. 1967 Cal. Stats. ch. 1104
38. <i>Tort Liability of Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 801 (1963)	Enacted. 1963 Cal. Stats., ch. 1681
39. <i>Claims, Actions and Judgments Against Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1001 (1963)	Enacted. 1963 Cal. Stats. ch. 1715
40. <i>Insurance Coverage for Public Entities and Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1201 (1963)	Enacted. 1963 Cal. Stats. ch. 1682
41. <i>Defense of Public Employees</i> , 4 CAL. L. REVISION COMM'N REPORTS 1301 (1963)	Enacted. 1963 Cal. Stats. ch. 1683
42. <i>Liability of Public Entities for Ownership and Operation of Motor Vehicles</i> , 4 CAL. L. REVISION COMM'N REPORTS 1401 (1963); 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. 1965 Cal. Stats. ch. 1527

Recommendation	Action by Legislature
43. <i>Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer</i> , 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963)	Enacted. 1963 Cal. Stats. ch. 1684
44. <i>Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes</i> , 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963)	Enacted. 1963 Cal. Stats. chs. 1685, 1686, 2029
45. <i>Evidence Code</i> , 7 CAL. L. REVISION COMM'N REPORTS 1 (1965)	Enacted. 1965 Cal. Stats. ch. 299
46. <i>Claims and Actions Against Public Entities and Public Employees</i> , 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. 1965 Cal. Stats. ch. 653
47. <i>Evidence Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 101 (1967)	Enacted in part. 1967 Cal. Stats. ch. 650. Balance enacted. 1970 Cal. Stats. ch. 69.
48. <i>Evidence—Agricultural Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 201 (1967)	Enacted. 1967 Cal. Stats. ch. 262
49. <i>Evidence—Commercial Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 301 (1967)	Enacted. 1967 Cal. Stats. ch. 703
50. <i>Whether Damage for Personal Injury to a Married Person Should be Separate or Community Property</i> , 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967)	Enacted. 1968 Cal. Stats. chs. 457, 458
51. <i>Vehicle Code Section 17150 and Related Sections</i> , 8 CAL. L. REVISION COMM'N REPORTS 501 (1967)	Enacted. 1967 Cal. Stats. ch. 702
52. <i>Additur</i> , 8 CAL. L. REVISION COMM'N REPORTS 601 (1967)	Enacted. 1967 Cal. Stats. ch. 72
53. <i>Abandonment or Termination of a Lease</i> , 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. 1970 Cal. Stats. ch. 89

Recommendation	Action by Legislature
54. <i>Good Faith Improver of Land Owned by Another</i> , 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1373 (1967)	Enacted. 1968 Cal. Stats. ch. 150
55. <i>Suit By or Against an Unincorporated Association</i> , 8 CAL. L. REVISION COMM'N REPORTS 901 (1967)	Enacted. 1967 Cal. Stats. ch. 1324
56. <i>Escheat</i> , 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967)	Enacted. 1968 Cal. Stats. chs. 247, 356
57. <i>Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding</i> , 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967)	Enacted. 1968 Cal. Stats. ch. 133
58. <i>Service of Process on Unincorporated Associations</i> , 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967)	Enacted. 1968 Cal. Stats. ch. 132
59. <i>Sovereign Immunity—Statute of Limitations</i> , 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); 9 CAL. L. REVISION COMM'N REPORTS 175 (1969)	Enacted. 1970 Cal. Stats. ch. 104
60. <i>Additur and Remittitur</i> , 9 CAL. L. REVISION COMM'N REPORTS 63 (1969)	Enacted. 1969 Cal. Stats. ch. 115
61. <i>Fictitious Business Names</i> , 9 CAL. L. REVISION COMM'N REPORTS 71 (1969)	Enacted. 1969 Cal. Stats. ch. 114
62. <i>Quasi-Community Property</i> , 9 CAL. L. REVISION COMM'N REPORTS 113 (1969)	Enacted. 1970 Cal. Stats. ch. 312
63. <i>Arbitration of Just Compensation</i> , 9 CAL. L. REVISION COMM'N REPORTS 123 (1969)	Enacted. 1970 Cal. Stats. ch. 417
64. <i>Revisions of Evidence Code</i> , 9 CAL. L. REVISION COMM'N REPORTS 137 (1969)	Enacted in part. 1970 Cal. Stats. ch. 69. See also 1970 Cal. Stats. chs. 1396, 1397
65. <i>Mutuality of Remedies in Suits for Specific Performance</i> , 9 CAL. L. REVISION COMM'N REPORTS 201 (1969)	Enacted. 1969 Cal. Stats. ch. 156

Recommendation	Action by Legislature
66. <i>Powers of Appointment</i> , 9 CAL. L. REVISION COMM'N REPORTS 301 (1969)	Enacted. 1969 Cal. Stats. chs. 113, 155
67. <i>Evidence Code—Revisions of Privileges Article</i> , 9 CAL. L. REVISION COMM'N REPORTS 501 (1969)	Vetoed. But see 1970 Cal. Stats. chs. 1396, 1397
68. <i>Fictitious Business Names</i> , 9 CAL. L. REVISION COMM'N REPORTS 601 (1969)	Enacted. 1970 Cal. Stats. ch. 618
69. <i>Representation as to the Credit of Third Persons and the Statute of Frauds</i> , 9 CAL. L. REVISION COMM'N REPORTS 701 (1969)	Enacted. 1970 Cal. Stats. ch. 720
70. <i>Revisions of Governmental Liability Act</i> , 9 CAL. L. REVISION COMM'N REPORTS 801 (1969)	Enacted in part. 1970 Cal. Stats. chs. 662, 1099
71. <i>“Vesting” of Interests Under Rule Against Perpetuities</i> , 9 CAL. L. REVISION COMM'N REPORTS 901 (1969)	Enacted. 1970 Cal. Stats. ch. 45
72. <i>Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions</i> , 10 CAL. L. REVISION COMM'N REPORTS 501 (1971)	Enacted. 1971 Cal. Stats. chs. 244, 950. See also 1973 Cal. Stats. ch. 828
73. <i>Wage Garnishment and Related Matters</i> , 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); 13 CAL. L. REVISION COMM'N REPORTS 1703 (1976); 14 CAL. L. REVISION COMM'N REPORTS 261 (1978)	Enacted in part. 1978 Cal. Stats. ch. 1133. See also 1979 Cal. Stats. ch. 66
74. <i>Proof of Foreign Official Records</i> , 10 CAL. L. REVISION COMM'N REPORTS 1022 (1971)	Enacted. 1970 Cal. Stats. ch. 41
75. <i>Inverse Condemnation—Insurance Coverage</i> , 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971)	Enacted. 1971 Cal. Stats. ch. 140

Recommendation	Action by Legislature
76. <i>Discharge From Employment Because of Wage Garnishment</i> , 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971)	Enacted. 1971 Cal. Stats. ch. 1607
77. <i>Civil Arrest</i> , 11 CAL. L. REVISION COMM'N REPORTS 1 (1973)	Enacted. 1973 Cal. Stats. ch. 20
78. <i>Claim and Delivery Statute</i> , 11 CAL. L. REVISION COMM'N REPORTS 301 (1973)	Enacted. 1973 Cal. Stats. ch. 526
79. <i>Unclaimed Property</i> , 11 CAL. L. REVISION COMM'N REPORTS 401 (1973); 12 CAL. L. REVISION COMM'N REPORTS 609 (1974)	Proposed resolution enacted. 1973 Cal. Stats. res. ch. 76. Legislation enacted. 1975 Cal. Stats. ch. 25.
80. <i>Enforcement of Sister State Money Judgments</i> , 11 CAL. L. REVISION COMM'N REPORTS 451 (1973)	Enacted. 1974 Cal. Stats. ch. 211
81. <i>Prejudgment Attachment</i> , 11 CAL. L. REVISION COMM'N REPORTS 701 (1973)	Enacted. 1974 Cal. Stats. ch. 1516. See also 1975 Cal. Stats. ch. 200.
82. <i>Landlord-Tenant Relations</i> , 11 CAL. L. REVISION COMM'N REPORTS 951 (1973)	Enacted. 1974 Cal. Stats. chs. 331, 332
83. <i>Pleading</i> (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973)	Enacted. 1972 Cal. Stats. ch. 73
84. <i>Evidence—Judicial Notice</i> (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1025 (1973)	Enacted. 1972 Cal. Stats. ch. 764
85. <i>Evidence—"Criminal Conduct" Exception</i> , 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973)	Not enacted 1974. See recommendation to 1975 session (item 90 <i>infra</i>) which was enacted.
86. <i>Erroneously Compelled Disclosure of Privileged Information</i> , 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973)	Enacted. 1974 Cal. Stats. ch. 227
87. <i>Liquidated Damages</i> , 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973); 13 CAL. L. REVISION COMM'N REPORTS 2139 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1735 (1976)	Enacted. 1977 Cal. Stats. ch. 198

Recommendation	Action by Legislature
88. <i>Payment of Judgments Against Local Public Entities</i> , 12 CAL. L. REVISION COMM'N REPORTS 575 (1974)	Enacted. 1975 Cal. Stats. ch. 285
89. <i>View by Trier of Fact in a Civil Case</i> , 12 CAL. L. REVISION COMM'N REPORTS 587 (1974)	Enacted. 1975 Cal. Stats. ch. 301
90. <i>Good Cause Exception to the Physician-Patient Privilege</i> , 12 CAL. L. REVISION COMM'N REPORTS 601 (1974)	Enacted. 1975 Cal. Stats. ch. 318
91. <i>Improvement Acts</i> , 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974)	Enacted. 1974 Cal. Stats. ch. 426
92. <i>The Eminent Domain Law</i> , 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974)	Enacted. 1975 Cal. Stats. chs. 1239, 1240, 1275
93. <i>Eminent Domain—Conforming Changes in Special District Statutes</i> , 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974)	Enacted. 1975 Cal. Stats. chs. 581, 582, 584, 585, 586, 587, 1176, 1276
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. 1975 Cal. Stats. ch. 7; 1976 Cal. Stats. ch. 109
95. <i>Partition of Real and Personal Property</i> , 13 CAL. L. REVISION COMM'N REPORTS 401 (1976)	Enacted. 1976 Cal. Stats. ch. 73
96. <i>Revision of the Attachment Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 801 (1976)	Enacted. 1976 Cal. Stats. ch. 437
97. <i>Undertakings for Costs</i> , 13 CAL. L. REVISION COMM'N REPORTS 901 (1976)	Not enacted 1976. But see recommendation to 1979 session (item 118 <i>infra</i>) which was 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. 1976 Cal. Stats. ch. 145

Recommendation	Action by Legislature
100. <i>Relocation Assistance by Private Condemnors</i> , 13 CAL. L. REVISION COMM'N REPORTS 2085 (1976)	Enacted. 1976 Cal. Stats. 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). 1976 Cal. Stats. ch. 994
102. <i>Transfer of Out-of-State Trusts to California</i> , 13 CAL. L. REVISION COMM'N REPORTS 2101 (1976)	Enacted. 1976 Cal. Stats. ch. 144
103. <i>Admissibility of Duplicates in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2115 (1976)	Not enacted. But see 1977 Cal. Stats. ch. 708, enacting substance of recommendation in modified form.
104. <i>Service of Process on Unincorporated Associations</i> , 13 CAL. L. REVISION COMM'N REPORTS 1657 (1976)	Enacted. 1976 Cal. Stats. ch. 888
105. <i>Sister State Money Judgments</i> , 13 CAL. L. REVISION COMM'N REPORTS 1669 (1976)	Enacted. 1977 Cal. Stats. ch. 232
106. <i>Damages in Action for Breach of Lease</i> , 13 CAL. L. REVISION COMM'N REPORTS 1679 (1976)	Enacted. 1977 Cal. Stats. ch. 49
107. <i>Nonprofit Corporation Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 2201 (1976)	Not enacted. Legislation on this subject, not recommended by the Commission, was enacted in 1978.
108. <i>Use of Keepers Pursuant to Writs of Execution</i> , 14 CAL. L. REVISION COMM'N REPORTS 49 (1978)	Enacted. 1977 Cal. Stats. ch. 155
109. <i>Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors</i> , 14 CAL. L. REVISION COMM'N REPORTS 61 (1978)	Enacted. 1977 Cal. Stats. ch. 499
110. <i>Review of Resolution of Necessity by Writ of Mandate</i> , 14 CAL. L. REVISION COMM'N REPORTS 83 (1978)	Enacted. 1978 Cal. Stats. ch. 286
111. <i>Use of Court Commissioners Under the Attachment Law</i> , 14 CAL. L. REVISION COMM'N REPORTS 93 (1978)	Enacted. 1978 Cal. Stats. ch. 151

Recommendation	Action by Legislature
112. <i>Evidence of Market Value of Property</i> , 14 CAL. L. REVISION COMM'N REPORTS 105 (1978)	Enacted in part. 1978 Cal. Stats. ch. 294. Substance of remainder enacted in 1980. See item 127 <i>infra</i> .
113. <i>Psychotherapist-Patient Privilege</i> , 14 CAL. L. REVISION COMM'N REPORTS 127 (1978); 15 CAL. L. REVISION COMM'N REPORTS 1307 (1980)	Vetoed 1978.
114. <i>Parole Evidence Rule</i> , 14 CAL. L. REVISION COMM'N REPORTS 143 (1978)	Enacted. 1978 Cal. Stats. ch. 150
115. <i>Attachment Law—Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action,"</i> 14 CAL. L. REVISION COMM'N REPORTS 241 (1978)	Enacted. 1978 Cal. Stats. ch. 273
116. <i>Powers of Appointment</i> (technical changes), 14 CAL. L. REVISION COMM'N REPORTS 257 (1978)	Enacted. 1978 Cal. Stats. ch. 266
117. <i>Ad Valorem Property Taxes in Eminent Domain Proceedings</i> , 14 CAL. L. REVISION COMM'N REPORTS 291 (1978)	Enacted. 1979 Cal. Stats. ch. 31
118. <i>Security for Costs</i> , 14 CAL. L. REVISION COMM'N REPORTS 319 (1978)	Enacted. 1980 Cal. Stats. ch. 114
119. <i>Guardianship-Conservatorship Law</i> , 14 CAL. L. REVISION COMM'N REPORTS 501 (1978); 15 CAL. L. REVISION COMM'N REPORTS 451 (1980)	Enacted. 1979 Cal. Stats. chs. 165, 726, 730
120. <i>Effect of New Bankruptcy Law on The Attachment Law</i> , 15 CAL. L. REVISION COMM'N REPORTS 1043 (1980)	Enacted. 1979 Cal. Stats. ch. 77
121. <i>Confessions of Judgment</i> , 15 CAL. L. REVISION COMM'N REPORTS 1053 (1980)	Enacted. 1979 Cal. Stats. ch. 568
122. <i>Special Assessment Liens on Property Taken for Public Use</i> , 15 CAL. L. REVISION COMM'N REPORTS 1101 (1980)	Enacted. 1980 Cal. Stats. ch. 122

Recommendation	Action by Legislature
123. <i>Assignments for the Benefit of Creditors</i> , 15 CAL. L. REVISION COMM'N REPORTS 1117 (1980)	Enacted. 1980 Cal. Stats. ch. 135
124. <i>Vacation of Public Streets, Highways, and Service Easements</i> , 15 CAL. L. REVISION COMM'N REPORTS 1137 (1980)	Enacted. 1980 Cal. Stats. ch. 1050
125. <i>Quiet Title Actions</i> , 15 CAL. L. REVISION COMM'N REPORTS 1187 (1980)	Enacted. 1980 Cal. Stats. ch. 44
126. <i>Agreements for Entry of Paternity and Support Judgments</i> , 15 CAL. L. REVISION COMM'N REPORTS 1237 (1980)	Enacted. 1980 Cal. Stats. ch. 682
127. <i>Application of Evidence Code Property Valuation Rules in Noncondemnation Cases</i> , 15 CAL. L. REVISION COMM'N REPORTS 301 (1980)	Enacted. 1980 Cal. Stats. ch. 381
128. <i>Probate Homestead</i> , 15 CAL. L. REVISION COMM'N REPORTS 401 (1980)	Enacted. 1980 Cal. Stats. ch. 119
129. <i>Enforcement of Claims and Judgments Against Public Entities</i> , 15 CAL. L. REVISION COMM'N REPORTS 1257 (1980)	Enacted. 1980 Cal. Stats. ch. 215
130. <i>Uniform Veterans Guardianship Act</i> , 15 CAL. L. REVISION COMM'N REPORTS 1289 (1980)	Enacted. 1980 Cal. Stats. ch. 89
131. <i>Enforcement of Obligations After Death</i> , 15 CAL. L. REVISION COMM'N REPORTS 1327 (1980)	Enacted. 1980 Cal. Stats. ch. 124
132. <i>Interest Rate on Judgments</i> , 15 CAL. L. REVISION COMM'N REPORTS 7 (1980)	Enacted. 1982 Cal. Stats. ch. 150
133. <i>Married Women as Sole Traders</i> , 15 CAL. L. REVISION COMM'N REPORTS 21 (1980)	Enacted. 1980 Cal. Stats. ch. 123
134. <i>State Tax Liens</i> , 15 CAL. L. REVISION COMM'N REPORTS 29 (1980)	Enacted. 1980 Cal. Stats. ch. 600

Recommendation	Action by Legislature
135. <i>Guardianship-Conservatorship</i> (technical change), 15 CAL. L. REVISION COMM'N REPORTS 1247 (1980)	Enacted. 1980 Cal. Stats. ch. 246
136. <i>Revision of Guardianship-Conservatorship Law</i> , 15 CAL. L. REVISION COMM'N REPORTS 1463 (1980)	Enacted. 1981 Cal. Stats. ch. 9
137. <i>Enforcement of Judgments Law</i> , 15 CAL. L. REVISION COMM'N REPORTS 2001 (1980)	Enacted. 1982 Cal. Stats. chs. 497, 1364
138. <i>Uniform Durable Power of Attorney Act</i> , 15 CAL. L. REVISION COMM'N REPORTS 351 (1980)	Enacted. 1981 Cal. Stats. ch. 511
139. <i>Non-Probate Transfers</i> , 15 CAL. L. REVISION COMM'N REPORTS 1605 (1980); 16 CAL. L. REVISION COMM'N REPORTS 129 (1982)	Enacted in part (pay-on-death accounts) 1982 Cal. Stats. ch. 269; (credit unions and industrial loan companies) 1983 Cal. Stats. ch. 92.
140. <i>Revision of the Powers of Appointment Statute</i> , 15 CAL. L. REVISION COMM'N REPORTS 1667 (1980)	Enacted. 1981 Cal. Stats. ch. 63
141. <i>State Tax Liens</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 24 (1982)	Enacted. 1981 Cal. Stats. ch. 217
142. <i>Assessment Liens on Property Taken for Public Use</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 25 (1982)	Enacted. 1981 Cal. Stats. ch. 139
143. <i>Federal Pensions as Community Property</i> , 16 CAL. L. REVISION COMM'N REPORTS 47 (1982)	Proposed resolution adopted. 1982 Cal. Stats. res. ch. 44
144. <i>Holographic and Nuncupative Wills</i> , 16 CAL. L. REVISION COMM'N REPORTS 301 (1982)	Enacted. 1982 Cal. Stats. ch. 187
145. <i>Marketable Title of Real Property</i> , 16 CAL. L. REVISION COMM'N REPORTS 401 (1982)	Enacted. 1982 Cal. Stats. ch. 1268
146. <i>Statutory Bonds and Undertakings</i> , 16 CAL. L. REVISION COMM'N REPORTS 501 (1982)	Enacted. 1982 Cal. Stats. chs. 517, 998
147. <i>Attachment</i> , 16 CAL. L. REVISION COMM'N REPORTS 701 (1982)	Enacted. 1982 Cal. Stats. ch. 1198

Recommendation	Action by Legislature
148. <i>Escheat</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 124 (1982)	Enacted. 1982 Cal. Stats. ch. 182
149. <i>Missing Persons</i> , 16 CAL. L. REVISION COMM'N REPORTS 105 (1982)	Enacted. 1983 Cal. Stats. ch. 201
150. <i>Emancipated Minors</i> , 16 CAL. L. REVISION COMM'N REPORTS 183 (1982)	Enacted. 1983 Cal. Stats. ch. 6
151. <i>Notice in Limited Conservatorship Proceedings</i> , 16 CAL. L. REVISION COMM'N REPORTS 199 (1982)	Enacted. 1983 Cal. Stats. ch. 72
152. <i>Disclaimer of Testamentary and Other Interests</i> , 16 CAL. L. REVISION COMM'N REPORTS 207 (1982)	Enacted. 1983 Cal. Stats. ch. 17
153. <i>Wills and Intestate Succession</i> , 16 CAL. L. REVISION COMM'N REPORTS 2301 (1982)	Enacted. 1983 Cal. Stats. ch. 842
154. <i>Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage</i> , 16 CAL. L. REVISION COMM'N REPORTS 2165 (1982)	Enacted. 1983 Cal. Stats. ch. 342
155. <i>Creditors' Remedies</i> , 16 CAL. L. REVISION COMM'N REPORTS 2175 (1982)	Enacted. 1983 Cal. Stats. ch. 155
156. <i>Conforming Changes to the Bond and Undertaking Law</i> , 16 CAL. L. REVISION COMM'N REPORTS 2239 (1982)	Enacted. 1983 Cal. Stats. ch. 18
157. <i>Notice of Rejection of Late Claim Against Public Entity</i> , 16 CAL. L. REVISION COMM'N REPORTS 2251 (1982)	Enacted. 1983 Cal. Stats. ch. 107
158. <i>Liability of Marital Property for Debts</i> , 17 CAL. L. REVISION COMM'N REPORTS 1 (1984)	Assembly Bill 1460 introduced at the 1983 legislative session to effectuate this recommendation. The bill will be acted upon by the Legislature in 1984.
159. <i>Durable Power of Attorney for Health Care Decisions</i> , 16 CAL. L. REVISION COMM'N REPORTS 101 (1984)	Enacted. 1983 Cal. Stats. ch. 1204

- | Recommendation | Action by Legislature |
|--|----------------------------------|
| 160. <i>Effect of Death of Support Obligor</i> (June 1983), published as Appendix XI to this Report. | Not enacted. |
| 161. <i>Vacation of Streets</i> (technical change), see "Legislative History of Recommendations Submitted to 1983 Legislative Session" in this Report. | Enacted. 1983 Cal. Stats. ch. 52 |

APPENDIX II
REPORT OF
SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 31

[Extract from Senate Journal for April 7, 1983 (1982-83 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 31, the Senate Committee on Judiciary makes this report.

Assembly Bill 31 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Conforming Changes to the Bond and Undertaking Law, 16 Cal. L. Revision Comm'n Reports 2239 (1982). Along with the new comments set out below, the Law Revision comments to the various sections of Assembly Bill 31 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 31. The new comments set out below also reflect the intent of the committee in approving this bill.

Business and Professions Code § 7071.15 (added)

Comment. Section 7071.15 is added for cross-referencing purposes only.

Code of Civil Procedure § 995.020 (amended)

Comment. Subdivision (b) (2) of Section 995.020 is amended for cross-referencing purposes only.

Code of Civil Procedure § 995.710 (amended). Deposit in lieu of bond

Comment. Subdivision (b) of Section 995.710 is amended to make clear the discretion of the board, commission, department, or other public official or entity to whom a license or permit bond is given pursuant to statute or administrative regulation, to set a fixed amount for a deposit of state and federal bearer bonds or bearer notes based on face value instead of market value. For example, the officer may require a deposit of bearer bonds or bearer notes in a face value of 120 percent of the amount of the bond. This authority is intended to give the officer flexibility to avoid the need for valuation proceedings and for continuous monitoring of the value of the bearer bonds or bearer notes for the duration of the deposit. This provision codifies and generalizes practice developed based on former Business and Professions Code Section 10238 (deposit of bonds in principal amount of \$6,000 in lieu of \$5,000 bond).

Subdivision (d) generalizes a provision formerly found in Business and Professions Code Section 7071.12 (authority of the Contractors State License Board).

Vehicle Code § 16434 (amended)

Comment. Section 16434 is amended to delete the unnecessary court approval procedure. A bond given under Section 16434 is subject to disapproval by the Department of Motor Vehicles pursuant to Code of Civil Procedure Section 996.020.

APPENDIX III

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 24

[Extract from Senate Journal for May 26, 1983 (1982-83 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 24, the Senate Committee on Judiciary makes the following report.

Assembly Bill 24 was introduced to effectuate the California Law Revision Commission's *Recommendation Relating to Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982). Except for the revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bill 24 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 24.

Probate Code §§ 260-295.4 (repealed). Administration of estates of missing persons

Comment. Chapter 1 (commencing with Section 260) of Division 2a, relating to a trustee for the estate of a person missing over 90 days, is superseded by the provisions of guardianship-conservatorship law that provide for the appointment of a conservator of the estate to administer the estate of a missing person. See Sections 1461.7, 1804, 1845-1849.5.

Chapter 2 (commencing with Section 280), relating to the administration of the estate of a person missing over seven years, is superseded by Chapter 24 (commencing with Section 1350) of Division 3.

Chapter 3 (commencing with Section 295), relating to the administration of estates of missing federal employees or members of the armed forces, is superseded by provisions of Division 4 that provide for the management and disposition of the missing person's property without a court proceeding. See Sections 3700 and 3710-3720.

Probate Code § 1350 (added). Missing person defined

Comment. Section 1350, which permits use of the phrase "missing person" for convenient reference, continues the terminology of former Section 280.

Probate Code § 1351 (added). Presumption of death for purposes of administration

Comment. The first sentence of Section 1351 supersedes a portion of former Section 280 (person deemed missing person if absent for seven years). The second sentence is new. Section 1351 is the same in substance as Uniform Probate Code Section 1-107(3). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

Probate Code § 1352 (added). Manner of administration and distribution of missing person's estate

Comment. Section 1352 continues the substance of a portion of former Section 280 and a portion of former Section 285 and supersedes former Sections 285, 286, and 294. See also Section 1358 (recovery of property by missing person upon reappearance).

The provision of Section 1352 that no preliminary or final distribution may be made until the lapse of one year after the appointment and qualification of the executor or administrator does not preclude payment of a family allowance.

Probate Code § 1353 (added). Jurisdiction of court

Comment. Section 1353 continues a portion of former Section 281.

Probate Code § 1354 (added). Petition for administration or probate

Comment. Section 1354 supersedes a portion of former Section 282. Pursuant to subdivision (c) and Section 1352, the general requirements for a petition for probate (see Section 326) or a petition for letters of administration (see Section 440) are applicable.

Probate Code § 1355 (added). Time for hearing; notice of hearing

Comment. Subdivision (a) of Section 1355 continues a portion of former Section 282. The remainder of Section 1355 supersedes former Section 283. See also Section 5 (certified mail equivalent of registered mail).

Probate Code § 1356 (added). Determination whether person is person presumed to be dead; search for missing person

Comment. Subdivision (a) of Section 1356 is drawn from the last sentence of former Section 284. Subdivisions (b) and (c) are drawn from subdivision (b) of Section 3-403 of the Uniform Probate Code.

Probate Code § 1357 (added). Appointment of executor or administrator and determination of date of disappearance

Comment. Subdivision (a) of Section 1357 continues the substance of a portion of former Section 284. See also Sections 1301 (death presumed at end of five-year period unless sufficient evidence of earlier death), 1302 (manner of administration and distribution). Subdivision (b) continues the substance of former Section 294.

Probate Code § 1358 (added). Recovery of property by missing person upon reappearance

Comment. Section 1358 supersedes former Sections 287-290 and a portion of former Section 292. Subdivisions (a) and (b) are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code. The Uniform Probate Code provision has been revised to add a provision barring an action under paragraph (a) (2) five years after the time the petition is filed under Section 1354. This additional provision continues the general effect of the portions of former Sections 287-292 that gave a distribution conclusive effect after the

missing person had been missing 10 years. Subdivision (c) is consistent with Section 1021 (effect of a decree of final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey a good title to property of the missing person prior to the time an action by the missing person against the distributee would be barred under subdivision (a) (2). This is because subdivision (c) provides a rule that the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a) (2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a) (2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a) (2), the reappearing missing person might recover from the distributee the property subject to the encumbrance. Subdivision (d) is drawn from a portion of former Section 287.

Probate Code § 1359 (added). Application of chapter

Comment. Section 1359 is drawn in part from former Section 293.

APPENDIX IV

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 99

[Extract from Senate Journal for May 26, 1983 (1982-83 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 99, the Senate Committee on Judiciary makes the following report:

Assembly Bill 99 was introduced to effectuate the California Law Revision Commission's *Recommendation Relating to Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bill 99 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 99.

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Code of Civil Procedure § 488.455 (amended). Attachment of deposit account

Comment. The second sentence is added to subdivision (a) of Section 488.455 to make clear that the attachment lien reaches only amounts in the deposit account at the time of levy. This continues the practice under former law. Consequently, any amounts deposited in the account after levy are not subject to the attachment lien. The lien does reach amounts in the account that are in the process of being collected unless the item being collected is returned unpaid to the financial institution. Subdivision (f) is added to make clear that no bond is required to levy on an account described in the subdivision.

Code of Civil Procedure § 488.465 (amended). Deposit accounts and safe deposit boxes not exclusively in name of defendant

Comment. Subdivision (b) of Section 488.465 is amended to delete the portion that required the undertaking to be executed by a corporate surety. This deletion permits the undertaking to be executed by two or more sufficient personal sureties as well as a corporate surety. See Section 995.310. Prior to the enactment of Section 488.465, the undertaking in case of attachment of deposit accounts and safe deposit boxes not exclusively in the name of the defendant could be executed by two or more individual sureties as well as by a corporate surety. See former Sections 489.040 and 489.240. Thus, the deletion in subdivision (b) restores prior law. Subdivision (f) is deleted. The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

Code of Civil Procedure § 488.620 (added). No liability for including information in garnishee's memorandum

Comment. Section 488.620 is added to make clear that a garnishee is not liable for disclosing information in the garnishee's

memorandum even though the information may relate to a person other than the defendant. See also Sections 488.455(d)(1) and 488.460(e)(1) (no liability for performance of duties of garnishee under the attachment in case of levy on deposit account or safe deposit box). For a comparable provision relating to execution, see Section 701.035.

Code of Civil Procedure § 697.640 (technical amendment). Recording of documents extinguishing judgment lien on personal property

Comment. Section 697.640 is amended to make clear that the person making the filing must include information showing the file number of the notice of judgment lien. Nothing in this section authorizes the filing of an acknowledgment of partial satisfaction of judgment or an acknowledgment of satisfaction of matured installments under installment judgment; only an acknowledgment of full satisfaction (Section 724.060) or a clerk's certificate of satisfaction of judgment may be filed under this section.

Code of Civil Procedure § 697.650 (technical amendment). Release or subordination of judgment lien on personal property

Comment. Section 697.650 is amended to make clear that a statement of subordination must include a description of the security interest or other lien or encumbrance to which the judgment lien is being subordinated and state the name of the secured party or other lienholder.

18313

Code of Civil Procedure § 700.140 (amended). Levy on deposit account

Comment. The second sentence is added to subdivision (a) of Section 700.140 to make clear that the execution lien reaches only amounts in the deposit account at the time of levy. This continues the practice under former law. Consequently, any amounts deposited in the account after levy are not subject to the attachment lien. The lien does reach amounts in the account that are in the process of being collected unless the item being collected is returned unpaid to the financial institution. Subdivision (c) is amended to supply a cross-reference to new Sections 700.165 and 700.167. Subdivision (f) is added to make clear that no bond is required to levy on an account described in subdivision (f).

Code of Civil Procedure § 700.160 (amended). Deposit accounts and safe deposit boxes not exclusively in name of judgment debtor

Comment. Subdivision (b) of Section 700.160 is amended to delete the portion that required the undertaking to be executed by a corporate surety. This deletion permits the undertaking to be executed by two or more sufficient personal sureties as well as a corporate surety. See Section 995.310. Prior to the enactment of Section 700.160, the undertaking in case of a levy of execution on deposit accounts and safe deposit boxes not exclusively in the name of the judgment debtor could be executed by two or more individual

sureties as well as by a corporate surety. See former Section 682a. Thus, the deletion in subdivision (b) restores prior law.

Subdivision (f) is deleted. The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

A new subdivision (g) is added to clarify the relation of this section to the special provisions of Sections 700.165 and 700.167 applicable to certain joint accounts.

15780

Code of Civil Procedure § 700.165 (added). Deposit account in name of judgment debtor and spouse

Comment. Section 700.165 is a new provision permitting the judgment creditor to cause a levy on a deposit account standing only in the names of both the judgment debtor and the judgment debtor's spouse without the need to provide a bond as is normally required where an account not standing only in the name of the judgment debtor is levied upon. See Section 700.160(g).

Code of Civil Procedure § 700.167 (added). Deposit account under fictitious business name

Comment. Section 700.167 is a new provision permitting the judgment creditor to cause a levy on a deposit account without providing a bond under Section 700.160 where the deposit account stands in a fictitious business name and the fictitious business name statement lists only the judgment debtor or only the judgment debtor and his or her spouse. See Section 700.160(g).

Code of Civil Procedure § 701.035 (added). No liability for including information in garnishee's memorandum

Comment. Section 701.035 is added to make clear that a garnishee is not liable for disclosing information in the garnishee's memorandum even though the information may relate to a person other than the judgment debtor. See also Sections 700.140(d) (1) and 700.150(e) (1) (no liability for performance of duties of garnishee in case of levy on deposit account or safe deposit box).

15781

Code of Civil Procedure § 703.110 (amended). Application of exemptions to marital property

Comment. Section 703.110 is amended to add the third sentence to subdivision (a). This new sentence makes clear how the exemption scheme works with respect to married persons. Some exemption provisions specifically provide for a separate exemption for each spouse or provide for an exemption in a greater amount for a married couple. See, e.g., Sections 704.030 (materials for repair or improvement of dwelling), 704.060 (personal property used in trade, business, or profession), 704.080 (deposit account in which social security payments are directly deposited), 704.090 (inmate's trust fund), 704.100 (life insurance, endowment, annuity policies). See also Section 704.730(b) (maximum combined homestead exemptions of married couple). Other exemption provisions provide a maximum

dollar amount for an exemption applicable to the spouses as a marital unit. For example, under subdivision (a), the maximum exemption for motor vehicles allowed the marital unit under Section 704.010 is an aggregate equity of \$1,200, whether one or both spouses are judgment debtors and whether the vehicle or vehicles are community or separate property. The exemption is not doubled where each spouse owns an interest in the motor vehicle. Likewise, the maximum exemption allowed under Section 704.040 for jewelry, heirlooms, and works of art is \$2,500 for the marital unit.

Former subdivision (b) of Section 703.110 is deleted and its substance is continued in new Section 703.115. See the Comment to Section 703.115.

Code of Civil Procedure § 703.115 (added). Determining exemption based on need

Comment. Section 703.115 continues the substance of former subdivision (b) of Section 703.110 but, unlike Section 703.110, Section 703.115 is applicable whether or not the judgment debtor is married. Section 703.115 also recognizes that an exemption based upon the needs of the judgment debtor and the spouse and dependents of the judgment debtor or upon the needs of the judgment debtor and the family of the judgment debtor is applicable even though the judgment debtor does not have a spouse or dependents or a family. Thus, in determining whether to allow the exemption and the extent to which it is to be allowed, the court takes into account the needs and property of the judgment debtor if the judgment debtor has no spouse or dependents or family and, in other cases, the needs of the judgment debtor and the spouse (if any), dependents (if any), or family (if any).

Code of Civil Procedure § 704.120 (amended). Unemployment benefits and contributions; strike benefits

Comment. Subdivisions (e) and (f) have been added to Section 704.120 to preserve the substance of Chapter 1072 of the Statutes of 1982 and subdivision (d) (2) of Section 704.120 has been revised to conform to Section 11350.5 added to the Welfare and Institutions Code by that chapter.

15799

Code of Civil Procedure § 704.710 (amended). Definitions

Comment. Sections 704.710 and 704.930 are amended to delete "actually" which appeared before "resides" or "resided" in various provisions of the sections. The word "actually" is deleted to avoid a possible construction that a person temporarily absent (such as a person on vacation or in the hospital) could not claim a dwelling exemption for his or her principal dwelling, or file a homestead declaration on his or her principal dwelling, merely because the person is temporarily absent, even though the dwelling is the person's principal dwelling and residence.

Code of Civil Procedure § 704.930 (amended). Homestead declaration

Comment. See the Comment to Section 704.710.

Code of Civil Procedure § 708.140 (amended). Powers and qualifications of referee

Comment. The second sentence is added to subdivision (b) to make clear that the requirements of this section do not apply to certain referees already in office on the operative date of this title.

Code of Civil Procedure § 724.060 (technical amendment). Contents of acknowledgment of satisfaction of judgment

Comment. Subdivision (a)(7) is amended to delete the reference to a "termination statement" since no provision is made in the law for filing a "termination statement" in order to terminate a judgment lien on personal property.

Code of Civil Procedure § 1801 (technical amendment). Exempt property where assignment for benefit of creditors

Comment. Section 1801 is amended to add references to Section 1255.7 of the Unemployment Insurance Code to preserve the substance of amendments made to its predecessor section (former Section 690.60) by Chapter 1072 of the Statutes of 1982.

APPENDIX V

LETTERS CLARIFYING LEGISLATIVE INTENT OF ASSEMBLY BILL 99

[Extract from Senate Journal for June 20, 1983 (1982-83 Regular Session)]

Assembly, California Legislature
Sacramento, June 20, 1983

The Honorable David Roberti
President pro Tempore

Dear Senator Roberti: This letter is intended to clarify the intent of the Legislature with respect to Assembly Bill 99 and the interpretation to be given any judgment lien which may be created subsequent to a judgment being renewed pursuant to an order made pursuant to the provisions of Section 694.030 of the Code of Civil Procedure. Assembly Bill 99 amends Section 683.180 of the Code of Civil Procedure. This provision of law states that a judgment lien on an interest in real property is extended provided a certified copy of the application for renewal of the judgment is recorded before the expiration of the judgment lien. The official comments to the section state in part: "The judgment lien is extended only if the certified copy of the application for renewal is recorded while the judgment lien is still in effect. If the judgment lien is not so extended, the judgment creditor may record an abstract of the renewed judgment to obtain a new judgment lien dating from the recording of such abstract." Accordingly, if a court makes an order authorizing the renewal of a judgment under subdivision (b) of Section 694.030 of the Code of Civil Procedure after the time for filing an application for renewal under Section 683.130 of the Code of Civil Procedure has expired, any former judgment lien cannot be extended or revived, but the judgment creditor may record an abstract of the renewed judgment to obtain a new judgment lien dating from the recording of the abstract.

Sincerely yours,

ALISTER McALISTER

[Extract from Assembly Journal for June 22, 1983 (1982-83 Regular Session)]

June 22, 1983

The Honorable Willie L. Brown, Jr.
Speaker of the Assembly

Dear Speaker Brown: This letter is intended to clarify the intent of the Legislature with respect to Assembly Bill 99 and the interpretation to be given any judgment lien which may be created subsequent to a judgment being renewed pursuant to an order made pursuant to the provisions of Section 694.030 of the Code of Civil Procedure. Assembly Bill 99 amends Section 683.180 of the Code of

Civil Procedure. This provision of law states that a judgment lien on an interest in real property is extended provided a certified copy of the application for renewal of the judgment is recorded before the expiration of the judgment lien. The official comments to the section state in part: "The judgment lien is extended only if the certified copy of the application for renewal is recorded while the judgment lien is still in effect. If the judgment lien is not so extended, the judgment creditor may record an abstract of the renewed judgment to obtain a new judgment lien dating from the recording of such abstract." Accordingly, if a court makes an order authorizing the renewal of a judgment under subdivision (b) of Section 694.030 of the Code of Civil Procedure after the time for filing an application for renewal under Section 683.130 of the Code of Civil Procedure has expired, any former judgment lien cannot be extended or revived, but the judgment creditor may record an abstract of the renewed judgment to obtain a new judgment lien dating from the recording of the abstract.

Sincerely yours,

ALISTER McALISTER, Assemblyman

APPENDIX VI
REPORT OF
SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 53

[Extract from Senate Journal for June 6, 1983 (1982-83 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 53, the Senate Committee on Judiciary makes the following report.

Assembly Bill 53 was introduced to effectuate the California Law Revision Commission's *Recommendation Relating to Nonprobate Transfers*, 16 Cal. L. Revision Comm'n Reports 129 (1982). Except for the revised comments set out below, the Law Revision Commission comments to Assembly Bill 53 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 53.

Civil Code § 683 (amended). Joint interest defined; creation of joint tenancy in personal property

Comment. Section 683 is amended to add subdivision (b) to make clear that this section does not apply to a joint account in a credit union or an industrial loan company to which the newly enacted provisions of the Probate Code (Sections 5100-5407) apply.

Probate Code § 5101 (added). Definitions

Comment. Section 5101 is the same as Section 6-101 of the Uniform Probate Code with some modifications. These include the following:

(1) In subdivision (c), "financial institution" is limited to credit unions and industrial loan companies. Unlike the Uniform Probate Code definition, it does not include banks or savings and loan associations. This is comparable to the Michigan statute which is limited to credit unions. See Mich. Comp. Laws § 23.510(1). The limitation of this part to credit unions and industrial loan companies is not intended to preclude a court from applying a rule set out in Chapter 3 (commencing with Section 5301) to a multiple-party account in another type of financial institution.

(2) The last sentence is added to subdivision (f) to establish a clear rule concerning the amount of "net contribution" in a case where the actual amount cannot be established.

(3) A reference to a "levying" creditor is substituted in subdivision (g) for the reference in the UPC to an "attaching" creditor; "attaching creditor" might be construed in California to be restricted to one who levies under a writ of attachment (prejudgment) and not to include one who levies under a writ of execution (postjudgment).

(4) The reference to UPC Section 1-107 has been replaced in subdivision (k) by a reference to the statutes of this state that make a death certificate or record or report prima facie evidence of death;

the reference to "an original or attested or certified copy" has been added, consistent with the statutes referred to in subdivision (k).

(5) Subdivision (l) is new and is drawn from a portion of the fourth sentence of Section 852 of the Financial Code.

Probate Code § 5201 (added). Ownership as between parties and others; protection of financial institutions

Comment. Section 5201 is the same in substance as Section 6-102 of the Uniform Probate Code. Nothing in this part affects set-off rights of financial institutions. See generally *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (right of set-off is "based upon general principles of equity").

Probate Code § 5304 (added). Transfers nontestamentary

Comment. Section 5304 is drawn from portions of Financial Code Sections 852.5, 7604.5, 11203.5, 14854.5, and 18318.5 (pay-on-death transfers nontestamentary). The first sentence is the same as the first portion of Section 6-106 of the Uniform Probate Code. The remainder of the Uniform Probate Code section is omitted. The second sentence of Section 5304 is comparable to New Jersey law. See N.J. Stat. Ann. § 17:161-14 (West Supp. 1981). The purpose of Section 5304 is to make clear that the effectiveness of transfers under this part is not to be determined by the requirements for a will.

A transfer under this part is effective by reason of the provisions of this part and the terms of the account or deposit agreement. This transfer avoids the need for a probate proceeding to accomplish a transfer. However, the transfer does not affect rights otherwise provided by law. Also, for example, Section 5304 has no effect on a surviving spouse's right to his or her share of community funds deposited in a multiple-party account under which a third person has a survivorship right upon the death of the other spouse. See the Comment to Section 5302.

Probate Code § 5401 (added). Establishment of and payment from multiple-party accounts; inquiry not required to establish net contributions

Comment. Subdivision (a) of Section 5401 is the same as the first two sentences of Section 6-108 of the Uniform Probate Code with the addition of the clarifying phrase "and according to its terms."

Subdivision (b) is not contained in the Uniform Probate Code. It is drawn from portions of Financial Code Sections 852, 7603, and 11204, and former Section 14854 (second sentence). Subdivision (c) is the same as the last sentence of Section 6-108 of the Uniform Probate Code.

Probate Code § 5405 (added). Payment as discharge

Comment. Section 5405 is drawn in part from Section 6-112 of the Uniform Probate Code. Subdivision (a) is the same in substance as a portion of the Uniform Probate Code section. Subdivision (b) is substituted for the comparable portion of the Uniform Probate Code section, and is drawn from Financial Code Sections 852.5, 7604.5, 11203.5, 14854.5, and 18318.5 relating to service of a court order restraining payment. Subdivision (c) is drawn from portions of

Financial Code Sections 852 and 7603. Subdivision (d) is the same in substance as the comparable portion of the Uniform Probate Code section. Receipt of notice under this section must be at the particular office or branch office where the account is carried. See Section 5101 (l).

Probate Code § 5406 (added). Payment of account held in trust form where financial institution has no notice that account is not a "trust account"

Comment. Section 5406 is drawn from a portion of Financial Code Section 853. Section 5406 permits a financial institution to treat an account in trust form as a trust account (defined in Section 5101) if it is unknown to the financial institution that the funds on deposit are subject to a trust created other than by the deposit of the funds in the account in trust form. If the financial institution does not have the additional information, the financial institution is protected from liability if it pays the account as provided in this chapter. See Section 5405. However, Section 5406 does not affect the rights as between the parties to the account, the beneficiary, or their successors. See Sections 5201, 5301(c), and 5302(c).

Probate Code § 5407 (added). Payment to a minor

Comment. Section 5407 is new; there is no comparable provision in Article VI of the Uniform Probate Code. Subdivision (a) of Section 5407 is consistent with Section 850 of the Financial Code. Subdivision (b) is new.

Duty of financial institutions

Comment. Section 6 is designed to avoid any expense to financial institutions of advising existing depositors concerning the enactment of this act.

Operative date

Comment. Section 7 is drafted on the assumption that this act will become effective on January 1, 1984. The operative date is delayed until July 1, 1984, so that financial institutions will have time to take any necessary action to operate under the provisions of the act and so persons who have accounts in existence on the effective date (January 1, 1984) will have time to make any changes in the deposit agreement that they believe are desirable in view of the enactment of this act.

APPENDIX VII

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 26

[Extract from Senate Journal for July 14, 1983 (1982-83 Regular Session)]

The Senate Committee on Judiciary has received the following report of the California Law Revision Commission concerning Assembly Bill 26. The report is preserved here as evidence of legislative intent.

**California Law Revision Commission
Report Concerning Assembly Bill 26**

A continuing problem in California law is that married persons frequently take title to property in joint tenancy form even though the property is acquired with community funds and even though the married persons are unaware of the different legal consequences of joint tenancy and community property tenure. At dissolution of marriage, for example, the court has no jurisdiction to divide joint tenancy property and therefore may be unable to make the most sensible disposition of all the assets of the parties. For instance, it may be desirable to award temporary occupancy of the family home to the spouse awarded custody of the minor children; this can be done if the property is community but not if it is joint tenancy. Moreover, because the joint tenancy property cannot be divided at dissolution, it will have to be subsequently partitioned in a separate civil action.

The Legislature addressed these problems directly in 1965 by adding to Civil Code Section 5110 a provision that a single-family residence acquired by the spouses during marriage is presumed to be community property for purposes of division at dissolution. The Section 5110 presumption has generally worked well and minimized the problems created by community property in joint tenancy form. However, as construed by the courts, the community property presumption may be rebutted by evidence of oral agreements between the parties and by implications from statements or conduct of the parties, notwithstanding the statute of frauds. Moreover, under the interpretation of *In re Marriage of Lucas*, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), the presumption precludes a spouse who bought the property with separate funds from tracing and recovering the funds at dissolution—a gift is presumed. The *Lucas* holding has been extended by the courts to other types of community property in addition to property taken in joint tenancy form.

Assembly Bill 26 builds on the community property presumption of Section 5110. Under Assembly Bill 26 all property acquired by the spouses during marriage in joint tenancy form is presumed to be community for purposes of dissolution—not just the single-family residence. This is significant because, although the single-family residence is the major asset in many marriages, spouses frequently

hold substantial amounts of their wealth in joint tenancy form, including bank accounts, stocks, and other real property. Assembly Bill 26 makes clear that the community property presumption may not be rebutted by an alleged oral agreement or an implication from a statement or conduct, but only by a written agreement. Finally, Assembly Bill 26 overrules the *Lucas* interpretation of the Section 5110 presumption and other community property presumptions by permitting a party to recover separate property contributions to the acquisition of the property; this is done through a reimbursement right at dissolution of marriage.

Assembly Bill 26 is jointly recommended by the California Law Revision Commission and the State Bar Conference of Delegates. It is a substantially revised version of the commission's *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982). The revisions are designed to avoid tax and theoretical problems raised by practitioners concerning the original recommendation. Revised Comments to the bill are set out below.

Civil Code § 4800.1 (added)

Comment. Section 4800.1 reverses the common law presumption that property acquired by the spouses during marriage in joint tenancy form is joint tenancy property, and instead creates a presumption that the property is community property. This generalizes a provision formerly found in Section 5110 (single-family residence acquired in joint tenancy form presumed to be community property). The community property presumption created by Section 4800.1 is applicable in dissolution and legal separation proceedings only. It governs both real and personal property, whether situated in California or another jurisdiction, and includes property acquired during marriage while domiciled in another jurisdiction. It also governs property initially acquired before marriage, the title to which is taken in joint tenancy form by the spouses during marriage. The measure of the separate property contribution under Section 4800.2, in such a case, is the value of the property at the time of its conversion to joint tenancy form.

Section 4800.1 requires a writing to rebut the community property presumption. This has the effect of limiting existing law which permits transmutations of property by oral agreements and implications from unilateral statements of a party.

Civil Code § 4800.2 (added)

Comment. Section 4800.2 overrules the case of *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980) (and cases following it), which precluded recognition of the separate property contribution of one of the parties to the acquisition of community property, unless the party could show an agreement between the spouses to the effect that the contribution was not intended to be a gift. Under Section 4800.2, a party making a separate property contribution to the acquisition of the property is not presumed to have made a gift, unless it is shown that the parties agreed it was a gift, but is entitled to reimbursement for the separate

property contribution at dissolution of marriage. The separate property contribution is measured by the value of the contribution at the time the contribution is made. Under this rule, if the property has since appreciated in value, the community is entitled to the appreciation. If the property has since depreciated in value, reimbursement may not exceed the value of the property; if both parties are entitled to reimbursement and the property has insufficient value to permit full reimbursement of both, reimbursement should be on a proportionate basis.

Civil Code § 5110 (amended)

Comment. Section 5110 is amended to delete the provision relating to classification for the purpose of dissolution of a joint tenancy single-family residence acquired during marriage. This provision is generalized and clarified by Section 4800.1 (division of joint tenancy property). The reference to former Section 5109 is also corrected.

SEC. 4. (uncodified)

Comment. Section 4 is intended to make Civil Code Sections 4800.1 and 4800.2 applicable retroactively to the extent practical. Under Section 4, the new law applies to proceedings pending on the operative date if the property division has not yet been adjudicated, if the adjudication is still subject to appellate review, or if the trial court has expressly reserved jurisdiction to make the adjudication. *Cf. In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (retroactive application of change in law to proceedings not yet final).

APPENDIX VIII

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS 25 AND 68

[Extract from Senate Journal for July 14, 1983 (1982-83 Regular Session)]

Note. The provisions of Assembly Bill 68 were amended into Assembly Bill 25 after this report was printed.

In order to indicate more fully its intent with respect to Assembly Bills 25 and 68, the Senate Committee on Judiciary makes the following report.

Assembly Bills 25 and 68 were introduced to effectuate the California Law Revision Commission's *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982). Except for the new and revised comments set out below, the Law Revision Commission Comments to Assembly Bills 25 and 68 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bills 25 and 68. The new and revised Comments set out below also reflect the intent of the committee in approving this bill.

Assembly Bill 25

§ 3. Application of certain provisions where decedent died before January 1, 1985

Comment. Section 3 limits the application of certain portions of this code to cases where the decedent died after December 31, 1984. Section 3 supersedes former Section 3. The former section is obsolete.

§ 26. Child

Comment. Section 26 is the same as Section 1-201(3) of the Uniform Probate Code. The definition of "child" in Section 26 applies unless the provision or context otherwise requires. See Section 20. Although under Section 26 a stepchild or foster child is not included within the meaning of "child" only on the basis of that relationship, a stepchild or foster child may be included if the relationship began during the person's minority, continued throughout the parties' joint lifetimes, and it is established by clear and convincing evidence that the stepparent or foster parent would have adopted the person but for a legal barrier. See Section 6408. See also Section 6152 (testamentary disposition).

§ 28. Community property

Comment. Section 28 is new. Subdivision (a) is consistent with Civil Code Sections 687 and 5110.

Under subdivisions (b) and (c), community property acquired while domiciled in another community property jurisdiction is treated as community property in California even though the property might not have been community if acquired while domiciled in California. For example, property is community property under subdivision (b) if it is the income of separate

property and the income of separate property is community property under the laws of the place where the spouse owning the separate property is domiciled at the time the income is earned. Thus, subdivisions (b) and (c) ensure generally comparable treatment of the property in California to that given it in the other community property jurisdiction and fills a gap in the quasi-community property law. See Section 66 ("quasi-community property" defined). Subdivisions (b) and (c) apply whether the property is acquired before or after the operative date of the section. The reference in subdivisions (b) and (c) to substantially equivalent types of marital property is intended to cover possible adoption in other jurisdictions of the Uniform Marital Property Act or other laws establishing a community property regime. See also Sections 58 ("personal property" defined), 68 ("real property" defined).

§ 54. *Parent*

Comment. Section 54 is the same as Section 1-201(28) of the Uniform Probate Code. The definition of "parent" in Section 54 applies unless the provision or context otherwise requires. See Section 20. although under Section 54 a stepparent or foster parent is not included within the meaning of "parent" only on the basis of that relationship, a stepparent or foster parent may be included if the relationship began during the minority of the stepchild or foster child, continued throughout the parties' joint lifetimes, and it is established by clear and convincing evidence that the stepparent or foster parent would have adopted the person but for a legal barrier. See Section 6408. See also Section 6152 (testamentary disposition).

§ 102. *Recapture by surviving spouse of certain quasi-community property*

Comment. Subdivisions (a) and (b) of Section 102 supersede the first sentence of former Section 201.8. Subdivision (c) continues the substance of the last sentence of former Section 201.8. The second sentence of former Section 201.8 which required the surviving spouse to elect to take under or against the decedent's will is not continued. Under the law as revised, the rule for quasi-community property is the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, summary of California Law *Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

Section 102 provides that a transfer may be set aside only if the decedent made it without receiving in exchange a consideration of "substantial" value. Where the consideration is not substantial and the transfer is set aside, no provision is made for return of the insubstantial consideration given by the transferee when property transferred is required to be restored. It is not expected that a transfer will be set aside under the statute if the transferee gave a consideration equal to one-half or more of the value of the property received. Thus, in cases in which the transfer is set aside the one-half which the transferee keeps will be at least equal in value to any consideration given.

The provision of Section 102 that only one-half of the property transferred is to be restored is applied when the decedent dies

intestate as well as when the decedent dies testate. This is because the decedent has manifested an intention to deprive the surviving spouse of the property. The intent of the intestate decedent should be given effect to the extent he or she could have accomplished the same result by will.

Paragraph (3) of subdivision (a) of Section 102 replaces the provision of former Section 201.8 that required as a condition of recapture that the decedent had a "substantial quantum of ownership or control of the property at death." Paragraph (3) is drawn from a portion of Uniform Probate Code Section 2-202 and Idaho Code Section 15-2-202. Paragraph (3) is intended to provide a clearer standard for determining the kinds of retained interests by the decedent that will result in the application of the recapture provisions of this section.

Subdivision (b) is new and is drawn from a portion of Uniform Probate Code Section 2-202.

Section 102 provides that all of the property restored to the estate belongs to the surviving spouse pursuant to Section 101. Such property is, in effect, the one-half which the surviving spouse could have claimed against the decedent's will. The one-half which the transferee is permitted to retain is, in effect, the one-half which the decedent could have given to the transferee by will. The surviving spouse is entitled to all of the first half.

Section 102 provides that the property shall be restored to the decedent's estate rather than that the surviving spouse may recover it directly from the transferee. This is to make the property available to creditors of the decedent to the extent that it would have been available to them if no inter vivos transfer had been made.

Section 102 is limited in application to transfers made at a time when the surviving spouse has an expectancy under Section 101—*i.e.*, at a time when the transferor is domiciled in California. This is to avoid the application of the statute to transfers made before the transferor moved here, when the transferor could not reasonably have anticipated that the transfer would later be subjected to California law.

§ 143. Waiver enforceable as of right

Comment. Section 143 establishes the basic standards of enforceability for a waiver. The court shall enforce the waiver unless the surviving spouse shows that he or she was not provided a fair and reasonable disclosure of property (absent a waiver of such disclosure after advice by independent legal counsel) *or* was not represented by independent legal counsel at the time of execution. By satisfying the conditions of disclosure and independent counsel, the parties can have certainty that their affairs will be governed in an agreed upon manner. If these conditions are not satisfied (for example, counsel may not have been sought at all or the surviving spouse may not have been separately represented), a waiver may still be enforceable under Section 144.

§ 147. Prospective effect of chapter

Comment. Subdivision (a) of Section 147 makes clear that, with respect to the effect of interspousal agreements or waivers on rights

at death, the provisions of this chapter provide the exclusive standards. *Accord*, Civil Code § 5135.5.

Subdivision (b) makes clear that the provisions of this chapter have no effect on waivers, agreements, or property settlements made prior to the operative date of this chapter. See also Section 141 (b) (nothing in chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a) of Section 141).

§ 200. Wills and intestate succession

Comment. This part—Sections 200–206—supersedes former Section 258. This part is the same in substance as Section 2-803 of the Uniform Probate Code except that language is added to Section 200 so that the antilapse statute (Section 6147) will not substitute the killer's issue for the disqualified killer. This part makes three substantive changes in prior law:

(1) Under this part, the killer is disqualified from taking from the victim only if the killing is felonious and intentional. Under former Section 258, the killer was disqualified if the killing was accidental but was one within the felony murder rule.

(2) Under Section 204, the civil standard of proof (preponderance of the evidence) is used in the civil proceeding to disqualify the killer from taking from the victim. Under prior law, the criminal burden of proof (beyond a reasonable doubt) was used in the civil proceeding. *Estate of McGowan*, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39 (1973).

(3) Under Section 204, an acquittal after a criminal trial has no effect in a subsequent civil proceeding. Under former Section 258, an acquittal was given conclusive effect in the later civil proceeding.

Under paragraph (3) of subdivision (a) of Section 200, one who feloniously and intentionally kills a spouse is entitled to no share of the decedent's quasi-community property, since for most purposes the decedent's quasi-community property is treated as the decedent's separate property during the decedent's lifetime. See 7 B. Witkin, *Summary of California Law Community Property* § 125, at 5219 (8th ed. 1974). Under paragraph (2) of subdivision (a), however, the spousal killer is disqualified from taking the decedent's half of the community property by intestate succession, but the killer's one-half ownership interest in the community property (see Civil Code § 5105) is not affected. See also Prob. Code §§ 100, 103.

§ 204. Determination of whether killing was felonious and intentional

Comment. See the Comment to Section 200. The last sentence of Section 204 is new but is consistent with Uniform Probate Code Section 2-803(e).

§ 220. Proof of survival by clear and convincing evidence

Comment. Section 220 supersedes former Section 296 and modifies the prior rule to require proof of survival by clear and convincing evidence. The introductory clause recognizes that Section 220 has limited application. Section 221 provides that this chapter does not apply to cases covered by Sections 103 (community

and quasi-community property), 6146 (wills), or 6403 (survival of heirs). Other provisions of this chapter provide rules that apply to particular cases. See Sections 222 (survival of beneficiaries), 223 (survival of joint tenants), 224 (survival of insurance beneficiaries). The rule provided by Section 220 may be varied by a provision in the governing instrument. See Section 221. See also Sections 230-234 (proceeding to determine whether one person survived another).

§ 221. *Application of chapter*

Comment. Subdivision (a) of Section 221 makes clear that the provisions of this chapter do not apply in cases where Section 103 (effect on community and quasi-community property where married person does not survive death of spouse), 6146 (wills), or 6403 (intestate succession) applies.

Subdivision (b) provides that the distribution provision of a trust, deed, contract of insurance, or other instrument controls if it results in a different distribution of property than that provided for in this chapter. Subdivision (b) continues the substance of former Section 296.6 but omits the reference to "wills" (will now being covered by Section 6146), substitutes "trust" for "living trusts," adds language drawn from Section 2-601 of the Uniform Probate Code, and includes the substance of the 1953 revision of Section 6 of the Uniform Simultaneous Death Act. The 1953 revision, which was not previously adopted in California, inserted the phrase "or any other situation" and added the clause which appears as the last portion of clause (2) of subdivision (b) of Section 221.

§ 240. *Representation*

Comment. Section 240 is the same in substance as Section 2-106 of the Uniform Probate Code, but the section applies the UPC rule also to the construction of wills. Section 240 changes the former California rule under which distribution was per stirpes unless all surviving descendants were of the same degree of kindred to the decedent. See former Sections 221, 222. Under Section 240, the primary division of the estate takes place at the first generation having any living members. This changes the rule of *Maud v. Catherwood*, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

§ 6100. *Who may make a will*

Comment. Section 6100 continues the substance of a portion of the first sentence of former Section 20 and a portion of former Section 21 and is the same in substance as Section 2-501 of the Uniform Probate Code. An emancipated minor is considered as being over the age of majority for the purpose of making or revoking a will. See Civil Code § 63.

§ 6110. *Execution of witnessed will*

Comment. Section 6110 supersedes former Section 50. Section 6110 relaxes the formalities required under former Section 50 by eliminating the requirements (1) that the testator's signature be "at the end" of the will, (2) that the testator "declare" to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be "at the end" of the will, (4) that the testator "request"

the witnesses to sign the will, and (5) that the witnesses sign the will in the testator's presence. Section 6110 continues the requirements of former Section 50 that (1) the will be in writing, (2) that the will be signed by the testator or by someone else who signs the testator's name in the testator's presence and by the testator's direction, (3) that the will be signed or the testator acknowledge the signature in the presence of two witnesses who are present at the same time, and (4) that the witnesses sign the will.

Subdivision (c) requires that the signing or acknowledgment take place in the presence of the witnesses, present at the same time, but does not require that the witnesses sign in the presence of each other. This is consistent with prior law. See, *e.g.*, *In re Estate of Armstrong*, 8 Cal.2d 204, 209-10, 64 P.2d 1093 (1937).

The requirement of subdivision (c) (2) that the witness understand that the instrument being witnessed is a will replaces the former requirement that the testator "declare" to the witnesses that the instrument is his or her will. The new requirement codifies California decisional law which did not apply the former declaration requirement literally and held the requirement satisfied if it is apparent from the testator's conduct and the surrounding circumstances that the instrument is a will. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 118, at 5633-34 (8th ed. 1974). The witness may obtain the necessary understanding by any means. For example, the witness may know that the instrument is a will by examining the instrument itself or from the circumstances surrounding the execution of the will. Nothing in Section 6110 requires that the testator disclose the contents of the will.

The introductory clause of Section 6110 recognizes that the validity of the execution of a will may be determined pursuant to some other provision of this part. See Sections 6111 (holographic will), 6221 (California statutory will), 6381-6385 (international will).

§ 6112. *Who may witness a will*

Comment. Section 6112 supersedes former Sections 51 and 52. Subdivision (a) and the first sentence of subdivision (b) of Section 6112 are the same as Section 2-505 of the Uniform Probate Code. The second and third sentences of subdivision (b) are new and are not found in the Uniform Probate Code.

Section 6112 changes the rule of former Section 51 which disqualified a subscribing witness from taking a share under the will larger than his or her intestate share unless there were two other disinterested subscribing witnesses. Under Section 6112, a witness may take under the will if the witness satisfies the burden of proving that the devise was not procured by duress, menace, fraud, or undue influence. The presumption of duress, menace, fraud, or undue influence established by Section 6112 only applies to the devise to the subscribing witness. If the witness fails to meet the burden of overcoming that presumption and the devise to that witness is not inconsistent with, and can be separated from, the remainder of the will, only the devise to the witness fails and not the entire will. *In re Estate of Carson*, 184 Cal. 437, 441, 194 P. 5 (1920); *Estate of Molera*, 23 Cal. App.3d 993, 1001, 100 Cal. Rptr. 696 (1972); *Estate of Stauffer*,

142 Cal. App.2d 35, 41, 297 P.2d 1029 (1956); *In re Estate of Webster*, 43 Cal. App.2d 6, 15-16, 110 P.2d 81 (1941). Section 6112 is consistent with former Section 52 (testator's creditor may be competent witness). See also Section 372.5 (devisee may contest gift to interested witness without being penalized by no-contest clause).

§ 6140. Intention of testator

Comment. Section 6140 continues the second sentence of former Section 101.

§ 6141. Choice of law as to meaning and effect of will

Comment. Section 6141 supersedes former Section 100 and is consistent with Section 2-602 of the Uniform Probate Code. The reference in Section 2-602 of the Uniform Probate Code to elective share is replaced by a reference to the rights of the surviving spouse in community and quasi-community property. Subdivision (b) is drawn from the reference in Section 2-602 of the Uniform Probate Code to provisions relating to elective share, exempt property, and allowances. See also Section 78 (definition of "surviving spouse").

§ 6142. Will passes all property including after-acquired property

Comment. Section 6142 is the same in substance as Section 2-604 of the Uniform Probate Code and continues the substance of former Sections 120, 121, 125, and 126. The "except" clause of Section 6142 is taken from former Sections 125 and 126 and is consistent with the Uniform Probate Code. See Uniform Probate Code §§ 2-604, 2-610. The provision that Section 6142 applies "absent a contrary intention of the testator" is drawn from former Section 100. *Cf.* Uniform Probate Code § 2-603.

§ 6143. Devisees as owners in common

Comment. Section 6143 continues the substance of former Section 29. Section 6143 applies absent a "contrary intention of the testator," while former Section 29 applied "unless the will otherwise provides." This difference is not substantive: Although it may have been argued that former Section 29 permitted contradiction only by the will itself, many cases have permitted extrinsic evidence of surrounding circumstances to show what was meant by the words of the will. See, e.g., *Estate of Russell*, 69 Cal.2d 200, 214-15, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 159-162, at 5674-79 (8th ed. 1974). As used in Section 6143, "devise" means a disposition of real or personal property by will. Section 32.

§ 6144. Direction in will to convert real property into money

Comment. Section 6144 is the same in substance as former Section 124. The introductory clause of Section 6144 is drawn from former Section 100. Section 6144 is declaratory of the common law doctrine of equitable conversion. See *In re Estate of Gracey*, 200 Cal. 482, 488, 253 P. 921 (1927). See generally 7 B. Witkin, *Summary of California Law Equity* §§ 118-121, at 5337-40 (8th ed. 1974).

§ 6145. Common law rule of worthier title abolished

Comment. Section 6145 continues the substance of former Section 109. Section 6145 omits references to a “bequest” which appeared in former Section 109. As used in Section 6145, “devise” applies to dispositions by will of both real and personal property. See Section 32. See also Section 6151 (devise to heirs or next of kin).

§ 6146. Requirement that devisee survive testator or until a future time

Comment. The first sentence of subdivision (a) of Section 6146 continues the substance of the first portion of former Section 92. The second sentence of subdivision (a) is new and establishes a constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required). See generally 3 B. Witkin, *Summary of California Law Real Property* §§ 246–259, at 1973–83 (8th ed. 1973). The second sentence thus changes the result in cases such as *Miller v. Oliver*, 54 Cal. App. 495, 202 P. 168 (1921) (vested remainder included in remainderman’s estate notwithstanding her death before life tenant), and *Estate of Stanford*, 49 Cal.2d 120, 315 P.2d 681 (1957) (class gift to “child or children” of income beneficiary on termination of trust held vested and remainderman not required to survive income beneficiary), and is consistent with *Estate of Easter*, 24 Cal.2d 191, 148 P.2d 601 (1944).

With respect to a class gift of a future interest, subdivision (a) of Section 6146 must be read together with Sections 6150 and 6151. Section 6146 establishes a constructional preference that in the case of a future interest a person who answers the class description at the testator’s death must survive until the future interest takes effect in enjoyment in order to take. If the devisee fails to survive but is properly related to the testator or the testator’s spouse, the antilapse statute may substitute the devisee’s issue. See Section 6147. Section 6150, on the other hand, deals with the addition of new members to the class after the testator’s death but before the future interest takes effect in enjoyment, and establishes a constructional preference in favor of adding members to the class during that period. Section 6151 is a special application of, and is consistent with, Section 6150. See also Section 6149 (death “with” or “without” issue).

Paragraph (1) of subdivision (b) of Section 6146 supersedes former Sections 296 and 296.6 insofar as those sections applied to wills, and is consistent with Section 220. See the *Comment* to Section 220. Paragraph (2) of subdivision (b) is new and applies a similar rule where the will requires the devisee to survive until some future time. For a provision governing the administration and disposition of community property and quasi-community property where one spouse does not survive the other, see Section 103. See also Sections 230–234 (proceeding to determine whether devisee survived testator).

§ 6147. Antilapse

Comment. Section 6147 supersedes former Section 92. Subdivision (a) expands former law to apply the antilapse statute not

only to kindred of the testator, but also to kindred of a surviving, deceased, or former spouse of the testator. Thus if the testator were to make a devise to a stepchild who predeceased the testator, Section 6147 will make a substitute gift to issue of the predeceased stepchild. The term "kindred" is taken from former Section 92 and refers to persons related by blood. *Cf. In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In general, an adoptee is kindred of the adoptive family and not of the adoptee's natural relatives. See Section 6152. See also *Estate of Goulart*, 222 Cal. App.2d 808, 35 Cal. Rptr. 465 (1963). As to when a devisee is treated as if he or she predeceased the testator, see Section 6146 (simultaneous death). See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by representation).

The first sentence of subdivision (b) is drawn from the first sentence of Uniform Probate Code Section 2-605 and is consistent with former Section 92. The second sentence of subdivision (b) is drawn from the second sentence of Uniform Probate Code Section 2-605 but, unlike the Uniform Probate Code, does not make a substitute gift in the case of a class gift where a person otherwise answering the description of the class was dead when the will was executed and that fact was known to the testator. The second sentence of subdivision (b) is consistent with *Estate of Steidl*, 89 Cal. App.2d 488, 201 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after execution of will).

The first sentence of subdivision (c) continues the substance of a portion of former Section 92. The second sentence of subdivision (c) is new.

§ 6148. *Failure of devise*

Comment. Section 6148 is the same in substance as Section 2-606 of the Uniform Probate Code, except that where a share of a future interest devised to two or more persons fails, the share passes to the other devisees of the future interest under subdivision (b) rather than becoming part of the residue under subdivision (a).

With respect to a residuary devise, subdivision (b) changes the former California case law rule that if the share of one of several residuary devisees fails, the share passed by intestacy. See, e.g., *Estate of Russell*, 69 Cal.2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); *In re Estate of Kelleher*, 205 Cal. 757, 760-61, 272 P. 1060 (1928); *Estate of Anderson*, 166 Cal. App.2d 39, 42, 332 P.2d 785 (1958).

§ 6149. *Meaning of death with or without issue*

Comment. Section 6149 is new and overrules California's much criticized theory of indefinite failure of issue established by *In re Estate of Carothers*, 161 Cal. 588, 119 P. 926 (1911). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 192-193, at 5704-06 (8th ed. 1974). Section 6149 adopts the majority view and the view of the Restatement of Property. See 7 B. Witkin, *supra* § 193, at 5705; Annot., 26 A.L.R.3d 407 (1969); Restatement of Property § 269 (1940). Under section 6149, if the devise is "to A for life, remainder to B and his heirs, but if B dies without issue, then to C," the devise is read as meaning if B dies before A without issue living

at the death of A. If B survives A, whether or not B then has living issue, B takes the devise absolutely. If B predeceases A with issue then living but at the time of A's subsequent death B does not having living issue, the devise goes to C.

§ 6150. *Persons included in class gift; afterborn member of class*

Comment. Subdivisions (a) and (b) of Sections 6150 continue the substance of the first sentence of former Section 123. Subdivision (b) applies to a devise of a future interest and permits enlargement of the class after the testator's death and before the devise takes effect in enjoyment. The question of whether class membership may be diminished by death after the testator's death but before the devise takes effect in enjoyment is dealt with by Section 6146 which establishes a constructional preference for requiring class members to survive until the devise takes effect in enjoyment (subject to possible application of the antilapse statute—Section 6147). See also Section 6151 (devise to testator's or another designated person's "heirs," "next of kin," "relatives," "family," or the like). Section 6151 is a special application of, and is consistent with, Section 6150.

Subdivision (c) continues the substance of the second sentence of former Section 123 but makes clear that the rule is not limited to a child of the testator. Subdivision (c) is comparable to the rule in intestate succession. See Section 6407.

§ 6151. *Class gift to "heirs," "next of kin," "relatives," or the like*

Comment. Section 651 is drawn from Section 2514 of the Pennsylvania Consolidated Statutes, Title 20, and establishes a special rule for a class gift to an indefinite class such as the testator's or another designated person's "heirs," "next of kin," "relatives," "family," or the like. As Section 6151 applies to a devise of a future interest, the section is consistent with Sections 6146 and 6150 in that Section 6151 establishes a constructional preference against early vesting. However, Section 6151 differs from Sections 6146 and 6150 in that one who does not survive until the future interest takes effect in enjoyment is not deemed a member of the indefinite class described in Section 6151 (such as "heirs"), is therefore not a "devisee" under the class gift, and no substitute gift will be made by the antilapse statute (Section 6147). If the devise of a future interest is to a more definite class such as "children," one coming within that description who fails to survive until the devise takes effect in enjoyment does not take under the will (Section 6146) but may nonetheless be a "deceased devisee" under the antilapse statute (Section 6147) permitting substitution of the deceased devisee's issue. See the Comments to Sections 6146 and 6147.

By postponing the determination of class membership until the gift takes effect in enjoyment where the class is indefinite (*e.g.*, to "heirs,"), Section 6151 should reduce the uncertainty of result under prior law. See Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 Calif. L. Rev. 297, 317-20 (1961). Section 6151 is consistent with Estate of Easter, 24 Cal.2d 191, 148 P.2d 601 (1944).

§ 6152. *Halfbloods, adopted persons, and persons born out of wedlock*

Comment. Subdivision (a) of Section 6152 is the same in substance as Section 2-611 of the Uniform Probate Code and supersedes former Section 108. To the extent that California cases have addressed the matter, subdivision (a) is consistent with prior California law. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 197-200, at 5708-12 (8th ed. 1974). For the rules for determining relationship and inheritance rights for purposes of intestate succession, see Sections 6406, 6408, and 6408.5.

Subdivision (b) is new and is included to preclude the adoption of a person (often an adult) solely for the purpose of permitting the adoptee to take under the will of another. Subdivision (b) also construes a devise to exclude a child born out of wedlock (where the testator is not the parent) if the child never lives while a minor as a regular member of the parent's household.

§ 6160. *Every expression given some effect; intestacy avoided*

Comment. Section 6160 continues the substance of former Section 102.

§ 6161. *Construction of will as a whole*

Comment. Section 6161 continues the substance of former Section 103 except for the provision of the former section that the last part must prevail where several parts of a will are absolutely irreconcilable.

§ 6165. *Rules of construction apply in absence of contrary intention*

Comment. Section 6165 is the same in substance as the last clause of former Section 100, except that Section 6165 omits the former requirement that a contrary intention must "clearly" appear.

§ 6170. *No exoneration*

Comment. Section 6170 expands the rule stated in Section 2-609 of the Uniform Probate Code to cover any lien. This expansion makes Section 6170 consistent with Section 736. Section 6170 reverses the prior California case law rule that, in the absence of an expressed intention of the testator to the contrary, if the debt which encumbers the devised property is one for which the testator was personally liable, the devisee was entitled to "exoneration," that is, to receive the property free of the encumbrance by having the debt paid out of other assets of the estate. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 456, at 5895-96. (8th ed. 1974). The rule stated in Section 6170 applies in the absence of a contrary intention of the testator. See Section 6165. See also Sections 32 ("devise" means a disposition of real or personal property by will), 62 ("property" defined).

§ 6171. *Change in form of securities*

Comment. Section 6171 is the same in substance as Section 2-607 of the Uniform Probate Code and is generally consistent with prior California case law. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 220, at 5730-31 (8th ed. 1974). The rules stated in

Section 6171 apply in the absence of a contrary intention of the testator. See Section 6165.

Under Section 6171, if the testator makes a specific devise of only a portion of the stock the testator owns in a particular company and there is a stock split or stock dividend, the specific devisee is entitled only to a proportionate share of the additional stock received. For example, if the testator owns 500 shares of stock in company A, devises 100 shares to his son, and the stock splits two for one, T's son is entitled to 200 shares, not 600.

§ 6172. Unpaid proceeds of sale, condemnation, or insurance; property obtained as a result of foreclosure

Comment. Section 6172 is the same in substance as subdivision (a) of Section 2-608 of the Uniform Probate Code and is generally similar to prior California case law. See, e.g., Estate of Shubin, 252 Cal. App.2d 588, 60 Cal. Rptr. 678 (1967). Cf. Estate of Newsome, 248 Cal. App.2d 712, 56 Cal. Rptr. 874 (1967). See also Sections 32 ("devise" defined), 62 ("property" defined). The rules stated in Section 6172 apply in the absence of a contrary intention of the testator. See Section 6165.

The rules of nonademption in Sections 6172-6177 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See Section 6178.

§ 6173. Sale by conservator; payment of proceeds of specifically devised property to conservator

Comment. Subdivisions (a) and (b) of Section 6173 are the same in substance as the first sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code and are consistent with prior California case law. See Estate of Packham, 232 Cal. App.2d 847, 43 Cal. Rptr. 318 (1965). See also Sections 32 ("devise" defined), 62 ("property" defined). The rules stated in Section 6173 apply in the absence of a contrary intention of the testator. See Section 6165. See also Section 6178.

Subdivision (c) of Section 6173 revises the corresponding Uniform Probate Code language to refer to the conservatorship being terminated rather than to it being "adjudicated that the disability of the testator has ceased." The application of subdivision (c) turns on whether a conservatorship has been terminated, and not on whether the testator has regained the capacity to make a will. This subdivision (c) provides a rule of administrative convenience and avoids the need to litigate the question of whether the conservatee had capacity to make a will after the time of the sale, condemnation, fire, or casualty.

Subdivision (d) of Section 6173 is the same in substance as the third sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code.

§ 6175. Contract for sale or transfer of specifically devised property

Comment. Section 6175 is drawn from former Section 77. See also Sections 32 ("devise" defined), 34 ("devisee" defined) 62 ("property" defined). The rule stated in Section 6175 applies in the

absence of a contrary intention of the testator. See Section 6165. See also Section 6178.

§ 6176. *Testator placing charge or encumbrance on specifically devised property*

Comment. Section 6176 continues the substance of a portion of former Section 78. See also Sections 32 (“devise” defined), 34 (“devisee” defined), 62 (“property” defined). The rule stated in Section 6177 applies in the absence of a contrary intention of the testator. See Section 6165. See also Section 6178.

§ 6177. *Act of testator altering testator’s interest in specifically devised property*

Comment. Section 6177 continues the substance of a portion of former Section 78. See also Sections 32 (“devise” defined), 34 (“devisee” defined), 62 (“property” defined). The rule stated in Section 6177 applies in the absence of a contrary intention of the testator. See Section 6165. See also Section 6178.

§ 6209. *Manner of distribution to “descendants”*

Comment. Section 6209 continues the substance of subdivision (i) of former Section 56. The rule stated in Section 6209 is consistent with the general rule concerning taking by representation. See Section 240 (representation).

§ 6220. *Persons who may execute California statutory will*

Comment. Section 6220 continues the substance of former Section 56.1. An emancipated minor is considered as being over the age of majority for the purpose of making or revoking a will. See Civil Code § 63.

§ 6221. *Method of executing California statutory will*

Comment. Section 6221 continues the substance of a portion of former Section 56.2.

§ 6221.5. *Attestation sufficient for admission of will to probate*

Comment. Section 6221.5 continues the last sentence of former Section 56.2.

§ 6240. *California Statutory Will Form*

Comment. Section 6240 continues the substance of former Section 56.7. The language in parentheses in paragraph 3.3 concerning bond is new.

§ 6241. *California Statutory Will With Trust Form*

Comment. Section 6241 continues the substance of former Section 56.8. The language in parentheses in paragraph 3.4 concerning bond is new.

§ 6401. *Intestate share of surviving spouse*

Comment. Subdivision (a) of Section 6401 is the same in substance as a portion of former Section 201. Upon the death of a married person, one-half of the community property, belongs to the surviving spouse (Section 100); in the case of intestate succession, the

other one-half of the community property, which belongs *to the decedent* (Section 100), goes to the surviving spouse under subdivision (a) of Section 6401. See also Section 28 (defining "community property").

Subdivision (b) is the same in substance as a portion of former Section 201.5. Upon the death of a married person, one-half of the decedent's quasi-community property belongs *to the surviving spouse* (Section 101); in the case of intestate succession, the other one-half of the decedent's quasi-community property, which belongs *to the decedent* (Section 101), goes to the surviving spouse under subdivision (b) of Section 6401. The quasi-community property recaptured under Section 102 does not belong *to the decedent* even though the property is restored to the decedent's estate; rather it is property that belongs *to the surviving spouse*. See Section 102 and Comment thereto. Accordingly, the surviving spouse does not take the recaptured property by intestate succession. See also Section 66 (defining "quasi-community property").

Community property and quasi-community property that passes to the surviving spouse under subdivisions (a) and (b) is subject to Sections 649.1 (election to have community and quasi-community property administered) and 649.2 (power to deal with community and quasi-community real property). As to the liability of the surviving spouse for debts of the deceased spouse, see Section 649.4.

Subdivision (c) continues the rules under former law that determined the share the surviving spouse received of the decedent's separate estate. See former Sections 221, 223, and 224.

§ 6402. *Intestate share of heirs other than surviving spouse*

Comment. Subdivisions (a) through (d) of Section 6402 are the same in substance as Section 2-103 of the Uniform Probate Code.

Subdivision (a) is consistent with former Section 222 except that the rule of representation is changed. See Section 240 and Comment thereto. Subdivisions (b) and (c) are consistent with former Section 225 except for the new rule of representation. Subdivisions (d), (e), (f), and (g) supersede former Section 226 and a portion of former Section 229. Subdivision (e) is drawn from former Section 229 and gives the decedent's stepchildren and issue of deceased stepchildren a right to inherit if there is no one to inherit under subdivisions (a) through (d). Subdivision (g) is also drawn from former Section 229 and gives parents and issue of deceased parents of a predeceased spouse of the decedent a right to inherit if there is no one to inherit under subdivisions (a) through (f). See also Section 6402.5 (succession to the portion of the decedent's estate attributable to the decedent's predeceased spouse).

If there are no takers under Sections 6401-6402.5, the decedent's estate escheats to the state. See Section 6404.

§ 6402.5. *Special rule for portion of decedent's estate attributable to the decedent's predeceased spouse*

Comment. Section 6402.5 continues the substance of subdivisions (a), (b), and (e) of former Section 229 of the Probate Code with the following changes:

(1) The application of Section 6402.5 is limited to real property and the section applies only where the predeceased spouse died not more than 15 years before the decedent. Former Section 229 was not so limited. The rules for determining what constitutes "the portion of the decedent's estate attributable to the decedent's predeceased spouse" are the same as under subdivision (b) of former Section 229.

(2) The provisions of Section 6402.5 relating to taking by representation are consistent with the general provisions relating to taking by representation. See Section 240.

(3) Paragraph (4) of subdivision (b) of former Section 229 is not continued. The omitted provision was made obsolete by 1980 Stats., Ch. 119, which provides that property set aside as a probate homestead for a surviving spouse shall in no case be set aside beyond the lifetime of the surviving spouse; after the 1980 enactment, the probate homestead is not a part of the estate of that spouse when that spouse dies.

(4) Subdivision (c) is included in Section 6402.5 to make clear that quasi-community real property (Section 66) is to be treated the same as community real property for the purposes of this section. Former Section 229 contained no provision that dealt specifically with quasi-community property.

The special rule provided in subdivision (c) of former Section 229 is not continued. Insofar as the property described in that subdivision is a "portion of the decedent's estate attributable to the decedent's predeceased spouse" and the spouse died not more than 15 years before the decedent, the property is governed by the general provisions of Section 6402.5.

Subdivision (d) of former Section 229 is superseded by subdivisions (e) and (g) of Section 6402.

§ 6404. Escheat if no taker

Comment. Section 6404 is comparable to Section 2-105 of the Uniform Probate Code. For provisions relating to escheat, see Sections 6800-6806. See also Code Civ. Proc. §§ 1300-1615 (unclaimed property).

§ 6406. Inheritance by relatives of halfblood

Comment. Section 6406 is the same as Section 2-107 of the Uniform Probate Code and supersedes former Section 254. Under former Section 254, halfblood relatives of the decedent who were not of the blood of an ancestor of the decedent were excluded from inheriting property of the decedent which had come to the decedent from such ancestor. Section 6406 eliminates this rule and puts halfbloods on the same footing as wholeblood relatives of the decedent. See also Section 6152 (construction of wills).

§ 6407. Inheritance by afterborn heirs

Comment. Section 6407 is the same in substance as Section 2-108 of the Uniform Probate Code and supersedes the second sentence of former Section 250. Section 6407 is consistent with Civil Code Section 29. See also Section 6150(c) (person conceived before but born after a testator's death or time of enjoyment takes if answering the class description).

§ 6408. Parent-child relationship

Comment. Section 6408 is drawn from Section 2-109 of the Uniform Probate Code and supersedes former Section 255 and 257. The second sentence of paragraph (2) of subdivision (a) is new and is not found in the Uniform Probate Code. This sentence applies, for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to the adoption. Paragraph (3) of subdivision (a) changes the rule of former Section 257 so that, in the case of an adoption coming within that paragraph, the adopted child may inherit from or through the adoptive parent and also from or through the natural parent who gave up the child for adoption or through the natural parent who died preceding the adoption. In some cases the natural relatives cannot inherit from a child adopted by another, even though under Section 6408 the child could inherit from the natural relatives. See Section 6408.5.

Subdivision (b) supersedes subdivision (d) of former Section 255. The "except" clause of paragraph (2) of subdivision (b) is new and restricts the rule of former Section 255 by requiring that if a court order establishing paternity under subdivision (c) of Section 7006 of the Civil Code is entered after the father's death it must, for the purposes of intestate succession, be supported by clear and convincing evidence that the father has openly and notoriously held out the child as his own.

The definitions of "child" (Section 26), "issue" (Section 50), and "parent" (Section 54) adopt the rules set out in Section 6408. See also Section 6152 (construction of wills).

§ 6408.5. Inheritance by natural relatives from or through adopted child or child born out of wedlock

Comment. Section 6408.5 is new and provides for cases where natural relatives may not inherit from or through an adopted child or a child born out of wedlock, even though the child may inherit from the natural relatives under Section 6408.

§ 6413. Persons related to decedent through two lines

Comment. Section 6413 is the same in substance as Section 2-114 of the Uniform Probate Code. Section 6413 would have potential application, for example, in a case where the natural parents of a child are killed in an accident and the child is adopted by a brother or sister of the natural mother of child, leaving the child as natural and adopted grandchild of the parents of the natural mother. See also the Comment to Uniform Probate Code § 2-114.

§ 6528. Declaration of homestead remains effective as to survivor's interest

Comment. Section 6528 is added to make clear the relationship between the probate homestead law and the declared homestead law. See Code Civ. Proc. §§ 704.910-704.990 (declared homestead). Although there is no longer a right of survivorship created by a declaration of homestead (1980 Cal. Stats. Ch. 119, § 22), in the sense that the survivor no longer takes the decedent's interest in the property over a contrary testamentary disposition, a homestead

declaration made by or for the benefit of a survivor nonetheless remains effective as to the survivor's interest in the property, notwithstanding dictum to the contrary in *Estate of Grigsby*, 134 Cal. App.3d 611, 184 Cal. Rptr. 886 (1982).

§ 6570. *Share of omitted child born or adopted after execution of will*

Comment. Sections 6570-6572 supersede former Section 90. Section 6570 limits the children that are considered to be pretermitted children in two significant ways:

(1) Unlike former Section 90, an omitted child living when the will was made does not receive a share of the estate under Section 6570 unless the child is one described in Section 6572 (child omitted solely because the testator mistakenly believed the child to be dead or was unaware of the birth of the child). When the omission is not based on such mistaken belief, it is more likely than not that the omission was intentional. See Evans, *Should Pretermitted Issue Be Entitled to Inherit?*, 31 Calif. L. Rev. 263, 269 (1943); Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 197 (1979).

(2) Unlike former Section 90, Section 6570 does not protect omitted grandchildren or more remote issue of a deceased child of the testator. If the testator's child is deceased at the time the will is made and the testator omits to provide for a child of that child (the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living when the will is made and is a named beneficiary under the will and dies before the testator leaving a child surviving, the testator's grandchild will be protected by the antilapse statute (Section 6147) which substitutes the deceased child's issue.

Former Section 90 gave an omitted child an intestate share in the deceased testator's estate. This rule is continued in Section 6570. As to the intestate share of the omitted child, see Sections 6401 and 6402.

Although the omitted child may receive nothing under this article, the child may be eligible to receive exempt property (Sections 6510-6511), probate homestead (Sections 6520-6527), and family allowance (Sections 6540-6545) if in need of support after the testator's death. See also Section 26 ("child" defined).

§ 6573. *Manner of satisfying share of omitted child*

Comment. Section 6573 supersedes former Section 91 and is consistent with Section 6562. Under this article, the share of a pretermitted child is satisfied out of the testator's probate estate. See also Sections 32 ("devise" means testamentary disposition of real or personal property), 34 ("devisee" means a person designated in a will to receive a devise).

Assembly Bill 68

Civil Code § 63. Purposes for which emancipated minor is treated as adult

Comment. Section 63 is amended to correct the cross-reference in paragraph (13) of subdivision (b) in view of the recodification of the section there referred to.

Civil Code § 5135.5. Rights at death governed by Probate Code

Comment. Section 5135.5 is new. The section makes clear that a marriage settlement, to the extent it affects rights at death, is governed by Sections 140–147 of the Probate Code and not by Section 5134 or 5135 of the Civil Code. Section 5135.5 is consistent with subdivision (a) of Section 147 of the Probate Code.

APPENDIX IX

REVISED COMMENTS FOR SECTIONS OF FORMER DIVISIONS 1, 2, AND 2b OF THE PROBATE CODE SUPERSEDED BY ASSEMBLY BILL 25

Note. The *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2499-2510 (1982) contained a Comment to each section of former Divisions 1, 2, and 2b of the Probate Code. These divisions were repealed by Assembly Bill 25 (the new wills and intestate succession statute). The Senate Committee on Judiciary adopted a report containing new or revised Comments for provisions of Assembly Bill 25 (see Appendix VIII *supra*), but this report did not include any revised Comments for sections in the three repealed divisions of the Probate Code. The Commission has revised the Comments to some of the sections in the three repealed divisions to reflect changes made in the Commission recommended legislation after it was introduced. These revised Comments are set out below.

§ 25 (repealed). Codicil republishes will

Comment. Former Section 25 is not continued. The original purpose of Section 25 was to extend the effect of a will to cover property acquired after the date of the will. Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 608 (1931). However, under Section 6142, a will is construed to pass all property which the testator owns at death. Hence Section 25 is no longer needed.

§ 29 (repealed). Plural devisee or legatee

Comment. Former Section 29 is continued in substance in Section 6143.

§ 56.2 (repealed). Method of executing California statutory will

Comment. Former Section 56.2 is continued in substance in Sections 6221 and 6221.5.

§ 56.10 (repealed). Full text of property disposition clauses of California Statutory Will Form

Comment. Former Section 56.10 is continued in substance in Section 6243, except that the former provision adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference in Section 6243 to the law relating to intestate succession. This change will permit community property and quasi-community property to be governed by the intestate succession rules applicable to that property and recognizes that the special provisions relating to succession of property acquired from a parent or grandparent have not been continued.

§ 91 (repealed). Source of share of omitted children and grandchildren

Comment. Former Section 91 is superseded by Section 6373.

§ 92 (repealed). **Anti-lapse**

Comment. Former Section 92 is superseded by subdivision (a) of Section 6146 and by Section 6147.

§ 100 (repealed). **Domestic law governs domestic property**

Comment. Former Section 100 is superseded by Section 6141 which permits the testator to specify in the will what state's law will govern the construction of the will without regard to where the property is located. If the testator does not specify what law shall apply, the traditional choice of law rules will apply. See generally 7 B. Witkin, Summary of California Law *Wills and Probate* § 49, at 5373 (8th ed. 1974).

§ 105 (repealed). **Correction of mistakes and omissions; extrinsic evidence**

Comment. Former Section 105 is not continued. The section purported to codify the much-criticized distinction between patent and latent ambiguities in a will. See Comment, *Extrinsic Evidence and the Construction of Wills*, 50 Calif. L. Rev. 283, 285 (1962). Also, although the section purported to exclude oral declarations of the testator, the courts have created exceptions to that rule. See, e.g., Estate of Kime, 144 Cal. App.3d 246, 261-65, 193 Cal. Rptr. 718 (1983) (decendent's oral declarations concerning her intent held admissible); *In re* Estate of Dominici, 151 Cal. 181, 185-86, 90 P. 448 (1907) (attorney's testimony of testator's oral instructions held admissible).

§ 107 (repealed). **Devise of fee**

Comment. Former Section 107 is superseded by Section 6142.

§ 108 (repealed). **Class gift construed according to rules for intestate succession**

Comment. Former Section 108 is superseded by Sections 6150-6152.

§ 109 (repealed). **Devise or bequest to testator's own heirs or next of kin**

Comment. Former Section 109 is continued in Section 6145.

§ 120 (repealed). **Devise of land**

Comment. Former Section 120 is continued in substance in Section 6142.

§ 121 (repealed). **Devise of land; after-acquired interests**

Comment. Former Section 121 is continued in substance in Section 6142.

§ 122 (repealed). **Words referring to death or survivorship**

Comment. Former Section 122 is not continued. For rules applicable to class gifts, see Sections 6150-6152.

§ 123 (repealed). **Scope of disposition to a class; afterborn child**

Comment. Former Section 123 is continued in substance in Section 6150.

§ 124 (repealed). **Direction in will for conversion of real property**

Comment. Former Section 124 is continued in substance in Section 6144.

§ 125 (repealed). **Disposition of all real or personal property; property included**

Comment. Former Section 125 is continued in substance in Section 6142.

§ 126 (repealed). **Residuary disposition**

Comment. Former Section 126 is continued in substance in Section 6142.

§ 201.8 (repealed). **Recapture by surviving spouse of certain quasi-community property**

Comment. The first and third sentences of former Section 201.8 are superseded by Section 102. The second sentence of former Section 201.8, which required the surviving spouse to elect to take under or against the decedent's will, is not continued. Under the

law as revised, the rule for quasi-community property is the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides, or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

§ 221 (repealed). **Distribution to surviving spouse and issue**

Comment. Former Section 221 is superseded by Sections 240, 6401, and 6402.

§ 222 (repealed). **Distribution to issue where no surviving spouse**

Comment. Former Section 222 is superseded by Sections 240 and 6402.

§ 223 (repealed). **Distribution to surviving spouse and immediate family where no issue**

Comment. Former Section 223 is superseded by Sections 240, 6401, and 6402.

§ 225 (repealed). **Distribution to immediate family where neither issue nor spouse**

Comment. Former Section 225 is superseded by Sections 240 and 6402.

§ 226 (repealed). **Distribution to next of kin where no spouse, issue, nor immediate family**

Comment. Former Section 226 is superseded by Sections 240 and 6402.

§ 227 (repealed). **Unmarried minor decedent**

Comment. Former Section 227, which stated one variant of the ancestral property doctrine, is not continued. Most aspects of the ancestral property doctrine have been abolished in California. See generally Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 204 (1979); Evans, *Comments on the Probate Code of California*, 19 *Calif. L. Rev.* 602, 614 (1931).

§ 229 (repealed). **Distribution of property received from predeceased spouse; distribution to prevent escheat**

Comment. Former Section 229 is superseded by Section 6402.5.

§ 230 (repealed). **Distribution of property received from predeceased spouse**

Comment. Former Section 230 is superseded by Sections 240 and 6402.

§ 250 (repealed). **Right of representation defined; posthumous child**

Comment. The first sentence of former Section 250 is superseded by Section 240. The second sentence is superseded by Section 6407.

§ 251 (repealed). **Degree of kindred**

Comment. Former Section 251 is not continued. The revised succession provisions use the term "degree of kinship" instead of "degree of kindred." See, e.g., Sections 6402, 6402.5. The term "degree of kinship" is not statutorily defined, since its meaning is well understood.

§ 252 (repealed). **Lineal consanguinity**

Comment. Former Section 252 is not continued. The revised succession provisions use the term "issue" instead of "lineal descendants." Compare Sections 6401 and 6402 with former Section 221. "Issue" is a defined term. See Section 50.

§ 255 (repealed). **Parent and child relationship**

Comment. Former Section 255 is superseded by Sections 6408 and 6408.5.

§ 257 (repealed). **Adopted child**

Comment. Former Section 257 is superseded by Sections 6408 and 6408.5.

§ 296.4 (repealed). Community property

Comment. The first paragraph of former Section 296.4 is superseded by Section 103. The second paragraph is superseded by subdivision (e) of Section 6402.

APPENDIX X
REPORT OF
ASSEMBLY COMMITTEE ON JUDICIARY
ON SENATE BILL 762

[Extract from Assembly Journal for September 15, 1983 (1982-83 Regular Session)]

In order to indicate more fully its intent with respect to Senate Bill 762, the Assembly Committee on Judiciary makes this report.

Senate Bill 762 was reintroduced to effectuate the California Law Revision Commission's *Recommendation Relating to Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984). Except for the new and revised comments set out below, the Law Revision Commission comments to the various sections of Senate Bill 762 reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Senate Bill 762. The comments set out below also reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of this bill.

§ 2411 (amended). Who may petition

Comment. Subdivisions (h) and (i) are added to Section 2411 to permit a treating health care provider or a parent of the principal to petition under this article with respect to a durable power of attorney for health care. See also Sections 2412.5 (petition with respect to durable power of attorney for health care), 2421 (restriction in power of attorney of right to file petition), 2420 (other remedies not affected).

§ 2412 (technical amendment). Petition: purposes

Comment. The introductory clause is added in Section 2412 to recognize that a different provision (Section 2412.5) applies to a petition with respect to a durable power of attorney for health care. Subdivision (a) is revised to make clear that a petition may be filed to determine whether the power of attorney was ever effective, thus permitting, for example, a determination that the power of attorney was invalid when executed because its execution was induced by fraud.

§ 2412.5 (added). Petition with respect to durable power of attorney for health care

Comment. Section 2412.5 is a special provision that enumerates the purposes for which a petition may be filed under this article with respect to a durable power of attorney for health care.

Under subdivision (b), the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court provide the standard for judging the acts of the attorney in fact. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney in fact is not complying with the duty to carry out the desires of the principal. These subdivisions adopt a standard based on the principal's desires in place

of a general standard of what may constitute the best interests of the principal. An attempted suicide by the principal is not to be construed to indicate the principal's desire that health care be restricted or inhibited. See Section 2443.

Where it is not possible to use a standard based on the principal's desires because those desires are not stated in the power of attorney or otherwise known or are unclear, subdivision (b) provides that the "best interests of the principal" standard be used.

Subdivision (d) permits termination of the durable power of attorney for health care not only where the attorney in fact, for example, is acting illegally or failing to perform his or her duties under the power of attorney or is acting contrary to the known desires of the principal but also where the desires of the principal are unknown or unclear and the attorney in fact is acting in a manner that is clearly contrary to the best interests of the principal. The desires of the principal may become unclear as a result of the developments in medical treatment techniques that have occurred since the desires were expressed by the principal, such developments having changed the nature or consequences of the treatment.

A durable power of attorney for health care may limit the authority to petition under this article. See Section 2421.

§ 2417 (technical amendment). Hearing on petition; order concerning health care pending determination of petition.

Comment. Subdivision (g) (2) of Section 2417 is revised to permit the court to award attorney's fees to the conservator of the person in a case where the attorney in fact fails without any reasonable cause or justification to submit a report requested under subdivision (c) of Section 2412.5.

Subdivision (h) is added to make clear that the court has authority to provide, for example, for the continuance of treatment necessary to keep the principal alive pending the court's action on the petition. See also Section 2413 (powers of court).

§ 2421 (amended). Restriction in power of attorney of authority to petition

Comment. Subdivisions (c) and (d) are added to Section 2421 to specify the purposes for which a conservator of the person or an attorney in fact may petition the court under this article with respect to a durable power of attorney for health care. The rights given by subdivisions (c) and (d) cannot be limited by a provision in the power of attorney, but the power of attorney may restrict or eliminate the right of any other persons to petition the court under this article if the principal has the advice of legal counsel and the other requirements of subdivision (a) are met.

Under subdivision (c), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 2412.5(a). The conservator of the person may obtain a court order requiring the attorney in fact to report his or her acts under the durable power of attorney for health care if the attorney in fact fails to submit such a report within 10 days

after a written request. See Section 2412.5(c). The conservator of the person may obtain a court determination that the durable power of attorney for health care is terminated upon a determination by the court that the attorney in fact is acting illegally or is not performing the duty under the durable power of attorney for health care to act consistent with the desires of the principal or, where the principal's desires are unknown or unclear, is acting in a manner that is clearly contrary to the best interests of the principal. See Section 2412.5(d). See also the Comment to Section 2412.5.

Under subdivision (d), the attorney in fact may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 2412.5(a). The attorney in fact may also obtain a court order passing on the acts or proposed acts of the attorney in fact under the durable power of attorney for health care. See Section 2412.5(b).

§ 2431. Application of article

Comment. Subdivision (a) of Section 2431 makes clear that the requirements of this article must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See also Section 2400 (durable power of attorney). Nothing in this article affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See Section 2430 ("health care decision" defined).

Subdivision (b) validates durable powers of attorney for health care executed before January 1, 1984, even though the witnessing or acknowledgment requirement of Section 2432(a)(2) is not satisfied and even though the requirement of Section 2433(c) is not satisfied. However, after December 31, 1983, any such durable power of attorney is subject to the same provisions as a durable power of attorney executed after that date. See, e.g., Sections 2412.5 (grounds for petition), 2421 (exceptions to limitations in power of attorney), 2434 (attorney in fact not authorized to act if principal can give informed consent), 2435 (unauthorized types of health care), 2436 (examination and release of medical records), 2437 (revocation), 2438 (protections from liability), 2440 (consent of attorney in fact not authorized where principal objects to the health care or objects to the withholding or withdrawal of health care necessary to keep principal alive), 2442 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 2443 (unauthorized acts or omissions). However, the limitation of the duration of the durable power of attorney for health care to seven years applies only to a durable power of attorney for health care executed after January 1, 1984. See Section 2436.5. A durable power of attorney for health care executed prior to that date is of unlimited duration unless the power of attorney otherwise provides.

Subdivision (c) makes clear that this article has no effect on decisions made before January 1, 1984, under durable powers of attorney executed before that date. The validity of such health care decisions is determined by the law that would apply if this article had not been enacted.

§ 2432. Requirements for durable power of attorney for health care

Comment. Subdivision (a) of Section 2432 makes clear that a durable power of attorney is not sufficient to enable the attorney in fact to consent to health care or make other health care decisions unless the durable power of attorney specifically authorizes health care decisions and the formalities of this section are satisfied. Subdivisions (d) and (e) limit the persons who may serve as witnesses. See also Sections 2400 (general requirements for durable power of attorney), 2433 (warning to person executing durable power of attorney for health care). See also Section 2431 (exception to formalities requirement for powers of attorney executed before operative date).

Subdivision (b) precludes the treating health care provider or an employee of the treating health care provider and other specified persons from acting as the attorney in fact under a durable power of attorney for health care. Subdivision (d) precludes health care providers in general and their employees and other specified persons from acting as witnesses to such powers of attorney. These limitations are included in recognition that Section 2438 provides protections from liability for a health care provider who relies in good faith on a decision of the attorney in fact. Subdivision (b) does not preclude a person from appointing, for example, a friend who is a doctor to be an attorney in fact under the durable power of attorney for health care, but if the doctor becomes a "treating health care provider" of the principal, the doctor is precluded from acting as the attorney in fact under the durable power of attorney for health care.

Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated as the attorney in fact for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no application where a person other than the conservator is to be designated as attorney in fact.

Subdivision (f) prescribes additional requirements where the principal is a patient in a nursing home.

§ 2433. Requirements for printed form; warning statement in nonprinted instrument

Comment. Section 2433 sets out a warning statement that is required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions. Subdivision (c) requires that the warning statement be included in capital letters in a nonprinted form and permits a certificate by the principal's attorney to be used as an alternative to the warning statement.

A printed form sold in this state for use by a person who does not have the advice of legal counsel can deal only with the authority to make health care decisions. If a person wants to give a durable power of attorney to deal with both health care decisions and property matters and the person wants to use a printed form, two different forms are required—one for health care and another for other matters. However, a person who has the advice of a lawyer may cover both health care and property matters in one durable power of attorney. In the latter case, the warnings or certificate required by subdivision (c) must be included.

§ 2434. Authority of attorney in fact to make health care decisions

Comment. Subdivision (a) of Section 2434 gives the attorney in fact priority to make health care decisions if known to the health care provider to be available and willing to act. The power of attorney may vary this priority. Subdivision (a) also provides that the attorney in fact is not authorized to make health care decisions if the principal is able to give informed consent. The power of attorney may, however, give the attorney in fact authority to make health care decisions for the principal even though the principal is able to give informed consent, but the power of attorney is always subject to Section 2440 (attorney in fact not authorized to consent to health care, or to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if principal objects).

Subdivision (b) authorizes attorney in fact to make health care decisions, except as limited by the power of attorney. In exercising his or her authority, the [attorney in fact] has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interests of the principal. This authority is subject to Section 2435 which precludes consent to certain specified types of treatment. See also Section 2443. The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Sections 2410-2423 (court enforcement of duties of attorney in fact). The authority under subdivision (b) is limited by Section 2440 (attorney in fact not authorized to consent to health care, or to the withholding or withdrawal of health care necessary to keep the principal alive, if principal objects). An attorney in fact may, without liability, decline to act under the power of attorney. For example, the attorney in fact may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. Subdivision (c) makes clear that, in such a case, the attorney in fact may make or participate in the making of health care decisions for the principal without being bound by the stated desires of the principal to the extent that the person designated as the attorney in fact has the right under the applicable law apart from the durable power of attorney.

As to the duration of the power of attorney, see Section 2436.5.

§ 2435. Consent to certain types of treatment not authorized

Comment. Section 2435 specifies certain types of treatment that may not be authorized by an attorney in fact under a durable power of attorney for health care. The durable power of attorney may not vary the limitations of this section. See also Section 2443.

§ 2436. Availability of medical information to attorney in fact

Comment. Section 2436 makes clear that the attorney in fact can obtain and disclose information in the medical records of the principal. The power of attorney may limit the right of attorney in fact, for example, by precluding examination of specified medical records or by providing that the examination of medical records is authorized only if the principal lacks the capacity to give informed consent. The right of the attorney in fact is subject to any limitations

on the right of the patient to reach medical records. See Health and Safety Code Sections 25253 (denial of right to inspect mental health records), 25256 (providing summary of record rather than allowing access to entire record).

§ 2436.5. *Duration*

Comment. Section 2436.5 limits the duration of a durable power of attorney for health care. The durable power of attorney may provide for a shorter duration, but the period of duration provided by Section 2436.5 may not be made longer by a provision in the durable power of attorney. The section does not apply to a durable power of attorney for health care executed before January 1, 1984, there being no limitation on the duration of such a durable power of attorney unless specified in the durable power of attorney.

§ 2437. *Revocation*

Comment. Section 2437 makes clear that the principal can revoke the appointment of the attorney in fact or the authority granted to the attorney in fact by oral or written notification to the attorney in fact or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. The burden of proof is on the person who seeks to establish that the principal did not have the capacity to revoke the appointment or authority. See subdivision (c). Although the authorization to act as attorney in fact to make health care decisions is revoked if the principal notifies the attorney in fact orally or in writing that the appointment of the attorney in fact is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the attorney in fact. See Section 2438.

Subdivision (b) is included to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider and imposes a duty to make a reasonable effort to notify the attorney in fact of the revocation.

§ 2438. *Protection of health care provider from liability*

Comment. Section 2438 implements this article protecting the health care provider who acts in good faith in reliance on a health care decision made by an attorney in fact pursuant to this article. The protection under Section 2438 is limited. A health care provider is not protected from liability for malpractice. Nor is a health care provider protected if the health care provider fails to provide the attorney in fact with the information necessary so that the attorney in fact can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 2435 (forms of treatment not authorized by durable power of attorney for health care), 2443 (construction of article).

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the attorney in fact to withdraw consent previously given to provide health care necessary to keep the principal alive.

This subdivision does not deal with *providing* health care necessary to keep the principal alive. The situations where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

§ 2440. *Treatment not authorized over principal's objection*

Comment. Section 2440 precludes the attorney in fact from consenting to treatment for the principal when the principal does not want the treatment or from consenting to the withholding or withdrawal of treatment necessary to keep the principal alive if the principal objects to withholding or stopping the treatment. This section does not limit any right the attorney in fact may have apart from the authority under the durable power of attorney for health care. See Section 2434(c).

§ 2441. *Conditioning admission, treatment, or insurance upon execution of power of attorney*

Comment. Section 2441 is included to eliminate the possibility that duress might be used by a health care provider or insurer to cause the patient to execute a durable power of attorney for health care.

§ 2442. *Alteration or forging, or concealment or withholding knowledge of revocation of, durable power of attorney*

Comment. Section 2442 is drawn from Section 7194 of the Health and Safety Code (Natural Death Act).

§ 2443. *Construction of article*

Comment. Section 2443 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

APPENDIX XI
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Effect of Death of
Support Obligor

May 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Effect of Death of Support Obligor*, 17 Cal. L. Revision Comm'n Reports 897 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

May 6, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith submits its recommendation to authorize the family law court, in making a spousal support order, to require maintenance of life insurance or other appropriate security to cover the contingency that the support order may be terminated by the death of the support obligor. This recommendation is submitted pursuant to authority of 1980 Cal. Stats. res. ch. 37 (probate law) and 1978 Cal. Stats. res. ch. 65 (community property).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

EFFECT OF DEATH OF SUPPORT OBLIGOR

A spousal support order does not survive the death of the support obligor.¹ This rule applies both to a contested court order and an order made pursuant to a marital termination settlement. However, the parties to a marital termination settlement may agree that support continues to be an obligation of the estate of the support obligor,² and a spousal support order based on such an agreement may survive death.³

Absent an agreement the support order is terminated by the obligor's death, even though support may be a necessity for the former spouse.⁴ By comparison, a child support order does not terminate on death of the parent.⁵

California public policy is to provide adequate support for a person dependent on, and entitled to, support. A spousal support order is often inadequate for the needs of the former spouse,⁶ needs that do not necessarily terminate upon the death of the support obligor.⁷

When the parties are negotiating a marital termination settlement, they may take into consideration the eventuality of the death of the support obligor and plan for it through life insurance, a trust fund, or other devices.⁸

¹ *Parker v. Parker*, 193 Cal. 478, 225 P. 447 (1924); *Roberts v. Higgins*, 122 Cal. App. 170, 9 P.2d 517 (1932); *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868 (1937); former Civil Code § 139, as amended by 1951 Cal. Stats. ch. 1700, § 7, p. 3912, now recodified as Civil Code § 4801(b).

² See, e.g., *Steele v. Langmuir*, 65 Cal. App.3d 459, 135 Cal. Rptr. 426 (1976).

³ See, e.g., *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1 (1957).

⁴ For a list of factors that determine the support order, see Civil Code Section 4801(a).

⁵ 6 B. Witkin, Summary of California Law *Parent and Child* § 129, at 4646-47 (8th ed. 1974).

⁶ See, e.g., Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181 (1981).

⁷ Among the criticisms directed at the California spousal support scheme is that the support award terminates upon the death of the support obligor. See, e.g., Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 816 (1982).

⁸ See, e.g., S. Walzer, California Marital Termination Settlements § 5.56, p. 195 (Cal. Cont. Ed. Bar 1971).

Where the parties are unable to reach an agreement, the court in a contested case should likewise be authorized to provide for the possibility that the support obligor's death will terminate the support obligation. The Law Revision Commission recommends that the court be authorized to make accommodation for the death of the support obligor, where proper. This could take the form of an order to name the supported spouse beneficiary of a life insurance policy, an order for purchase of an annuity, or other appropriate order.

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

An act to amend Section 4801 of the Civil Code, relating to spousal support.

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

Civil Code § 4801 (amended)

SECTION 1. Section 4801 of the Civil Code is amended to read:

4801. (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties.

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

- (4) The duration of the marriage.
- (5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
- (6) The time required for the supported spouse to acquire appropriate education, training, and employment.
- (7) The age and health of the parties.
- (8) The standard of living of the parties.
- (9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make the payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include findings of fact and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

(b) Except as otherwise agreed by the parties in writing, the obligation of ~~any~~ a party under ~~any~~ an order ~~or judgment~~ for the support ~~and maintenance~~ of the other party ~~shall terminate~~ *terminates* upon the death of either party or the remarriage of the other party. *If the court determines that to do so is just and reasonable under the circumstances of the particular case, the court may make an appropriate order, including but not limited to an order requiring the maintenance of life insurance or the purchase of an annuity, to provide for the support of the other party in the event the order for support is terminated by the death of the party required to make the payment of support.*

(c) When a court orders a person to make specified payments for support of the other party for a contingent period of time, the liability of the person terminates upon the happening of the contingency. If the party to whom payments are to be made fails to notify the person ordered to make the payments, or the attorney of record of the person so ordered, of the happening of the contingency and

continues to accept support payments, the supported party shall refund any and all moneys received which accrued after the happening of the contingency, except that the overpayments shall first be applied to any and all support payments which are then in default. The court may, in the original order for support, order the party to whom payments are to be made to notify the person ordered to make such payments, or his or her attorney of record, of the happening of the contingency.

(d) An order for payment of an allowance for the support of one of the parties shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction.

(e) In any proceeding under this section the court may order a party to submit to an examination by a vocational training consultant. The order may be made only on motion, for good cause shown, and upon notice to the party to be examined and to all parties, and shall specify the time, place, manner, conditions, scope of the examination and the person or persons by whom it is to be made. The party refusing to comply with such an order shall be subject to the same consequences provided for failure to comply with an examination ordered pursuant to Section 2032 of the Code of Civil Procedure.

(f) For the purposes of this section, "vocational training consultant" means an individual with sufficient knowledge, skill, experience, training, or education relating to interviewing, the testing and analysis of work skills, the planning of courses of training and study, the formulation of career goals, and the work market to qualify as an expert in vocational training under Section 720 of the Evidence Code.

Comment. Subdivision (b) of Section 4801 is amended to give the court authority to make an order requiring insurance or some other provision for support after the death of the support obligor. Such an order may be appropriate in a case where long-term support is ordered. This authority is consistent with the practice of parties in a marital termination settlement. See, *e.g.*, S. Walzer, *California Marital Termination Settlements* § 5.56, at 195 (Cal. Cont. Ed. Bar 1971).

APPENDIX XII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED RECOMMENDATION

relating to

Dismissal for Lack of Prosecution

June 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Revised Recommendation Relating to Dismissal for Lack of Prosecution*, 17 Cal. L. Revision Comm'n Reports 905 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

June 2, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The Commission in 1982 submitted its *Recommendation Relating to Dismissal for Lack of Prosecution*, 16 Cal. L. Revision Comm'n Reports 2205 (1982), to codify, clarify, and modestly liberalize the law governing the dismissal of civil actions for lack of prosecution. Since then the Commission has had the opportunity to give further consideration to these matters, and herewith submits a revised recommendation that is somewhat stricter in a few key areas.

The Commission wishes to express its appreciation to its consultant of this study, Mr. Garrett H. Elmore (Burlingame), for his substantial contribution to the development of this recommendation.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

REVISED RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

Code of Civil Procedure Sections 581a and 583 provide for dismissal of civil actions for lack of diligent prosecution.¹ The major effect of these statutes is that:

(1) If the plaintiff fails to serve and return summons within three years after filing the complaint, the action must be dismissed.²

(2) If the plaintiff fails to take a default judgment within three years after summons is served or the defendant makes a general appearance, the action must be dismissed.³

(3) If the plaintiff fails to bring the action to trial within five years after filing the complaint, the action must be dismissed.⁴

(4) If the plaintiff fails to bring the action to trial within three years after a new trial or retrial is granted, the action must be dismissed.⁵

(5) If the plaintiff fails to bring the action to trial within two years after filing the complaint, the action may be dismissed in the court's discretion.⁶

The statutes requiring dismissal for lack of diligent prosecution enforce the requirement that the plaintiff move the suit expeditiously to trial. In essence, these statutes are similar to statutes of limitation, only they operate during the period after the plaintiff files the complaint rather than before the plaintiff files the

¹ In addition, Rule 203.5 of the California Rules of Court prescribes the Superior Court procedure for obtaining dismissal pursuant to Code of Civil Procedure Section 583(a).

² Code Civ. Proc. § 581a(a).

³ Code Civ. Proc. § 581a(c).

⁴ Code Civ. Proc. § 583(b).

⁵ Code Civ. Proc. § 583(c)-(d).

⁶ Code Civ. Proc. § 583(a).

complaint.⁷ They promote the trial of the case before evidence is lost or destroyed and before witnesses become unavailable or their memories dim. They protect the defendant against being subjected to the annoyance of an unmeritorious action that remains undecided for an indefinite period of time. They also are a means by which the courts can clean out the backlog of cases on crowded calendars.⁸

The policy of the dismissal statutes conflicts with another strong public policy—that which seeks to dispose of litigation on the merits rather than on procedural grounds.⁹ As a result of this conflict the courts have developed numerous limitations on and exceptions to the dismissal statutes.¹⁰ The statutes do not accurately state the exceptions, excuses, and existence of court discretion. The interrelation of the statutes is confusing.¹¹ The state of the law is generally unsatisfactory, requiring frequent appellate decisions for clarification.¹² The Law Revision Commission recommends that the dismissal for lack of prosecution provisions be revised in the manner described below.

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the

⁷ See, e.g., *Crown Coach Corp. v. Superior Court*, 8 Cal.3d 540, 546, 503 P.2d 347, 105 Cal. Rptr. 339 (1972); *Dunsmuir Masonic Temple v. Superior Court*, 12 Cal. App.3d 17, 22, 90 Cal. Rptr. 405 (1970).

⁸ See, e.g., *Ippolito v. Municipal Court*, 67 Cal. App.3d 682, 136 Cal. Rptr. 795 (1977).

⁹ See, e.g., *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970).

¹⁰ See, e.g., discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. Cont. Ed. Bar 1978); *Slomanson, Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. West. L. Rev. (1982).

¹¹ For example, there appears to be an inconsistency between the provisions of Section 581a for the mandatory dismissal of an action if the summons is not served and returned within three years after commencement of an action and those of Section 583(a) providing for the dismissal of an action, in the discretion of the court, if it is not brought to trial within two years. This inconsistency has been raised in a number of appellate cases. See, e.g., *Black Bros. Co. v. Superior Court*, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968).

¹² Since the two dismissal statutes were first enacted around the turn of the century there has been continuous appellate litigation—hundreds of cases, the notation of which requires more than 100 pages in the annotated codes—interpreting, clarifying, and rewriting the statutes.

1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal.¹³ In 1969 an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal.¹⁴ In 1970 the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continues to this day.¹⁵ The current judicial attitude has been stated by the Supreme Court:¹⁶ "Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seems to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds."

Fluctuations in basic procedural policy are undesirable. Every policy shift generates additional litigation to establish the bounds of the law. The policy of the state towards dismissal for lack of prosecution should be fixed and codified, and the dismissal statutes should be construed consistently with this policy. The Law Revision Commission believes that the current preference for trial on the merits over dismissal on procedural grounds is sound and should be preserved by statute. The proposed legislation contains a statement of this basic public policy.

Dismissal for Failure to Make Service

Section 581a(a) requires that summons be served "and return made" within three years after the action is commenced. The requirement that a return be made within the statutory period is taken literally, even though there may be no question that service has been made.¹⁷ The

¹³ See *Breckenridge v. Mason*, 256 Cal. App.2d 121, 64 Cal. Rptr. 201 (1967), and the line of cases following it.

¹⁴ See Comment, *The Demise (Hopefully) of an Abuse: The Sanction of Dismissal*, 7 Cal. W.L. Rev. 438, 455-56 (1971).

¹⁵ See *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

¹⁶ *Id.*, 2 Cal.3d at 566. See also *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

¹⁷ See, e.g., *Kaiser Found. Hosp. v. Superior Court*, 49 Cal. App.3d 523, 122 Cal. Rptr. 432 (1975); *Bernstein v. Superior Court*, 2 Cal. App.3d 700, 82 Cal. Rptr. 775 (1969); *Beckwith v. Los Angeles County*, 132 Cal. App.2d 377, 282 P.2d 87 (1955). See also *Highlands Inn, Inc. v. Gurries*, 276 Cal. App.2d 694, 81 Cal. Rptr. 273 (1969) (risk of loss in mail on plaintiff).

purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.¹⁸ The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The requirement has been called "a vintage anachronism in California law" that does not coincide with public policy.¹⁹ The proposed law eliminates the return requirement.²⁰

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;²¹ 1982 legislation declares that it is.²² The 1982 legislation was intended to limit the ability of the courts to develop exceptions and excuses not prescribed by statute. Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack.²³ The proposed law makes clear the service requirement is mandatory (not jurisdictional),²⁴ and provides expressly that the courts may not develop exceptions and excuses not prescribed by statute.

Dismissal for Failure to Bring to Trial

A significant problem with the operation of the statute governing dismissal for failure to bring an action to trial within five years is the effect of tolling or extensions on the

¹⁸ Nor does the return requirement appear to shift the burden of proof of service. Whether service was in fact made within the three-year period is a question of proof. The return of summons does not help materially in this respect.

¹⁹ Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. W.L. Rev. 1, 32 (1982).

²⁰ The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

²¹ *Hocharian v. Superior Court*, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

²² Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. 600.

²³ This would be contrary to general principles that govern procedural rules. See, e.g., 1 B. Witkin, *California Procedure Jurisdiction* §§ 3, 180, 184 (2d ed. 1970).

²⁴ The same rule also applies to the bringing to trial requirement.

statute. The problem arises when, within the last months before the five-year period is about to expire, an event occurs that suspends the running of the statute (for example an injunction against prosecution of the action because of pending related litigation). The running of the statute may be suspended for a time under these circumstances, but when the tolling or extension ends and the statute begins to run again, the plaintiff has only a short time to bring the action to trial. In many cases this is an unrealistic or impossible deadline to meet.

Legislation enacted in 1983 addresses this problem specifically where suspension of the dismissal statute is a result of submission of the action to judicial arbitration.²⁵ Under this legislation, if judicial arbitration is pending at any time during the last six months of the five-year period, the plaintiff is allowed six months after a trial de novo is requested to bring the case to trial.²⁶ The six-month extension is proper, and the proposed law broadens this provision to allow six months to bring the action to trial where there has been suspension of the five-year statute for any reason within the last six months of the five-year period.

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.²⁷ The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,²⁸ that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is

²⁵ This problem was highlighted in *Moran v. Superior Court*, 135 Cal. App.3d 986, 185 Cal. Rptr. 805 (1982) (hearing granted); *Fluor Drilling Service v. Superior Court*, 135 Cal.3d 1009, 186 Cal. Rptr. 1009 (1982); *Castorena v. Superior Court*, 135 Cal. App.3d 1014, 186 Cal. Rptr. 14 (1982).

²⁶ Code Civ. Proc. § 1141.17 (enacted 1983 Cal. Stats. ch. 123, § 3).

²⁷ Code Civ. Proc. § 581a(c).

²⁸ *Mustalo v. Mustalo*, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

progressing,²⁹ that a stipulation excuses compliance even if unfiled,³⁰ and that a judgment entered after the three-year period may not be set aside on collateral attack.³¹

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,³² and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.³³

The dismissal provision for failure to obtain a default is not well understood and is unduly inflexible, nor does it appear to be supported by compelling reasons of orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.³⁴ The dismissal provision should be repealed in the interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.³⁵ This provision has caused confusion, since it allows dismissal for failure to bring the action to trial at a

²⁹ *AMF Pinstoppers, Inc. v. Peek*, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1970).

³⁰ *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

³¹ *Phillips v. Trusheim*, 25 Cal.2d 913, 156 P.2d 25 (1945).

³² *Jacks v. Lewis*, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

³³ *Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co.*, 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

³⁴ Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again, arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, e.g., *Merner Lumber Co. v. Silvey*, 29 Cal. App.2d 426, 84 P.2d 1062 (1938).

³⁵ Code Civ. Proc. § 583(a).

time when service is not even required to have been made.³⁶ The two-year trial period is also unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.³⁷ The proposed law changes the dismissal period for failure to bring to trial to a more consistent and more realistic period of three years after the action is commenced.

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have relied on their inherent powers to dismiss.³⁸ The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make reliance on inherent powers unnecessary and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure to serve and return summons.³⁹ The proposed law clarifies and codifies this rule.

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing conditions on trial or dismissal of the action.⁴⁰ The proposed law codifies this rule.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the

³⁶ See note 11, *supra*.

³⁷ See discussion under "Policy of Statute," above.

³⁸ See, *e.g.*, *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

³⁹ See, *e.g.*, *Black Bros. Co. v. Superior Court*, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

⁴⁰ Rule 203.5. See discussion in *Lopez v. Larson*, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.⁴¹ The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.⁴² The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

General appearance. The requirement that process be served within the statutory period does not apply if the defendant makes a general appearance in the action.⁴³ The general appearance exception has been broadly construed and is not limited to documents filed in an action that are commonly regarded as a general appearance. Thus, for example, an open stipulation between the parties extending the defendant's time to answer or otherwise respond to the complaint is a general appearance for purposes of the exception to the service and return requirement.⁴⁴ A defendant may make a general appearance for purposes of the dismissal statute by any act outside the record that shows an intent to submit to the general jurisdiction of the court.⁴⁵ The proposed law makes clear that the service requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service is a motion to dismiss for failure to timely serve and return summons.⁴⁶ The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default

⁴¹ See, e.g., Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 Cal. W.L. Rev. 1 (1982).

⁴² See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

⁴³ Code Civ. Proc. § 581a(a)-(b).

⁴⁴ See, e.g., Knapp v. Superior Court, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

⁴⁵ See, e.g., General Ins. Co. v. Superior Court, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

⁴⁶ Code Civ. Proc. § 581a(e).

judgment does not transform the motion into a general appearance.⁴⁷

Stipulation extending time. The time within which service must be made, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.⁴⁸ The requirement that the stipulation be filed is unduly restrictive;⁴⁹ parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.⁵⁰ The proposed law permits an extension of time upon presentation to the court of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary. This does not affect the ability of the parties to make an oral stipulation in open court, if entered in the minutes or if a transcript is made.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.⁵¹ However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.⁵² This difference in treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a

⁴⁷ See, e.g., *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); *Pease v. City of San Diego*, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss).

⁴⁸ Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

⁴⁹ See, e.g., *Woley v. Turkus*, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

⁵⁰ See, e.g., *Obgerfell v. Obgerfell*, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

⁵¹ Code Civ. Proc. § 583(c)-(d).

⁵² See, e.g., *Neustadt v. Skernswell*, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

stipulation,⁵³ has failed to assert the statute,⁵⁴ or has acted in a manner that misleads the plaintiff.⁵⁵ The existence of the excuses of waiver and estoppel is not generally reflected in the dismissal statutes.⁵⁶ The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile.⁵⁷ Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.⁵⁸ Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.⁵⁹ The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and is applicable only to causes beyond the plaintiff's control. The excuse must be liberally construed as applied to the bringing to trial requirement. This disparity is in recognition of the fact that service is ordinarily within the plaintiff's control whereas bringing a case to trial frequently may be hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be

⁵³ See, e.g., *Knapp v. Superior Court*, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

⁵⁴ See, e.g., *Southern Pac. v. Seaboard Mills*, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962).

⁵⁵ See, e.g., *Tresway Aero, Inc. v. Superior Court*, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

⁵⁶ But see Code Civ. Proc. § 581a(f) (1), as enacted 1982 Cal. Stats. ch. 600.

⁵⁷ See, e.g., *Wyoming Pac. Oil v. Preston*, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); *Crown Coach Corp. v. Superior Court*, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972); *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

⁵⁸ See, e.g., cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

⁵⁹ Code Civ. Proc. § 581a(f) (2), as enacted 1982 Cal. Stats. ch. 600.

brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.⁶⁰ The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;⁶¹ it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.⁶² The proposed law is drafted to make clear this flexibility.

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.⁶³ The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.⁶⁴ In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.⁶⁵

⁶⁰ See, e.g., *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

⁶¹ See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

⁶² See, e.g., *Innovest, Inc. v. Bruckner*, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); *Watson v. Superior Court*, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); *J.A. Thompson & Sons, Inc. v. Superior Court*, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1963); *Fisher v. Superior Court*, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

⁶³ See, e.g., *Big Bear Mun. Water Dist. v. Superior Court*, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

⁶⁴ See, e.g., Code Civ. Proc. § 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

⁶⁵ See, e.g., 4 B. Witkin, *California Procedure Proceedings Without Trial* § 80 (2d ed. 1971).

Recommended Legislation

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

An act to amend Sections 411.30, 581, and 1141.17 of, to add Chapter 1.5 (commencing with Section 583.110) to Title 8 of Part 2 of, and to repeal Sections 581a and 583 of, the Code of Civil Procedure, and to amend Section 3638 of the Revenue and Taxation Code, relating to civil actions.

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

Code of Civil Procedure § 411.30 (technical amendment).

Attorney's certificate required in certain malpractice actions

SECTION 1. Section 411.30 of the Code of Civil Procedure is amended to read:

411.30. (a) In any action for damages arising out of the professional negligence of a person holding a valid physician's and surgeon's certificate issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or of a person holding a valid dentist's license issued pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code, or of a person holding a valid podiatrist's certificate issued pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code, or of a person licensed pursuant to the Chiropractic Act, on or before the date of service of the complaint on any defendant, the plaintiff's attorney shall file the certificate specified in subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one physician and surgeon, dentist, podiatrist, or chiropractor who is licensed to practice and practices in this state or any other state or teaches at an accredited college or university and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review

and consultation that there is reasonable and meritorious cause for the filing of such action.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations, including the provisions of ~~Section 581a~~ *Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8*, would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after service of the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate physicians and surgeons, dentists, podiatrists, or chiropractors to obtain such consultation and none of those contacted would agree to such a consultation.

(c) Where a certificate is required pursuant to this section, only one such certificate shall be filed notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of the consequences of a medical procedure or both, and for that reason is not filing a certificate required by this section.

(e) If a request by the plaintiff for the defendant's records has been made pursuant to Section 1158 of the Evidence Code, and if the defendant has failed to produce such records within the time limits specified by that section, the time for filing the certificate of merit shall be extended for the period by which the time for furnishing records set forth in Section 1158 of the Evidence Code is exceeded by the defendant to a maximum of 60 days after which the requirement for the certificate is voided.

(f) For purposes of this section, and subject to Evidence Code Section 912, an attorney who submits a certificate as

required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the physician or surgeon, dentist, podiatrist, or chiropractor consulted and the contents of such consultation. Such privilege shall also be held by the physician or surgeon, dentist, podiatrist, or chiropractor so consulted, provided when the attorney makes a claim under paragraph (3) of subdivision (b) that he was unable to obtain the required consultation with the physician and surgeon, dentist, podiatrist, or chiropractor, the court may require the attorney to divulge the names of physicians and surgeons, dentists, podiatrists, or chiropractors refusing such consultation.

(g) A violation of the provisions of this section may constitute unprofessional conduct and be grounds for discipline against the attorney.

(h) The failure to file a certificate required by this section shall be grounds for a demurrer pursuant to Section 430.10.

(i) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(j) This section shall remain in effect until January 1, 1987, and on that date is repealed unless a later enacted statute deletes or extends that date.

Comment. Section 411.30 is amended to correct a section reference.

Code of Civil Procedure § 581 (amended). Dismissal

SEC. 2. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

~~1-~~ (a) By plaintiff, by written request to the clerk, filed with the papers in case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge; ~~provided, that~~. *This subdivision does not apply if affirmative relief has not been sought by the cross-complaint of the defendant; and provided further that or if there is no a motion pending for an order transferring the action to another court under the provisions of Section 396b. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be is no opening statement,*

then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

2. (b) By either party, upon the written consent of the other. No dismissal mentioned in subdivisions ~~1 and 2 of this section~~ (a) and (b) shall be granted ~~unless~~ *except* upon the written consent of the attorney of record of the party or parties applying therefor, or if ~~such~~ consent is not obtained upon order of the court after notice to ~~such~~ *the* attorney.

3. (c) By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, or a motion to strike the whole of the complaint is granted without leave to amend, or a motion to strike the whole of a complaint or portion thereof is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court, and either party moves for such dismissal.

4. (d) By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

5. (e) The provisions of subdivision ~~1, of this section~~ (a) shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a cross-complaint filed in ~~said~~ *the* action. Dismissals without prejudice may be had in either of the manners provided for in subdivision ~~1 of this section~~ (a), after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

6. (f) By the court without prejudice when no party appears for trial following 30 days notice of time and place for trial.

(g) *By the court without prejudice pursuant to Chapter 1.5 (commencing with Section 583.110).*

Comment. Subdivision (g) is added to Section 581 in recognition of the relocation of the dismissal for lack of prosecution provisions from former Sections 581a and 583 to Sections 583.110-583.430. A dismissal for lack of prosecution is without prejudice. See, *e.g.*, *Elling Corp. v. Superior Court*, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975) (dismissal for failure to timely serve and return summons); *Hill v. San Francisco*, 268 Cal. App.2d 874, 74 Cal. Rptr. 381 (1969) (dismissal for failure to timely bring to trial); *Stephan v. American Home Builders*, 21 Cal. App.3d 402, 98 Cal. Rptr. 354 (1971) (discretionary dismissal). The other changes in Section 581 are technical.

Code of Civil Procedure § 581a (repealed). Dismissal for lack of prosecution

SEC. 3. Section 581a of the Code of Civil Procedure is repealed.

~~581a. (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.~~

~~(b) No action heretofore or hereafter commenced by cross/complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless, if a summons is not required, the cross/complaint is served within three years after the filing of the cross/complaint or unless, if a summons is required, the summons on the cross/complaint is served and return made within three years after the filing of the cross/complaint, except where the parties have filed a stipulation in writing that the time may be extended or, if a summons is required, the party against whom service~~

would otherwise have to be made has made a general appearance in the action.

(c) All actions, heretofore or hereafter commenced, shall be dismissed by the court in which the action may be pending, on its own motion, or on the motion of any party interested therein, if no answer has been filed after either service has been made or the defendant has made a general appearance, if plaintiff fails, or has failed, to have judgment entered within three years after service has been made or such appearance by the defendant, except where the parties have filed a stipulation in writing that the time may be extended.

(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section.

(e) A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after the motion, or stipulation extending time for service of summons and return thereof, constitute a general appearance.

(f) Except as provided in this section, the provisions of this section are mandatory and are not excusable, and the times within which acts are to be done are jurisdictional. Compliance may be excused only for either of the following reasons:

(1) Where the defendant or cross/defendant is estopped to complain.

(2) Where it would be impossible, impracticable, or futile to comply due to causes beyond a party's control. However, failure to discover relevant facts or evidence shall not excuse compliance.

Comment. The substance of the first portions of subdivisions (a) and (b) of former Section 581a is continued in Sections 583.210 (time for service), 583.220 (general appearance), and 583.250 (mandatory dismissal), but return is not required within the three-year period. The substance of the last portions of subdivisions (a) and (b) is continued in Sections 583.230 (extension of time) and 583.240 (computation of time).

Subdivision (c) is not continued. The provision was not well understood, was unduly inflexible, and was subject to numerous implied exceptions in the case law. Whether a default must be entered or judgment taken within a particular time is a matter

for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

The substance of subdivision (d) is continued in subdivision (a) of Section 583.240 (computation of time).

The substance of subdivision (e) is continued in Section 583.220 (general appearance).

The substance of subdivision (f) is continued in Sections 583.140 (waiver and estoppel), 583.240 (computation of time), and 583.250 (mandatory dismissal). The portion of subdivision (f) that declared the times to be jurisdictional is superseded by Section 583.250 (mandatory dismissal).

Code of Civil Procedure § 583 (repealed). Dismissal for lack of prosecution

SEC. 4. Section 583 of the Code of Civil Procedure is repealed.

~~583. (a) The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.~~

~~(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.~~

~~(c) When in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant~~

after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court. Nothing in this subdivision shall require the dismissal of an action prior to the expiration of the five-year period prescribed by subdivision (b).

(d) When in any action a trial has commenced but no judgment has been entered therein because of a mistrial or because a jury is unable to reach a decision, such action shall be dismissed on the motion of defendant after due notice to plaintiff or by the court of its own motion, unless such action is again brought to trial within three years after entry of an order by the court declaring the mistrial or disagreement by the jury, except where the parties have filed a stipulation in writing that the time may be extended.

(e) For the purposes of this section, "action" includes an action commenced by cross/complaint.

(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.310 (time for trial), 583.320 (time for new trial), 583.330 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.340 (computation of time).

Code of Civil Procedure §§ 583.110-583.430 (added)

SEC. 5. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110. Definitions

583.110. As used in this chapter, unless the provision or context otherwise requires:

(a) “Action” includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief.

(b) “Complaint” includes a cross-complaint or other initial pleading.

(c) “Court” means the court in which the action is pending.

(d) “Defendant” includes a cross-defendant or other person against whom an action is commenced.

(e) “Plaintiff” includes a cross-complainant or other person by whom an action is commenced.

Comment. Subdivision (a) of Section 583.110 supersedes subdivision (e) of former Section 583. It implements the policy of permitting separate treatment of individual parties and causes of action, where appropriate. See, *e.g.*, *Innovest, Inc. v. Bruckner*, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981) (dismissal of cross-complaint). As used in this chapter, “action” does not include a statement of interest in or claim to property made solely in a responsive pleading. Subdivisions (b), (c), (d), and (e) are new.

§ 583.120. Application of chapter

583.120. (a) This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding.

(b) Notwithstanding subdivision (a), the court may in its discretion apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding.

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, *e.g.*, *Big Bear Mun. Water Dist. v. Superior Court*, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969)

(dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rules of Court 1233 (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inconsistent with the character of a special proceeding such as a decedent's estate. See, *e.g.*, *Horney v. Superior Court*, 83 Cal. App.2d 262, 188 P.2d 552 (1948). In addition, a special proceeding may prescribe different rules. *Cf.* Civil Code § 3147 (discretionary dismissal of action to foreclose mechanics lien).

§ 583.130. Policy statement

583.130. It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires reasonable diligence in the prosecution of an action in construing the provisions of this chapter.

Comment. Section 583.130 is new. It is consistent with statements in the cases of the preference for trial on the merits. See, *e.g.*, *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981); *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975); *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970); *Weeks v. Roberts*, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968).

§ 583.140. Waiver and estoppel

583.140. Nothing in this chapter abrogates or otherwise affects the principles of waiver and estoppel.

Comment. Section 583.140 continues and expands a provision of former Section 581a(f) (1). This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, *e.g.*, *Southern Pac. v. Seaboard Mills*, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962) (waiver of failure to timely bring to trial); *Tresway Aero, Inc. v. Superior Court*, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal.

Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); *Borglund v. Bombardier, Ltd.*, 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); *Holder v. Sheet Metal Worker's Int'l Ass'n*, 121 Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

§ 583.150. Relation of chapter to other law or authority

583.150. This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions under a rule adopted by the court pursuant to Section 575.1 or by the Judicial Council pursuant to statute, or otherwise under inherent authority of the court.

Comment. Section 583.150 makes clear that although this chapter is by its terms limited in scope, it does not affect other law or authority relating to delay in prosecution. See, *e.g.*, Section 575.1 (court rules); Section 583.410 (Judicial Council rules); *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977) (inherent authority). Inherent authority of the court may not be exercised contrary to statute and may not be used to justify a lesser sanction where dismissal is mandated. Sections 583.250 and 583.360 (mandatory dismissal). See, *e.g.*, *Weeks v. Roberts*, 68 Cal.2d 802, 442 P.2d 361, 69 Cal. Rptr. 305 (1968). This chapter is supplemented by general provisions of law such as the right of the defendant to appear and compel discovery and the right of the defendant to set or advance trial date.

§ 583.160. Transitional provisions

583.160. (a) This chapter applies to a motion for dismissal made on or after the effective date of this chapter. A motion for dismissal made before the effective date of this chapter is governed by the applicable law in effect immediately before the effective date and for this purpose the law in effect immediately before the effective date continues in effect.

(b) This chapter does not affect an order dismissing an action made before the effective date of this chapter.

Comment. Section 583.160 expresses the legislative policy of making the provisions of this chapter immediately applicable to the greatest extent practicable, subject to limitations to avoid disturbing prior dismissals and pending motions for dismissal.

Article 2. Mandatory Time for Service of Summons

§ 583.210. Time for service of summons

583.210. (a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service need not be made within the time the summons and complaint must be served upon a defendant, but whether or not so made, proof of service shall be made to the court if relevant to a motion to dismiss under this article.

Comment. Section 583.210 is drawn from the first portions of subdivisions (a) and (b) of former Section 581a. Unlike the former provisions, Section 583.210 does not require return of summons within the time required for service. For exceptions and exclusions, see Sections 583.220 (general appearance), 583.230 (extension of time), and 583.240 (computation of time). Section 583.210 is consistent with Section 411.10 (civil action commenced by filing complaint) and applies to a cross-complaint from the time the cross-complaint is filed. See Section 583.110 (“action” and “complaint” defined). Section 583.210 applies to a defendant sued by a fictitious name from the time the complaint is filed and to a defendant added by amendment of the complaint from the time the amendment is made. See, *e.g.*, *Austin v. Mass. Bonding & Ins. Co.*, 56 Cal.2d 596, 364 P.2d 681, 15 Cal. Rptr. 817 (1961); *Elling Corp. v. Superior Court*, 48 Cal. App.3d 89, 123 Cal. Rptr. 734 (1975); *Warren v. A.T. & S.F. Ry. Co.*, 19 Cal. App.3d 24, 96 Cal. Rptr. 317 (1971); *Lesko v. Superior Court*, 127 Cal. App.3d 476, 179 Cal. Rptr. 595 (1982).

§ 583.220. General appearance

583.220. The time within which service must be made pursuant to this article does not apply if the defendant enters into a stipulation in writing or does another act that constitutes a general appearance in the action. For the purpose of this section none of the following constitutes a general appearance in the action:

(a) A stipulation pursuant to Section 583.230 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Section 583.220 continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purpose of this section by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, *e.g.*, *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, *e.g.*, *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); *Pease v. City of San Diego*, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Section 583.220 applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 (“action” and “defendant” defined).

§ 583.230. Extension of time

583.230. The parties may extend the time within which service must be made pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral agreement made in open court, if entered in the minutes of the court or a transcript is made.

Comment. Subdivision (a) of Section 583.230 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive. Subdivision (b) is consistent with Section 583.330(b) (extension of time).

§ 583.240. Computation of time

583.240. In computing the time within which service shall be made pursuant to this article, there shall be

excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Subdivision (d) continues the substance of subdivision (f) (2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence. Contrast Section 583.340 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130—plaintiff must exercise diligence—and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) continues the substance of a portion of former Section 581a(f), making clear the meaning of "jurisdictional" as it was used in the former provision.

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. Time for trial

583.310. An action shall be brought to trial within five years after the action is commenced against the defendant.

Comment. Section 583.310 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.330 (extension of time) and 583.340 (computation of time).

§ 583.320. Time for new trial

583.320. (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.310.

Comment. Section 583.320 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.330 (extension of time) and 583.340 (computation of time).

§ 583.330. Extension of time

583.330. The parties may extend the time within which an action must be brought to trial pursuant to this article by the following means:

(a) By written stipulation. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

(b) By oral agreement made in open court, if entered in the minutes of the court or a transcript is made.

Comment. Subdivision (a) of Section 583.330 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, *e.g.*, cases cited in *Good v. State*, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316 (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive. Subdivision (b) codifies existing case law. See, *e.g.*, *Govea v. Superior Court*, 26 Cal. App.2d 27, 78 P.2d 433 (1938); *Preiss v. Good Samaritan Hospital*, 171 Cal. App.2d 559, 340 P.2d 661 (1959).

§ 583.340. Computation of time

583.340. In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.340 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law. See, *e.g.*, *Marcus v. Superior Court*, 75 Cal. App.3d 204, 141 Cal. Rptr. 890 (1977).

Subdivision (c) codifies the case law “impossible, impractical, or futile” standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

§ 583.350. Extension where less than six months remains

583.350. If the time within which an action must be brought to trial pursuant to this article is tolled or otherwise extended pursuant to statute with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension.

Comment. Section 583.350 provides an extension of time for a plaintiff to bring an action to trial where a period of tolling operates in such a way that at the end of the period the plaintiff would have less than six months to obtain a trial. In this situation the plaintiff has six months within which to bring the action to trial. Section 583.350 is consistent with the rule applicable to judicial arbitration. Section 1141.17. It is intended to cure problems in other cases as well where the statutory period in which to bring the action to trial is extended pursuant to statute. See, e.g., Section 583.340 (computation of time).

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.

Comment. Subdivision (a) of Section 583.360 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion).

§ 583.420. Time for discretionary dismissal

583.420. (a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

(2) The action is not brought to trial within three years after the action is commenced against the defendant.

(3) A new trial is granted and the action is not again brought to trial within the following times:

(A) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court

declaring the mistrial or the disagreement of the jury is entered.

(B) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

(C) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

(b) The times provided in subdivision (a) shall be computed in the manner provided for computation of the comparable times under Articles 2 (commencing with Section 583.210) and 3 (commencing with Section 583.310).

Comment. Subdivision (a)(1) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service. See, *e.g.*, *Black Bros. Co. v. Superior Court*, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service) (disapproved on other grounds in *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

Subdivision (a)(2) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (a)(3) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, *e.g.*, *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority

under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement). The authority of the court to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.

Code of Civil Procedure § 1141.17 (technical amendment).

Tolling limitation on dismissal for lack of prosecution

SEC. 6. Section 1141.17 of the Code of Civil Procedure is amended to read:

1141.17. (a) Submission of an action to arbitration pursuant to this chapter shall not suspend the running of the time periods specified in ~~Section 583~~ *Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2*, except as provided in this section.

(b) If an action is or remains submitted to arbitration pursuant to this chapter more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under Section 1141.20 shall not be included in computing the five-year period specified in ~~subdivision (b) of Section 583~~ *Section 583.310*.

Comment. Section 1141.17 is amended to correct section references. The rule stated in Section 1141.17 is consistent with Section 583.350 (extension where less than six months remains).

Revenue and Taxation Code § 3638 (technical amendment). Dismissal for delay in bringing to trial

SEC. 7. Section 3638 of the Revenue and Taxation Code is amended to read:

3638. ~~Any proceedings heretofore or hereafter~~ *An action* commenced under this chapter shall be dismissed by the court in which ~~the same shall have been~~ *it is* commenced or to which it ~~may be~~ *is* transferred on motion of the defendant after due notice to plaintiff, or by

the court upon its own motion, unless ~~such~~ *the* action is brought to trial within one year after the plaintiff has filed ~~his~~ *the* action, except where the parties have stipulated, in writing, that the time may be extended. ~~Section 582, Chapter 1.5 (commencing with Section 583.110) of Title 8 of Part 2 of the Code of Civil Procedure shall~~ does not apply to ~~actions~~ *an action* commenced under this chapter.

Comment. Section 3638 is amended to correct a section reference. The other changes in Section 3638 are also technical.

APPENDIX XIII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Severance of Joint Tenancy

November 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Severance of Joint Tenancy*, 17 Cal. L. Revision Comm'n Reports 941 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

November 5, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith submits its recommendation to codify the rule that a joint tenant may sever a joint tenancy by written declaration and to require that a severance be recorded to be effective. This recommendation is made pursuant to 1983 Cal. Stats. res. ch. 40 (law relating to real and personal property).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

SEVERANCE OF JOINT TENANCY

If a joint tenant of real or personal property wishes to sever the joint tenancy (thereby destroying the right of survivorship), this can be done in two ways under existing California law:

(1) If the property is located in most parts of California, the joint tenant must use the traditional technique of conveyance and reconveyance of his or her interest to and from a strawman.¹

(2) If the property is located in the First or Second Appellate District, the joint tenant may sever the joint tenancy by a unilateral conveyance to himself or herself as a tenant in common.²

The strawman conveyance is a legal fiction designed to satisfy feudal technicalities that have no contemporary application. It requires the use of two documents where one will suffice. In the case of a real property joint tenancy it may trigger a property tax reassessment.³

The law should codify the rule allowing severance of joint tenancy by written declaration. However, severance of a real property joint tenancy of record should be recorded in order to be effective. This will minimize the opportunity for deceit.⁴

¹ Clark v. Carter, 265 Cal. App.2d 291, 70 Cal. Rptr. 923 (1968); Estate of Dean, 109 Cal. App.3d 156, 167 Cal. Rptr. 138 (1980).

² Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980) (1st App. Dist.); Estate of Carpenter, 140 Cal. App.3d 709, 189 Cal. Rptr. 651 (1983) (2d App. Dist.); Estate of Grigsby, 134 Cal. App.3d 611, 184 Cal. Rptr. 886 (1982) (2d App. Dist.). See Letter, "Riddle in, Clark out?", Cal. Lawyer, February 1983, at 8-9.

³ Rev. & Tax. Code §§ 61(d), 62(f), 63, 65 (change in ownership for purpose of implementation of Article XIII A of California Constitution).

⁴ Otherwise, there is a danger that a joint tenant may execute a secret severance and make a will disposing of his or her interest; then, if the other joint tenant dies first, the severing joint tenant simply destroys the secret document and takes the whole property by survivorship.

This recommendation would be effectuated by enactment of the following measure:

An act to add Section 683.2 to the Civil Code, relating to joint interests in property.

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

SECTION 1. Section 683.2 is added to the Civil Code, to read:

683.2. (a) In addition to any act that terminates ownership of a joint interest in property, a joint tenant may sever a joint tenancy as to the joint tenant's interest by executing a written declaration of severance. Except as provided in subdivision (b), a severance by written declaration is effective at the time of execution of the written declaration.

(b) In the case of joint tenancy of record in real property, a severance by written declaration, deed, or other instrument is not effective until it is recorded, unless it is executed by all joint tenants.

Comment. Subdivision (a) of Section 683.2 codifies case law holdings that a "strawman" conveyance is not necessary to sever a joint tenancy by unilateral act of a joint tenant. See, *e.g.*, *Riddle v. Harmon*, 102 Cal. App.3d 524, 162 Cal. Rptr. 530 (1980). The severance is effective only as between the severing joint tenant and the remaining joint tenants at the time of execution of the declaration of severance. In the case of a recorded real property joint tenancy, severance by written declaration or by other instrument must be recorded during the lifetime of the severing joint tenant to be effective, unless all joint tenants have joined. Subdivision (b). For other means of severance of joint tenancy, see, *e.g.*, Code Civ. Proc. § 872.210 (partition of property owned by several persons concurrently).

SEC. 2. This act applies to all property held in joint tenancy, whether the joint tenancy was created before, on, or after the operative date of this act. This act does not affect the validity of a severance validly made under the law in effect at the time of the severance.

APPENDIX XIV
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Effect of Quiet Title and
Partition Judgments

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Effect of Quiet Title and Partition Judgments*, 17 Cal. L. Revision Comm'n Reports 947 (1984).

CALIFORNIA LAW REVISION COMMISSION

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BEATRICE P. LAWSON

September 22, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission has maintained a continuing review of the quiet title and partition statutes since their enactment upon Commission recommendation. The Commission has discovered a few technical defects in the provisions governing the effect of quiet title and partition judgments and herewith submits recommendations for cure of the defects. These recommendations are made pursuant to authority of 1983 Cal. Stats. res. ch. 40 (law relating to real and personal property).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

EFFECT OF QUIET TITLE AND PARTITION JUDGMENTS

The Law Revision Commission has maintained a continuing review of the quiet title and partition statutes since their enactment upon Commission recommendation.¹ The Commission has discovered a few technical defects in the provisions governing the effect of the quiet title and partition judgments.² The Commission recommends that the defects be cured in the manner set out in the following draft. Explanatory comments are included in the draft.

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

An act to amend Sections 764.030 and 874.210 of, to add Sections 764.045 and 874.225 to, and to repeal Sections 764.040, 764.050, 874.220, and 874.230 of, the Code of Civil Procedure, relating to judgments in property actions.

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

SECTION 1. Section 764.030 of the Code of Civil Procedure is amended to read:

764.030. The judgment in the action is binding and conclusive on all of the following persons, regardless of any legal disability:

(a) All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided.

¹ 1980 Cal. Stats. ch. 44, § 15; *Recommendation Relating to Quiet Title Actions*, 15 Cal. L. Revision Comm'n Reports 1187 (1980). 1976 Cal. Stats. ch. 73, § 6; *Recommendation Relating to Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976).

² The Commission is indebted to Mr. Richard F. Weiner of Los Angeles for calling these matters to the Commission's attention.

(b) Except as provided in Section ~~764.050~~ 764.045, all persons who were not parties to the action and who have any claim to the property which was not of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

~~(c) All persons claiming under any of the foregoing persons.~~

Comment. Subdivision (b) of Section 764.030 is amended to correct a section reference. Subdivision (c) is deleted because it added nothing to subdivisions (a) and (b) and was inconsistent with Section 764.045 (persons not bound by judgment) in certain cases.

SEC. 2. Section 764.040 of the Code of Civil Procedure is repealed.

~~764.040. The judgment does not affect the claim of any person who was not a party to the action and who had a claim of record in the property or part thereof at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.~~

Comment. The substance of former Section 764.040 is continued in Section 764.045, with the clarification that a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a)(2).

SEC. 3. Section 764.045 is added to the Code of Civil Procedure, to read:

764.045. Except to the extent provided in Section 1908, the judgment does not affect a claim in the property or part thereof of any person who was not a party to the action if any of the following conditions is satisfied:

(a) The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

(b) The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed or, if none was filed, at the time the judgment was entered. Nothing in this subdivision shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest.

Comment. Subdivision (a) of Section 764.045 continues the substance of former Section 764.040. Subdivision (b) continues the substance of former Section 764.050, with clarifications relating to the time of the plaintiff's knowledge. The introductory portion of Section 764.045 makes clear that notwithstanding the provisions of this section, a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a) (2).

SEC. 4. Section 764.050 of the Code of Civil Procedure is repealed.

~~**764.050.** If a person having an unrecorded claim in the property or part thereof was not a party to the action but the claim was actually known to the plaintiff at any time before entry of judgment or would have been reasonably apparent from an inspection of the property, the judgment does not affect the claim of the person. Nothing in this section shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value of the property.~~

Comment. The substance of former Section 764.050 is continued in Section 764.045, with clarifications relating to the time of the plaintiff's knowledge. Section 764.045 also makes clear that a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a) (2).

SEC. 5. Section 874.210 of the Code of Civil Procedure is amended to read:

874.210. The judgment in the action is binding and conclusive on all of the following:

(a) All persons known and unknown who were parties to the action and who have or claim any interest in the property, whether present or future, vested or contingent, legal or beneficial, several or undivided.

(b) All persons not in being or not ascertainable at the time the judgment is entered who have any remainder interest in the property, or any part thereof, after the determination of a particular estate therein and who by any contingency may be entitled to a beneficial interest in the property, provided the judge shall make appropriate provision for the protection of such interests.

(c) Except as provided in Section ~~874.220~~ 874.225, all persons who were not parties to the action and who have or claim any interest in the property which was not of record at the time the lis pendens was filed, or if none was filed, at the time the judgment was recorded.

~~(d) All persons claiming under any of the foregoing persons.~~

Comment. Subdivision (c) of Section 874.210 is amended to correct a section reference. Subdivision (d) is deleted because it added nothing to subdivisions (a)-(c) and was inconsistent with Section 874.225 (persons not bound by judgment) in certain cases.

SEC. 6. Section 874.220 of the Code of Civil Procedure is repealed.

~~874.220. The judgment does not affect the interest of any person who was not a party to the action and who had an interest of record in the property or part thereof at the time the lis pendens was filed, or if none was filed, at the time the judgment was recorded.~~

Comment. The substance of former Section 874.220 is continued in Section 874.225, with the clarification that a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a)(2).

SEC. 7. Section 874.225 is added to the Code of Civil Procedure, to read:

874.225. Except to the extent provided in Section 1908, the judgment does not affect a claim in the property or part thereof of any person who was not a party to the action if any of the following conditions is satisfied:

(a) The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

(b) The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed or, if none was filed, at the time the judgment was entered. For the purpose of this subdivision, a "claim in the property or part thereof" of any person means the interest of the person in

the portion of the property or proceeds of sale thereof allocated to the plaintiff. Nothing in this subdivision shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest.

Comment. Subdivision (a) of Section 874.225 continues the substance of former Section 874.220.

Subdivision (b) continues the substance of former Section 874.230, with clarifications relating to the time of the plaintiff's knowledge. Subdivision (b) 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. Subdivision (b) 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 subdivision (b) 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.

The introductory portion of Section 874.225 makes clear that notwithstanding the provisions of this section, a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a)(2).

SEC. 8. Section 874.230 of the Code of Civil Procedure is repealed.

874.230. Where a person having or claiming an unrecorded interest in the property or part thereof was not a party to the action but the existence or claim of the interest was actually known to the plaintiff at any time before entry of the interlocutory judgment or would have been reasonably apparent from an inspection of the property, the judgment does not affect the interest of such person in the portion of the property or proceeds of sale thereof allocated to the plaintiff. Nothing in this section shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or his successors in interest.

Comment. The substance of former Section 874.230 is continued in Section 874.225, with clarifications relating to the

time of the plaintiff's knowledge. Section 874.225 also makes clear that a claimant may be bound by the proceeding if a claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding. Section 1908(a)(2).

APPENDIX XV
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Dormant Mineral Rights

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Dormant Mineral Rights*, 17 Cal. L. Revision Comm'n Reports 957 (1984).

CALIFORNIA LAW REVISION COMMISSION

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September 22, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The first of a series of statutes was enacted upon recommendation of the Law Revision Commission in 1983 to achieve greater marketability of title by removing the cloud on title created by obsolete interests of record. The Commission herewith submits its recommendation to deal with dormant mineral rights, a property interest not dealt with in the Commission's earlier proposals. This recommendation is submitted pursuant to 1983 Cal. Stats. res. ch. 40 (law relating to real and personal property).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

DORMANT MINERAL RIGHTS

It is a common occurrence in California conveyancing that a grantor of real property reserves mineral rights from the grant, even though there may be no reasonably foreseeable possibility that the rights will ever be exploited.¹ The pattern of large-scale reservation of mineral rights on a speculative basis leaves many titles unnecessarily clouded and substantially impairs the marketability of otherwise useful real property.²

This situation can persist indefinitely, since severed mineral rights can take the form of a fee interest.³ Even a grant of minerals following a typical reservation of mineral rights that by its terms is limited in duration may violate the Rule Against Perpetuities, so that what appears to be a limited mineral right is in fact a perpetual mineral right.⁴

¹ See, e.g., Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 853 (1970); Comment, *Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227, 1231-32 (1969) ("Although there appear to be no statistics on the extent of the severance, it is a matter of common knowledge that mineral rights have been severed from large amounts of surface acreage in mineral-producing states.").

² See, e.g., L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 241 (1960) ("Such interests are widely acquired on a speculative basis and present an intolerable situation after they have proved to be worthless.").

³ Grants or reservations of mineral rights can take innumerable forms including but not limited to a mineral interest, leasehold, easement, profit a prendre, rents, and royalties. California law distinguishes between fixed-location minerals such as ore, metal, and coal which are owned by the surface owner and which can be severed from the surface and conveyed in fee, and fugacious minerals such as oil and gas which are not owned by the surface owner and cannot be conveyed as a fee estate but only as a profit a prendre, a type of incorporeal hereditament. See, e.g., *In re Waltz*, 197 Cal. 263, 240 P. 19 (1925); *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788 (1935). A profit a prendre may be unlimited in duration by its terms, but is subject to abandonment. See, e.g., *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 52 P.2d 237 (1935); *Gerhard v. Stephens*, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

⁴ See, e.g., *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App.2d 222, 270 P.2d 604 (1954) (executory interest following reservation of mineral rights that "shall continue for a period of twenty (20) years, and so long thereafter as oil, gas, or other minerals may or shall be produced therefrom in paying quantities" violates Rule Against Perpetuities). But see *Rousselot v. Spanier*, 60 Cal. App.3d 238, 131 Cal. Rptr. 438 (1976).

The impairment of marketability caused by dormant mineral rights affects both surface and subsurface interests. A conveyance of subsurface mineral rights includes the right of access over the surface and restricts the use of the surface. The surface ownership "may be burdened in part, and, in very rare cases perhaps, in its totality, by the reasonable exercise of the rights of the owner of the oil and mineral estate."⁵ Old mineral rights created in the 19th century can adversely affect the development of the surface in the 20th century despite changed conditions that have made development of the surface of greater importance to society as a whole than the undeveloped mineral rights and that have made the value of the undeveloped mineral rights insignificant in comparison with the value of the surface.⁶

Dormant mineral rights also impede development of the subsurface minerals. The existence of a dormant mineral interest discourages drilling and other mineral exploration efforts by increasing the risks associated with such operations: the owners of the interests are often difficult to identify and locate, and mineral exploiters face the possibility of severe penalties if they drill without obtaining the consent of all the mineral-rights owners, for example, by a requirement of accounting to nonconsenting owners (who run no risk) for a share of production.⁷

The impediment of dormant mineral rights on both surface and subsurface interests can make the real property practically unmarketable. When it becomes necessary or economically desirable to put together a full and unencumbered fee title, identifying and locating the owners of the retained mineral interest may be an impossible task. Negotiating for its purchase is often difficult, since the value of the mineral interest as an impairment of the fee title may exceed its intrinsic value as a source of possible future income from mineral exploitation. Where the mineral interests are owned in fee, quiet title actions are generally ineffective to clear title,

⁵ *Wall v. Shell Oil Co.*, 209 Cal. App.2d 504, 513, 25 Cal. Rptr. 908, 913 (1962).

⁶ See Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 Loy. L.A. L. Rev. 136, 147-48 (1969).

⁷ See Comment, *Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227, 1231-33 (1969).

since normal surface use is not hostile to severed mineral rights and therefore does not constitute adverse possession.⁸

The California Supreme Court has held in *Gerhard v. Stephens*⁹ that since mineral interests in oil and gas are a profit a prendre, a type of incorporeal hereditament,¹⁰ the mineral interests are subject to abandonment based on nonuse and intent to abandon:¹¹

Commentators have noted that "The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interest of long standing, the existence of which may impede exploration or development of the premises by reason of difficulty of ascertainment of present owners or of difficulty of obtaining the joinder of such owners."

As stated in *Dabney-Johnston*, "the use of different terms of description may give rise to different legal incidents . . ." By describing rights identical to those granted to the corporations as incorporeal hereditaments our court foreordained the conclusion we now reach. Moreover, a ruling that incorporeal hereditaments of the type involved here may be abandoned tends to promote the marketability of title by facilitating the clearing of titles. To that extent it better fulfills the demands of a modern economic order. Further, it reduces the possibility of the resurrection of the ghosts of abandoned claims by which title searchers and forgotten owners collect the windfalls of accidental profit.

Gerhard v. Stephens does not offer a completely satisfactory solution to the problem of dormant mineral rights. It requires a judicial determination of intent to abandon. In *Gerhard*, for example, the court held that 47 years of nonuser, coupled with such a number of cotenancy interests that a court appointed receiver would be needed for development, was not sufficient to show abandonment as to all mineral interests.¹² It appears that abandonment

⁸ See Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 853-54 (1970).

⁹ 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

¹⁰ See *supra* note 3.

¹¹ 68 Cal.2d at 887-89, 442 P.2d at 711-12, 69 Cal. Rptr. at 631-32 (citations omitted).

¹² 68 Cal.2d at 893-95, 442 P.2d at 716-17, 69 Cal. Rptr. at 635-36.

will be a useful basis for clearing title only infrequently.¹³ Moreover, the possibility that there has been an off-record abandonment may have the effect of clouding otherwise good record titles to mineral rights.¹⁴

Gerhard v. Stephens by its terms applies only to those mineral rights in fugacious minerals which are incorporeal hereditaments and therefore subject to abandonment.¹⁵ Presumably mineral rights in nonfugacious minerals, which may take the form of a severed fee, are not subject to abandonment. Where a grant or reservation of mineral rights includes both fugacious and nonfugacious minerals, the grant apparently would be subject to abandonment only in part.¹⁶

In an effort to deal by statute with marketability problems, California has enacted a provision to enable termination of surface entry rights under a 20-year old oil and gas lease in certain counties where this will not adversely affect the operations of the oil and gas lessee,¹⁷ and has limited a lease of land for production of oil and gas on other lands to 99 years.¹⁸ However, these efforts to improve marketability of property subject to mineral rights are piecemeal and narrow in scope.

An extensive body of legal literature demonstrates the need for a more effective means of clearing land titles of dormant mineral rights.¹⁹ Subjecting dormant mineral rights to termination is in the public interest and further legislative intervention in the continuing conflict between mineral and surface interests is necessary. More than

¹³ See, e.g., Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 856 (1970).

¹⁴ See, e.g., Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 Loy. L.A. L. Rev. 136, 150 (1969).

¹⁵ See, e.g., Comment, *Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227 (1969).

¹⁶ See, e.g., Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 854-56 (1970); Comment, *Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227, 1233-35 (1969); Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 Loy. L.A. L. Rev. 136, 150 (1969).

¹⁷ 1971 Cal. Stats. ch. 1586, § 1, now codified as Code Civ. Proc. §§ 772.010-772.060.

¹⁸ Civil Code § 718f.

¹⁹ See, e.g., P. Basye, *Clearing Land Titles* § 38 (2d ed. 1970); L. Simes & C. Taylor, *The Improvement of Conveyancing by Legislation* 239-47 (1960); Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835 (1970); Comment, *Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227 (1969); Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 Loy. L.A. L. Rev. 136 (1969). For a more extensive bibliography, see 1 H. Williams & C. Meyers, *Oil and Gas Law* § 216.7 n.1 (1981).

one-fourth of the states have now enacted special statutes to enable termination of dormant mineral rights,²⁰ and most of the nearly two dozen states that now have marketable title acts apply the acts to mineral rights.²¹

The statutes of other jurisdictions that have confronted the problem of dormant mineral interests offer two basic models. One model is based on nonuse: a mineral right is extinguished if there have been no operations for mineral production within a recent period of time, for example, within 10 or 20 years.²² The major attraction of this model is that it enables extinguishment of dormant rights solely on the basis of nonuse; proof of intent to abandon is unnecessary. The major drawbacks of this model are that it requires resort to facts outside the record and that it requires a judicial proceeding to determine the fact of nonuse.²³ This model also precludes long-term holding of mineral rights for such purposes as future development, future price increases that will make development feasible, or assurance by a conservation organization or subdivider that the mineral rights will not be exploited.²⁴

The other major statutory model is based on passage of time without recording—a mineral right is extinguished a certain period of time after it is recorded, for example 30 years, unless during that period a notice of intent to preserve the interest is recorded.²⁵ The virtues of this model are that it enables clearing of title on the basis of facts in the record and without resort to judicial action, and it keeps the record mineral ownership current. Its major disadvantages

²⁰ For discussions of the statutes, see, e.g., P. Basye, *Clearing Land Titles* § 38 (2d ed. 1970); 1 H. Williams & C. Meyers, *Oil and Gas Law* § 216.7 (1981); Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 *Loy. L.A. L. Rev.* 136, 142-44 (1969).

²¹ See discussion in P. Basye, *Clearing Land Titles* §§ 171-193 (2d ed. 1970; Supp. 1979). The Uniform Simplification of Land Transfers Act (1977) follows the Model Marketable Title Act in making no exception for mineral interests (although providing an optional provision excepting mineral interests—Section 3-306(5)). The Uniform Act notes that whether or not the exception should be made is the “most controversial issue” with respect to marketable title legislation.

²² See, e.g., *La. Civ. Code Ann. arts. 789, 3546* (1973).

²³ Even a marginal effort by the mineral owner will keep the interest alive. See Comment, *The Oil and Gas A Prendre: What Effect on California Land?*, 2 *Loy. L.A. L. Rev.* 136, 142-44 (1969).

²⁴ See Willemsen, *Improving California's Quiet Title Laws*, 21 *Hastings L.J.* 835, 860 (1970).

²⁵ See, e.g., *Ind. Code Ann. § 32-5-11-1* (1979); 1983 *Oregon Leg. Ass., HB 2578*.

are that it permits an inactive mineral owner to preserve the mineral rights on a purely speculative basis and to hold out for nuisance money indefinitely,²⁶ and it creates the possibility that actively producing mineral rights will be lost through an inadvertent failure to record a notice of intent to preserve the mineral rights. Although this model has been criticized as a taking of property without notice or compensation, the United States Supreme Court has held that it satisfies constitutional requirements of due process.²⁷

In addition to the two basic models, there are numerous variants and combinations of the two,²⁸ as well as statutes designed to enable development of mineral rights while protecting the interests of absent or unknown owners.²⁹

Of the various available alternatives, the Law Revision Commission recommends a statute that combines the protections of the mineral rights owner while still enabling termination of dormant mineral rights. Under this statute, an action could be brought to terminate mineral rights that have been dormant for 20 years, provided the record also evidences no activity involving the minerals during that period, the holder of the mineral rights fails to record a notice of intent to preserve the mineral rights within that period, and no taxes are paid on the mineral rights within that period. This is analogous to the practice under many oil and gas leases of an express requirement that the holder of the mineral rights proceed diligently or the lease terminates.³⁰ To protect the interests of a person who through inadvertence fails to record, the statute provides that where the mineral right has substantial value, the court has discretion to permit late recording or to award compensation for the value of the right taken, on an

²⁶ See Willemsen, *Improving California's Quiet Title Laws*, 21 Hastings L.J. 835, 860 (1970).

²⁷ *Texaco v. Short*, 102 S. Ct. 781 (1982).

²⁸ See, e.g., Mich. Stat. Ann. § 26.1163(1)-(4) (Callaghan 1982); 1983 Kan. Sess. L. ch. 185, p. 1039.

²⁹ See, e.g., Kan. Stat. Ann. § 55-219 *et seq.* (1976); Miss. Code Ann. § 11-17-33 (1972); Neb. Rev. Stat. §§ 57-210 to 57-212.01 (1978); Okla. Stat. Ann. tit. 52, §§ 521-523 (1969); Tex. Rev. Civ. Stat. Ann. art. 2320b (1971).

³⁰ See 1 A. Bowman, *Ogden's Revised California Real Property Law* § 12.42 (1974). The lease ties up the lessor's property for a long period and failure to develop its production involves the danger of depletion of the oil by wells on adjoining lands. See 3 B. Witkin, *Summary of California Law Real Property* § 557 (8th ed. 1973).

equitable basis. This provision will be inapplicable in most cases, since the value of most dormant mineral rights is nominal or zero.

This procedure will assure that active or valuable mineral interests are protected, but will not place an undue burden on marketability. In addition, there should be a five-year grace period for owners of mineral rights to record a notice of intent to preserve rights that would be immediately or within a short period affected by enactment of the statute. The combination of these protections will help ensure the fairness of the statute, even though they are not constitutionally required.³¹

Because titles in California have been clouded over the years on a mass basis by reservation of mineral rights, such a statute will enable the gradual clearing of title records in appropriate cases. Comparable statutes have been criticized on the ground that the major holders of mineral interests will be unlikely to let their interests lapse by failure to record a notice of intent to preserve their interest, thereby rendering the statute ineffective.³² The Commission believes that a person who desires to preserve a valid mineral interest and who takes active steps to preserve the interest by recording, payment of taxes, or mineral operations, should be permitted to do so.

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

An act to add Chapter 3 (commencing with Section 883.110) to Title 5 of Part 2 of Division 2 of, and to repeal Section 794 of, the Civil Code, relating to mineral rights.

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

³¹ Cf. *Donlan v. Weaver*, 118 Cal. App.3d 675, 173 Cal. Rptr. 566 (1981) (constitutionality of statute enabling termination of right of surface entry under oil or gas lease).

³² Comment, *The Oil and Gas Profit A Prendre: What Effect on California Land?*, 2 Loy. L.A. L. Rev. 136, 143 (1969).

Civil Code § 794 (repealed)

SECTION 1. Section 794 of the Civil Code is repealed.

~~794. When the term of any oil, gas or other mineral lease has expired, or such a lease has been abandoned by the lessee or his assignee or other successor in interest, the lessee or his assignee or other successor in interest shall, on demand by the lessor or his successor in interest or his heirs or grantees, execute, acknowledge and deliver, or cause to be recorded, a deed quitclaiming all his interest in and to the lands and minerals covered by the terms of the lease; provided, however, that where said expiration or abandonment covers less than the entire interest of said lessee, assignee or successor in and to said land or minerals, such lessee, assignee or successor shall execute, acknowledge and deliver an appropriate instrument or notice of surrender or termination covering that interest which has expired or been abandoned. Failure of the lessee or his assignee or other successor in interest to execute the deed, instrument or notice required by this section within 30 days after demand therefor shall make him liable to the lessor or his successor in interest or his heirs or grantees for all damages which may be sustained by them as a result of his refusal, and for reasonable attorney's fees to be fixed by the court. He shall also forfeit the sum of one hundred fifty dollars (\$150).~~

Comment. The substance of former Section 794 is continued in Section 883.140 (clearing record of expired or abandoned mineral right lease).

Civil Code §§ 883.110-883.270 (added)

SEC. 2. Chapter 3 (commencing with Section 883.110) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

CHAPTER 3. MINERAL RIGHTS**Article 1. General Provisions****§ 883.110. "Mineral right" defined**

883.110. As used in this chapter, "mineral right" means an interest in minerals, regardless of character, whether

fugacious or non-fugacious, organic or inorganic, that is created by grant or reservation, regardless of form, whether a fee or lesser interest, mineral, royalty, or leasehold, absolute or fractional, corporeal or incorporeal, and includes express or implied appurtenant surface rights.

Comment. Section 883.110 defines mineral rights broadly to include a fee interest as well as any lesser interest and to include oil and gas as well as in-place minerals such as ores, metals, and coal. *Cf. In re Waltz*, 197 Cal. 263, 240 P. 19 (1925) (characterizing mineral rights). Section 883.110 also makes clear that for the purposes of this chapter, surface rights appurtenant to a mineral interest are included within the meaning of "mineral right." *Cf. Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788 (1935) (grant of minerals includes implied right of entry to extract them).

§ 883.120. Federal mineral reservations excluded

883.120. (a) This chapter does not apply to a mineral right reserved to the United States (whether in a patent, pursuant to federal law, or otherwise) or to an oil or gas lease, mining claim, or other mineral right of a person entitled pursuant thereto, to the extent provided in Section 880.240.

(b) This chapter does not apply to a mineral right of the state or a local public entity, or of any other person, to the extent provided in Section 880.240.

Comment. Section 883.120 is a specific application of Section 880.240 (interest of United States and other interests not subject to expiration), and is included for purposes of cross-referencing.

§ 883.130. Law governing abandonment not affected

883.130. Nothing in this chapter limits or affects the common law governing abandonment of a mineral right or any other procedure provided by statute for clearing an abandoned mineral right from title to real property.

Comment. Section 883.130 makes clear that although this chapter includes a statute by which a dormant mineral right may be terminated (see Sections 883.210-883.270), this chapter is not intended to limit the common law of abandonment of mineral rights. See, e.g., *Gerhard v. Stephens*, 68 Cal.2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968) (mineral right in oil and gas subject to abandonment). Thus, for example, nothing in this article affects the common law determination of abandonment of an oil or gas

lease. See, *e.g.*, *Banks v. Calstar Petroleum Co.*, 82 Cal. App.2d 789, 187 P.2d 127 (1947); *Berry v. Kelly*, 90 Cal. App.2d 486, 203 P.2d 80 (1949). Nor is this chapter the exclusive means by which title to property may be cleared of an abandoned mineral right. See, *e.g.*, Code Civ. Proc. §§ 760.010-764.070 (quiet title).

§ 883.140. Clearing record of expired or abandoned mineral right lease

883.140. (a) As used in this section:

(1) "Lessee" includes an assignee or other successor in interest of the lessee.

(2) "Lessor" includes a successor in interest or heir or grantee of the lessor.

(b) If the term of a mineral right lease has expired or a mineral right lease has been abandoned by the lessee, the lessee shall, within 30 days after demand therefor by the lessor, execute, acknowledge, and deliver, or cause to be recorded, a deed quitclaiming all interest in and to the mineral rights covered by the lease. If the expiration or abandonment covers less than the entire interest of the lessee, the lessee shall execute, acknowledge, and deliver an appropriate instrument or notice of surrender or termination that covers the interest that has expired or been abandoned.

(c) If the lessee fails to comply with the requirements of this section, the lessee is liable for all damages sustained by the lessor as a result of the failure, including but not limited to court costs and reasonable attorney's fees in an action to clear title to the lessor's interest. The lessee shall also forfeit to the lessor the sum of one hundred fifty dollars (\$150).

(d) Nothing in this section makes a quitclaim deed or other instrument or notice of surrender or termination, or a demand therefor, a condition precedent to an action to clear title to the lessor's interest.

Comment. Section 883.140 continues the substance of former Section 794. *Cf.* Section 886.020 and Comment thereto (release of contract for sale of real property).

Article 2. Termination of Dormant Mineral Right

§ 883.210. Action authorized

883.210. The owner of real property subject to a mineral right may bring an action to terminate the mineral right pursuant to this article if the mineral right is dormant.

Comment. Section 883.210 authorizes termination of dormant mineral rights, subject to the limitations and conditions in this article. This is consistent with public policy to enable and encourage full use and development of real property, including both surface and subsurface interests. Section 880.020 (declaration of policy and purposes). Section 883.210 is also consistent with the common law rule that mineral rights in oil and gas are subject to abandonment, and applies to mineral rights in other substances as well. See Sections 883.110 (“mineral right” defined) and 883.130 (law governing abandonment not affected) and Comments thereto; *cf.* Section 883.140 (clearing record of expired or abandoned mineral right lease). This article supplements common law principles of abandonment by providing a separate and independent basis for terminating a dormant mineral right.

§ 883.220. Dormancy

883.220. For the purpose of this article, a mineral right is dormant if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the action to terminate the mineral right:

(a) There is no production of the minerals and no exploration, drilling, mining, development, or other operations that affect the minerals, whether on or below the surface of the real property or on other property, whether or not unitized or pooled with the real property.

(b) No separate property tax assessment is made of the mineral right or, if made, no taxes are paid on the assessment.

(c) No instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded.

Comment. Section 883.220 defines dormancy for the purpose of this article; it does not affect the common law of abandonment. See Section 883.130 (law governing abandonment not affected).

The 20-year period prescribed in Section 883.220 is consistent with the 20-year period prescribed by statute for termination of a right of entry or occupation of surface lands under an oil or gas lease. Code Civ. Proc. §§ 772.010-772.060. The 20-year period can be extended indefinitely by recordation of a notice of intent to preserve the mineral right. Section 883.230 (preservation of mineral right).

§ 883.230. Preservation of mineral right

883.230. (a) An owner of a mineral right may at any time record a notice of intent to preserve the mineral right.

(b) Notwithstanding any other provision of this title, a mineral right is not dormant for the purpose of this article if:

(1) A notice of intent to preserve the mineral right is recorded within 20 years immediately preceding commencement of the action to terminate the mineral right.

(2) A notice of intent to preserve the mineral right is recorded pursuant to Section 883.250 after commencement of the action to terminate the mineral right.

Comment. Section 883.230 makes recording a notice of intent to preserve a mineral right conclusive evidence of non-dormancy for purposes of this article. Recording a notice of intent to preserve also creates a presumption affecting the burden of proof that the claimant has not abandoned the mineral right for purposes of a determination of abandonment pursuant to common law. Section 880.310 (notice of intent to preserve interest).

§ 883.240. Court procedure

883.240. (a) An action to terminate a mineral right pursuant to this article shall be brought in the superior court of the county in which the real property subject to the mineral right is located.

(b) The action shall be brought in the same manner and shall be subject to the same procedure as an action to quiet title pursuant to Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure, to the extent applicable.

Comment. Section 883.240 incorporates, insofar as applicable, the general quiet title procedures for an action to terminate a dormant mineral right pursuant to this article. See Code Civ. Proc. §§ 760.010-764.070.

§ 883.250. Discretion of court

883.250. (a) In an action to terminate a mineral right pursuant to this article, if the court determines that the mineral right has substantial value, the court has discretion to require the owner of the real property to compensate the owner of the mineral right for the value of the mineral right as a condition of its termination or to permit the owner of the mineral right to record a late notice of intent to preserve the mineral right as a condition of dismissal of the action.

(b) The court shall not exercise its discretion under this section unless to do so appears equitable under the circumstances of the particular case. In making this determination the court shall take into account all relevant factors, including, but not limited to, the comparative value of the mineral right and its impairment of the marketability of the real property (including use or development of surface or subsurface interests).

(c) For the purpose of this section it is presumed that a mineral right that is dormant does not have substantial value. This presumption is a presumption affecting the burden of proof.

Comment. Section 883.250 provides a limitation on the ability of the owner of real property to terminate a dormant mineral right. This limitation is subject to court discretion on equitable grounds and is applicable only where the value of the mineral right being terminated is substantial.

§ 883.260. Effect of termination

883.260. A mineral right terminated pursuant to this article is unenforceable and is deemed to have expired. A court order terminating a mineral right pursuant to this article is equivalent for all purposes to a conveyance of the mineral right to the owner of the real property.

Comment. Section 883.260 makes clear that termination of a dormant mineral right has the effect of a reconveyance to the

surface owner. See also Section 883.240 (court procedure) and Code Civ. Proc. §§ 764.010-764.070 (effect of quiet title judgment).

§ 883.270. Transitional provision

883.270. Subject to Section 880.370 (grace period for recording notice), this article applies to all mineral rights, whether executed or recorded before, on, or after January 1, 1985.

Comment. Section 883.270 makes clear the legislative intent to apply this article to mineral interests existing on the date this article becomes operative (January 1, 1985). Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a mineral interest that would be subject to termination pursuant to this article before, on, or within five years after the operative date of this article. See Sections 883.230 (preservation of mineral right) and 880.370 (grace period for recording notice) and Comments thereto.

APPENDIX XVI
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Creditors' Remedies

Levy on Joint Deposit Accounts
Issuance of Earnings Withholding Orders
by Registered Process Servers
Protection of Declared Homestead After Owner's Death
Jurisdiction of Condominium Assessment Lien Enforcement
Technical Amendments

November 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Creditors' Remedies*, 17 Cal. L. Revision Comm'n Reports 975 (1984).

CALIFORNIA LAW REVISION COMMISSION

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November 4, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

An Enforcement of Judgments Law was enacted by Chapter 1364 of the Statutes of 1982 upon recommendation of the Law Revision Commission. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980). A related recommendation relating to prejudgment attachment was enacted by Chapter 1198 of the Statutes of 1982. See *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

The Commission has continued to review the law relating to creditors' remedies to determine whether any substantive or technical changes are necessary. As a result of this review, the Commission recommends amendments to simplify the procedure for levying on joint deposit accounts, to permit registered process servers to perform the clerical function of issuing earnings withholding orders, to clarify the protection of declared homesteads after the owner's death, to grant municipal and justice courts jurisdiction of enforcement of condominium assessment liens, and to make some technical revisions.

This recommendation is submitted pursuant to Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The Law Revision Commission has reviewed the experience under the Enforcement of Judgments Law¹ and the related changes in the Attachment Law,² both of which were recently enacted upon recommendation of the Commission.³ As a result of this review, the Commission proposes a number of substantive and technical changes. The more important substantive changes are discussed below; recommended technical changes are explained in the comments to the provisions in the proposed legislation.

Creditor's Undertaking for Levying on Deposit Accounts and Safe Deposit Boxes

The Attachment Law and Enforcement of Judgments Law continue in modified form a provision of former law that required the creditor to furnish an undertaking as a prerequisite to levy on a deposit account or safe deposit box if the account or box stands in the names of both the debtor and a third person or in the name of a third person.⁴ This is the only situation where a prelevy undertaking is required to protect a third person. In all other situations the third person protects his or her rights in the property by making a third-party claim.⁵

¹ 1982 Cal. Stats. ch. 1364 (operative July 1, 1983). See also 1982 Cal. Stats. ch. 497 (conforming changes); 1983 Cal. Stats. ch. 155 (technical revisions).

² 1982 Cal. Stats. ch. 1198 (operative July 1, 1983). See also 1983 Cal. Stats. ch. 155 (technical revisions).

³ See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980); *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982); *Recommendation Relating to Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982).

⁴ Code Civ. Proc. §§ 488.465 (attachment), 700.160 (execution). Exceptions to this requirement are provided where the judgment creditor seeks to levy execution on a deposit account in the name of the judgment debtor and his or her spouse (Section 700.165) or under a fictitious business name (Section 700.167).

⁵ See Code Civ. Proc. §§ 488.110 (third-party claims in attachment), 720.010-720.800 (general third-party claims procedure).

The special undertaking requirement results in a confusing and cumbersome procedure. Consider, for example, a case where the creditor seeks to levy on the debtor's bank accounts. At the outset, if the creditor does not furnish an undertaking, the attempted levy will not reach the debtor's interest in joint accounts. Consequently, a second levy may be required, this time accompanied by an undertaking, or the creditor will have to give an undertaking in the first instance even though it may be unnecessary where the debtor has no joint accounts. If the undertaking has been delivered to the bank at the time of levy, the bank must immediately mail or deliver a notice to the third person stating that the undertaking has been received. The bank holds the undertaking unless instructed by the third person to deliver it somewhere else. Meanwhile, the account is frozen for the amount of the levy until 15 days after the bank gives notice to the third person, or until any objection to the undertaking is determined, whichever is the later time. When the time for objection to the undertaking or for determining the objection has expired, the bank is required to pay over the amount levied upon when notified to do so by the levying officer. This aspect of the procedure results in confusion since the levying officer does not know when the bank gave the required notice to the third person to start the 15-day objection period running. Neither the bank nor the levying officer may know if the third person has made an objection to the undertaking. The bank can not confidently pay over to the levying officer at the end of 15 days from notice to the third person because of the possibility that an objection has been made. Hence, the statute was amended in 1983 to require the levying officer to notify the bank when the holding period has expired.⁶ Just as the bank may not know when the period ends, the levying officer does not know when it begins, since it begins when the bank gives notice to the third person. In some counties, the levying officer requires the creditor to determine the requisite information and instruct the levying officer when to give the second notice to the bank.⁷

⁶ 1983 Cal. Stats. ch. 155, § 14.3, amending Code Civ. Proc. § 700.160.

⁷ See, e.g., "Notice to Judgment Creditor: Third Party Accounts" (Office of the Sheriff, Santa Clara County) (copy available in Commission's office).

The Commission recommends that the special undertaking requirement be repealed. The debtor will be better off without the undertaking requirement since the debtor ultimately must pay the cost of the undertaking premium.⁸ The financial institution is protected since the new laws provide explicitly that the financial institution is not liable for complying with the levy.⁹ The nondebtor joint account holder is protected since the levying officer gives the nondebtor notice of the levy so that the nondebtor may make a third-party claim.¹⁰ In any event, the nondebtor does not forfeit his or her interest in the account by failure to make a third-party claim.¹¹ Elimination of the undertaking requirement will also simplify and streamline the levy process. No longer will there be a need for the minimum 15-day delay built into the existing system.¹² Nor will the levying officer be required to give two notices to the financial institution before the levy is complete.¹³ The financial institution will no longer be required to furnish the levying officer and the creditor with information concerning the time when the institution gave notice to the third person and to hold the undertaking or deliver it pursuant to the third person's instructions.

Issuance of Earnings Withholding Order by Registered Process Server

For many types of levy, the judgment creditor may choose to hire the services of a registered process server to speed the initial service which constitutes the levy.¹⁴

⁸ See Code Civ. Proc. § 685.040.

⁹ Code Civ. Proc. §§ 488.455(d)(1), 448.460(e)(1), 700.140(d)(1), 700.150(e)(1).

¹⁰ Code Civ. Proc. §§ 488.455(b) (notice of attachment to third person), 700.140(b) (notice of execution levy to third person), 720.120 (time for making third-party claim).

¹¹ Code Civ. Proc. § 720.150(b).

¹² An execution levy is made by serving the financial institution with a writ of execution and notice of levy. Code Civ. Proc. § 700.140. The financial institution is not required to pay the levying officer in the case of a deposit account involving a nondebtor, however, until receiving notice to do so from the levying officer. Code Civ. Proc. § 700.160(f). The levying officer may not direct the financial institution to pay until expiration of the 15-day period afforded the nondebtor account holder to object to the creditor's undertaking or until completion of proceedings determining the objection. There is some uncertainty concerning how the levying officer is to know when to give this second notice. See *supra* text accompanying note 7.

¹³ See Code Civ. Proc. §§ 488.465(d), 700.160(d).

¹⁴ See Code Civ. Proc. § 699.080.

However, in the case of a wage garnishment the levying officer must still issue the earnings withholding order before the registered process server can serve it.¹⁵ The requirement that the order be issued by the levying officer may cause a delay of a week or more before the wage garnishment can be made.

The Commission recommends that registered process servers be empowered to issue earnings withholding orders. This is essentially a clerical function; the information on the order is derived from the writ of execution issued by the court clerk and from information supplied by the judgment creditor. Issuance of earnings withholding orders by registered process servers will result in more expeditious wage garnishments and reduce the workload on levying officers.

Protection of Declared Homestead from Creditors After Death of Homestead Owner

Doubt has arisen concerning the extent a declared homestead is protected from creditors when the homestead owner dies.¹⁶ In order to clarify the law, the Commission recommends enactment of a provision that continues the protection afforded a declared homestead before the owner's death in favor of a surviving spouse of the decedent or a member of the decedent's family. The amount of protection against claims of creditors would depend upon the normal rules as applied in the circumstances of the case at the time the exemption needs to be determined.¹⁷

Jurisdiction of Enforcement of Condominium Assessment Liens

Condominium owners may be assessed for the cost of insurance, maintenance of common areas, taxes, and other

¹⁵ In order to garnish a judgment debtor's wages, a judgment creditor must first obtain a writ of execution and then apply to the levying officer for an earnings withholding order. See Code Civ. Proc. §§ 706.101 (e), 706.102.

¹⁶ See Estate of Grigsby, 134 Cal. App.3d 611, 615, 184 Cal. Rptr. 886, 888 (1982) (dictum stating "the declared homestead does not survive the death of one of the spouses"). See also Prob. Code § 667 (enacted by 1983 Cal. Stats. ch. 290, § 1, operative July 15, 1983), to be superseded by Prob. Code § 6528 (enacted by 1983 Cal. Stats. ch. 842, § 55, operative January 1, 1985) (homestead declaration remains effective as to survivor's interest).

¹⁷ See Code Civ. Proc. § 704.730 (amount of homestead exemption).

items.¹⁸ If the assessments are not paid, a notice of assessment may be recorded with the county recorder to create a lien on the condominium.¹⁹ Should the managing body find it necessary to bring an action to foreclose the lien, it appears that the action must be brought in the superior court,²⁰ even though in most cases the amount is likely to be relatively small.

The Commission recommends that the jurisdiction of municipal and justice courts be expanded to include actions to enforce and foreclose condominium assessment liens where the amount of the lien does not exceed \$15,000. Municipal and justice courts already have jurisdiction over enforcement of liens of mechanics, materialmen, laborers, and others, where the amount of the liens does not exceed \$15,000.²¹

Time for Making Objections to Undertakings

If a bond or undertaking is given in an action or proceeding, the beneficiary must make objections within 10 days or the objections are waived.²² Although the 10-day period is appropriate in many cases and protects the beneficiary as well as the principal, in some cases it does not afford adequate time for the beneficiary. This may occur, for example, where a bond or undertaking is properly served on an entity, but by the time the bond or undertaking has been routed to the appropriate litigation department attorney, the time for making an objection has expired. In this situation the beneficiary should be permitted to make a late objection upon a showing of good cause for failure to object to the undertaking within the statutory time limit.

¹⁸ See Civil Code §§ 1355, 1356.

¹⁹ Civil Code § 1356. The lien expires one year after recordation of the notice of assessment, but may be renewed for one additional year by recordation of an extension. *Id.*

²⁰ See Code Civ. Proc. § 86 (jurisdiction of municipal and justice courts); *Holbrook v. Phelan*, 121 Cal. App. Supp. 781, 783, 6 P.2d 356 (1931) (municipal court without jurisdiction to foreclose liens on real property except liens of mechanics, materialmen, artisans and laborers).

²¹ Code Civ. Proc. § 86(a)(6). Liens enforceable in municipal and justice courts under this provision include liens of artisans, contractors, subcontractors, lessors of equipment, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen. See Civil Code § 3110 (incorporated by Code Civ. Proc. § 86(a)(6)).

²² Code Civ. Proc. § 995.930.

Proposed Legislation

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

An act to amend Sections 86, 485.610, 488.080, 488.455, 488.460, 489.210, 491.410, 491.430, 515.010, 515.020, 515.030, 681.030, 695.010, 697.340, 697.390, 699.080, 700.140, 700.150, 704.740, 706.101, 708.110, 708.450, 708.530, and 995.930 of, to add Sections 491.415, 491.470, 704.995, and 706.108 to, and to repeal Sections 488.465, 700.160, 700.165, and 700.167 of, and Chapter 19 (commencing with Section 693.010) of Division 1 of Title 9 of Part 2 of, the Code of Civil Procedure, and to amend Section 26830 of the Government Code, relating to creditors' remedies.

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

Code of Civil Procedure § 86 (amended). Jurisdiction of municipal and justice courts

SECTION 1. Section 86 of the Code of Civil Procedure is amended to read:

86. (a) Each municipal and justice court has original jurisdiction of civil cases and proceedings as follows:

(1) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to fifteen thousand dollars (\$15,000) or less, except cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, except the courts have jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant.

(2) In actions for dissolution of partnership where the total assets of the partnership do not exceed fifteen thousand dollars (\$15,000); in actions of interpleader where the amount of money or the value of the property involved does not exceed fifteen thousand dollars (\$15,000).

(3) In actions to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding fifteen thousand dollars (\$15,000) or property of a value not exceeding fifteen thousand dollars

(\$15,000), paid or delivered under, or in consideration of, the contract; in actions to revise a contract where the relief is sought in an action upon the contract if the court otherwise has jurisdiction of the action.

(4) In all proceedings in forcible entry or forcible or unlawful detainer:

(A) In actions to recover possession of real property where rent is charged, and the amount of the last rental charged is one thousand dollars (\$1,000) per month or less, and the whole amount of damages claimed is fifteen thousand dollars (\$15,000) or less.

(B) In all other actions to recover possession of real property where the rental value is one thousand dollars (\$1,000) per month or less, and the whole amount claimed is fifteen thousand dollars (\$15,000) or less.

(5) In all actions to enforce and foreclose liens on personal property where the amount of the liens is fifteen thousand dollars (\$15,000) or less.

(6) In all actions to enforce and foreclose liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under the provisions of Chapter 2 (commencing with Section 3109) of Title 15 of Part 4 of Division 3 of the Civil Code, *or to enforce and foreclose an assessment lien on a condominium created pursuant to Section 1356 of the Civil Code*, where the amount of the liens is fifteen thousand dollars (\$15,000) or less. However, where an action to enforce the lien is pending in a municipal or justice court, and affects property which is also affected by a similar action pending in a superior court, or where the total amount of the liens sought to be foreclosed against the same property by action or actions in a municipal or justice court aggregates an amount in excess of fifteen thousand dollars (\$15,000) the municipal or justice court in which any such action, or actions, is, or are, pending, upon motion of any interested party, shall order the action or actions pending therein transferred to the proper superior court. Upon the making of the order, the same proceedings shall be taken as are provided by Section 399 with respect to the change of place of trial.

(7) In actions for declaratory relief when brought by way of cross-complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross-complaint in an action or proceeding otherwise within the jurisdiction of the municipal or justice court.

(8) To issue temporary restraining orders and preliminary injunctions, to take accounts, and to appoint receivers where necessary to preserve the property or rights of any party to an action of which the court has jurisdiction; to appoint a receiver and to make any order or perform any act, pursuant to Title 9 (commencing with Section 680.010) of Part 2 (enforcement of judgments); to determine title to personal property seized in an action pending in such court.

(9) In all actions under Article 3 (commencing with Section 708.210) of Chapter 6 of Division 2 of Title 9 of Part 2 for the recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor where the interest claimed adversely is of a value not exceeding fifteen thousand dollars (\$15,000) or the debt denied does not exceed fifteen thousand dollars (\$15,000).

(b) Each municipal and justice court has jurisdiction of cases in equity as follows:

(1) In all cases to try title to personal property when the amount involved is not more than fifteen thousand dollars (\$15,000).

(2) In all cases when equity is pleaded as a defensive matter in any case otherwise properly pending in a municipal or justice court.

(3) To vacate a judgment or order of such municipal or justice court obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect.

(c) In any action that is otherwise within its jurisdiction, the court may impose liability whether the theory upon which liability is sought to be imposed involves legal or equitable principles.

(d) Changes in the jurisdictional ceilings made by amendments to this section at the 1977-78 Regular Session of the Legislature shall not constitute a basis for the transfer to another court of any case pending at the time such changes become operative.

Comment. Subdivision (a)(6) of Section 86 is amended to make clear that the municipal and justice courts have jurisdiction over actions to enforce and foreclose condominium assessment liens to the same extent as actions to enforce and foreclose mechanics' and laborers' liens.

Code of Civil Procedure § 485.610 (technical amendment).

Claim of exemption in attachment

SEC. 2. Section 485.610 of the Code of Civil Procedure is amended to read:

485.610. (a) The defendant may claim an exemption as to real or personal property levied upon pursuant to a writ of attachment issued under this chapter by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9, except that the defendant shall claim the exemption as to personal property not later than 30 days after the levying officer serves the defendant with the notice of attachment describing such property *and may claim an exemption for real property within the time provided in Section 487.030.* For this purpose, references in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 to the "judgment debtor" shall be deemed references to the defendant, and references to the "judgment creditor" shall be deemed references to the plaintiff.

(b) The defendant may claim the exemption provided by subdivision (b) of Section 487.020 within the time provided by subdivision (a) of this section either (1) by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 or (2) by following the procedure set forth in subdivision (c) of Section 482.100 except that the requirement of showing changed circumstances under subdivision (a) of Section 482.100 does not apply.

Comment. Subdivision (a) of Section 485.610 is amended to provide a cross-reference to Section 487.030 which permits claims of exemption for real property to be made at any time before judgment in the action regardless of the time that has expired since the property was attached or notice was given the defendant. This amendment makes no substantive change.

Code of Civil Procedure § 488.080 (technical amendment).

Attachment by registered process server

SEC. 3. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) A registered process server may levy under a writ of attachment on the following types of property:

- (1) Real property, pursuant to Section 488.315.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 488.325.
- (3) Personal property in the custody of a levying officer, pursuant to Section 488.355.
- (4) Equipment of a going business, pursuant to Section 488.375.
- (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, pursuant to Section 488.385.
- (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (8) Deposit accounts, pursuant to Section 488.455 ~~or 488.465~~.
- (9) Property in a safe-deposit box, pursuant to Section 488.460 ~~or 488.465~~.
- (10) Accounts receivable or general intangibles, pursuant to Section 488.470.
- (11) Final money judgments, pursuant to Section 488.480.

(12) Interest of a defendant in personal property in the estate of a decedent, pursuant to Section 488.485.

(b) Before levying under the writ of attachment, the registered process server shall deposit a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do ~~all~~ *both* of the following:

(1) Comply with the applicable levy, posting, and service provisions of Article 2 (commencing with Section 488.300).

~~(2) Deliver any undertaking required by Section 488.465.~~

~~(3)~~ (2) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 483.610.

(d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of attachment.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of attachment on other persons as required by Article 2 (commencing with Section 488.300).

(4) Instructions in writing, as required by the provisions of Section 488.030.

(e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court. The levying officer is not liable for actions taken in conformance with the provisions of this title in reliance on information provided to the levying officer under subdivision (d) except to the extent that the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information provided under subdivision (d).

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivisions (a) and (c) of Section 488.080 are amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.455 (technical amendment).**Attachment of deposit accounts**

SEC. 4. Section 488.455 of the Code of Civil Procedure is amended to read:

488.455. (a) To attach a deposit account, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the deposit account is maintained. The attachment lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the deposit account stands.

(c) ~~Subject to Section 488.465, during~~ *During* the time the attachment lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount attached. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (c).

(e) When the amount attached pursuant to this section is paid to the levying officer, the attachment lien on the attached deposit account terminates.

(f) For the purposes of this section ~~and Section 488.465~~, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, ~~7601.5~~, ~~11203.5~~, ~~6854~~, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 488.455 are amended to reflect the repeal of Section 488.465 and the substitution of Section 6854 of the Financial Code for the sections deleted from subdivision (f) (2).

Code of Civil Procedure § 488.460 (technical amendment).

Attachment of safe-deposit boxes

SEC. 5. Section 488.460 of the Code of Civil Procedure is amended to read:

~~488.460.~~ (a) To attach property in a safe-deposit box, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the safe-deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the safe-deposit box stands.

(c) ~~Subject to Section 488.465, during~~ *During* the time the attachment lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe-deposit box except pursuant to the attachment.

(d) The levying officer may first give the person in whose name the safe-deposit box stands an opportunity to open the safe-deposit box to permit the removal pursuant to the attachment of the attached property. The financial institution may refuse to permit the forcible opening of the safe-deposit box to permit the removal of the attached property unless the plaintiff pays in advance the cost of

forcibly opening the safe-deposit box and of repairing any damage caused thereby.

(e) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) Refusal to permit access to the safe-deposit box by the person in whose name it stands.

(3) Removal of any of the contents of the safe-deposit box pursuant to the attachment.

Comment. Subdivision (c) of Section 488.460 is amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.465
(repealed). Attachment of deposit accounts and
safe-deposit boxes not exclusively in name of
defendant

SEC. 6. Section 488.465 of the Code of Civil Procedure is repealed.

~~488.465.~~ (a) The provisions of this section apply in addition to the provisions of Sections ~~488.455~~ and ~~488.460~~ if any of the following property is attached:

(1) A deposit account standing in the name of a third person or in the names of both the defendant and a third person.

(2) Property in a safe/deposit box standing in the name of a third person or in the names of both the defendant and a third person.

(b) The plaintiff shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the attachment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the attachment of the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision.

If the provisions of this subdivision are not satisfied, the attachment is ineffective and the financial institution shall not comply with the requirements of this section or with the attachment.

(e) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe/deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 4 (commencing with Section 488.600), from the time of levy and delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (e) if no objection to the undertaking is made or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount attached. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe/deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (d).

~~(3) Refusal to permit access to the safe/deposit box by the person in whose name it stands.~~

~~(4) Removal of any of the contents of the safe/deposit box pursuant to the attachment.~~

~~(f) Upon the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the attachment and Sections 488.455 and 488.460 apply.~~

Comment. The requirement of providing an undertaking as a prerequisite for attachment of a deposit account or safe-deposit box not exclusively in the name of the defendant provided in Section 488.465 is repealed. See Sections 488.455(d), 488.460(c) (nonliability of financial institution for complying with levy). The nondefendant holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Section 488.110.

Code of Civil Procedure § 489.210 (amended). Undertaking required

SEC. 7. Section 489.210 of the Code of Civil Procedure is amended to read:

489.210. Before issuance of a writ of attachment ~~or~~, a temporary protective order, *or an order under subdivision (b) of Section 491.415*, the plaintiff shall file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action.

Comment. Section 489.210 is amended to require the giving of an undertaking as a prerequisite to obtaining an order permitting creation of a lien in a pending action.

Code of Civil Procedure § 491.410 (amended). Plaintiff's lien in pending action or proceeding

SEC. 8. Section 491.410 of the Code of Civil Procedure is amended to read:

491.410. (a) ~~If the plaintiff has obtained a right to attach order and~~ the defendant is a party to a pending action or special proceeding, the plaintiff may obtain a lien under this article, to the extent required to secure the amount to be secured by the attachment, on both of the following:

(1) Any cause of action of the defendant for money or property that is the subject of the other action or

proceeding, *if the money or property would be subject to attachment if the defendant prevails in the action or proceeding.*

(2) The rights of the defendant to money or property under any judgment subsequently procured in the other action or proceeding, *if the money or property would be subject to attachment.*

(b) To obtain a lien under this article, the plaintiff shall file **a notice of lien and a copy of the right to attach order** *all of the following* in the other pending action or special proceeding:

(1) *A notice of lien.*

(2) *A copy of the right to attach order.*

(3) *A copy of an order permitting creation of a lien under this article made by the court that issued the right to attach order.*

(c) At the time of the filing under subdivision (b) or promptly thereafter, the plaintiff shall serve on all parties who, prior thereto, have made an appearance in the other action or special proceeding a copy of the notice of lien and a statement of the date when the notice of lien was filed in the other action or special proceeding. Failure to serve all parties as required by this subdivision does not affect the lien created by the filing under subdivision (b), but the rights of a party are not affected by the lien until the party has notice of the lien.

(d) For the purpose of this article, an action or special proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined.

Comment. Subdivision (a) of Section 491.410 is amended to provide that a lien may not be created under this article if the money or property the defendant seeks would not be subject to attachment should the defendant prevail in the action or special proceeding. See, *e.g.*, Section 487.010 (property subject to attachment). Subdivision (b) is amended to require the plaintiff to file a court order permitting creation of a lien under this article.

Code of Civil Procedure § 491.415 (added). Procedure for obtaining orders and determining exemptions

SEC. 9. Section 491.415 is added to the Code of Civil Procedure, to read:

491.415. (a) For the purpose of applying for a right to attach order, the defendant's cause of action that is the subject of the pending action or proceeding and the defendant's rights to money or property under a judgment procured in the action or proceeding shall be treated as property subject to attachment.

(b) At the time the plaintiff applies for a right to attach order, the plaintiff may apply for an order permitting creation of a lien under this article. If the plaintiff has already obtained a right to attach order, an application for an order permitting creation of a lien under this article may be applied for in the same manner as a writ of attachment. As a prerequisite to obtaining an order under this subdivision, the plaintiff shall file an undertaking as provided by Sections 489.210 and 489.220.

(c) The defendant may, but is not required to, claim an exemption in a proceeding initiated by the plaintiff for an order permitting creation of a lien under this article. An exemption may be claimed if the money or property sought by the defendant would be exempt from attachment should the defendant prevail in the other action or proceeding. The exemption shall be claimed and determined pursuant to this subdivision in the same manner as an exemption is claimed and determined upon application for a writ of attachment.

Comment. Subdivision (a) of Section 491.415 facilitates applying for a right to attach order in a situation where the plaintiff seeks to create a lien under this article. See Section 484.020 (application for right to attach order). Subdivision (b) imposes a new requirement that the plaintiff obtain a court order permitting creation of the lien; this requirement is analogous to obtaining a writ of attachment which describes the property to be attached. See Section 488.010 (contents of writ of attachment). Subdivision (b) also makes clear that an undertaking is required. If an undertaking has already been given to obtain a writ of attachment, this provision does not require another undertaking.

Subdivision (c) permits the defendant to make an exemption claim in the proceedings initiated by the plaintiff to obtain a right to attach order and an order permitting creation of a lien in a pending action. This subdivision incorporates the procedures applicable to claiming attachment exemptions generally. The defendant may also claim exemptions pursuant to the procedure provided in Section 491.470, if the exemption has not been determined under subdivision (c) of Section 491.415. Proceedings under Section 491.415 are in the court where the plaintiff's action against the defendant is pending, whereas proceedings under Section 491.470 are in the court where the action involving the defendant's right to money or property is pending.

Code of Civil Procedure § 491.430 (technical amendment).

Plaintiff deemed a party for certain purposes

SEC. 10. Section 491.430 of the Code of Civil Procedure is amended to read:

491.430. (a) The court in which the action or special proceeding subject to the lien under this article is pending may permit the plaintiff who has obtained the lien to intervene in the action or proceeding pursuant to Section 387.

(b) For the ~~purpose~~ *purposes* of subdivision (a) of Section 491.460 *and of Section 491.470*, a plaintiff shall be deemed to be a party to the action or special proceeding even though the plaintiff has not become a party to the action or proceeding under subdivision (a).

Comment. Subdivision (b) of Section 491.430 is amended to take account of the enactment of Section 491.470 (exemption claim in court where action pending).

Code of Civil Procedure § 491.470 (added). Defendant's claim of exemption

SEC. 11. Section 491.470 is added to the Code of Civil Procedure, to read:

491.470. (a) If a lien is created under this article, the defendant may claim that all or any portion of the money or property that the defendant may recover in the action or special proceeding is exempt from attachment. The claim shall be made by application on noticed motion to the

court in which the action or special proceeding is pending, filed and served on the plaintiff not later than 30 days after the defendant has notice of the creation of the lien. The defendant shall execute an affidavit in support of the application that includes the matters set forth in subdivision (c) of Section 484.070. No notice of opposition to the claim of exemption is required. The failure of the defendant to make a claim of exemption under this section constitutes a waiver of the exemption.

(b) The court may determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding or may consolidate the exemption hearing with the hearing on a motion pursuant to Section 491.460.

(c) If the defendant establishes to the satisfaction of the court that the money or property that the defendant may recover in the action or special proceeding is all or partially exempt from attachment, the court shall order the termination of the lien created under this article on the exempt portion of the money or property.

Comment. Section 491.470 provides the procedure for the making and determination of an exemption claimed for the defendant's prospective recovery that is subject to a lien created under this article. This procedure is drawn from Section 708.450. The plaintiff is deemed to be a party for the purposes of this section. See Section 491.430(b). See also Section 482.070 (manner of service).

An exemption claim may also be made and determined as provided in Section 491.415(c). See the Comment to Section 491.415(c).

Code of Civil Procedure § 515.010 (technical amendment). Plaintiff's undertaking

SEC. 12. Section 515.010 of the Code of Civil Procedure is amended to read:

515.010. The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking. The undertaking shall provide that the sureties are bound to the defendant ~~in the amount of the undertaking~~ for the return of the property to the defendant, if return of the property is

ordered, and for the payment to the defendant of any sum recovered against plaintiff. The undertaking shall be in an amount not less than twice the value of defendant's interest in the property *or in a greater amount*. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and such other factors as may be necessary to determine the defendant's interest in the property.

Comment. The reference in the second sentence of Section 515.010 to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety). The third sentence is amended to make clear that the plaintiff may give an undertaking in an amount that exceeds twice the value of the defendant's interest. This is not a substantive change. Under Section 515.020 the defendant can obtain the release of the property or prevent its seizure by giving an undertaking in the same amount as the plaintiff's undertaking. Under Section 515.010 the plaintiff may set the amount of the undertaking at a level sufficient to protect the plaintiff's interest in the property should the defendant give a release undertaking pursuant to Section 515.020.

**Code of Civil Procedure § 515.020 (technical amendment).
Defendant's undertaking**

SEC. 13. Section 515.020 of the Code of Civil Procedure is amended to read:

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking required by Section 515.010. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property; ~~not exceeding the amount of the undertaking~~. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer.

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

Comment. The provision in subdivision (a) of Section 515.020 limiting liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety). This amendment makes no substantive change.

Code of Civil Procedure § 515.030 (technical amendment).

Objection to undertaking

SEC. 14. Section 515.030 of the Code of Civil Procedure is amended to read:

515.030. (a) The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ of possession. The defendant shall mail notice of objection to the levying officer.

(b) The plaintiff may ~~object to the defendant's sureties~~ *object to the defendant's undertaking* not later than 10 days after the defendant's undertaking is filed. The plaintiff shall mail notice of objection to the levying officer.

(c) If the court determines that the plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the court determines that the plaintiff's undertaking is sufficient, the court shall order the levying officer to deliver the property to the plaintiff.

(d) If the court determines that the defendant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court shall order the levying officer to deliver the property to the

plaintiff, or, if the plaintiff has previously been given possession of the property, the plaintiff shall retain possession. If the court determines that the defendant's undertaking is sufficient, the court shall order the levying officer or the plaintiff to deliver the property to the defendant.

Comment. Subdivision (b) of Section 515.030 is amended for consistency with the Bond and Undertaking Law. See Section 995.920 (objection to undertaking). This amendment makes no substantive change.

Code of Civil Procedure § 681.030 (technical amendment).

Rules for practice and procedure; forms

SEC. 15. Section 681.030 of the Code of Civil Procedure is amended to read:

681.030. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, writs, and other papers under this title. ~~A form prescribed by the Judicial Council under this section is deemed to comply with this title and supersedes any corresponding form provided in this title.~~ The Judicial Council may prescribe forms in languages other than English.

(c) The Judicial Council shall prepare a form containing both of the following:

(1) A list of each of the federal and this state's exemptions from enforcement of a money judgment against a natural person.

(2) A citation to the relevant statute of the United States or this state which creates each of the exemptions.

Comment. Section 681.030 is amended to reflect the repeal of the statutory forms formerly provided in this title.

Code of Civil Procedure §§ 693.010-693.060 (repealed). Forms

SEC. 16. Chapter 19 (commencing with Section 693.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

Comment. The statutory forms provided by former Sections 693.010-693.060 are repealed because the Judicial Council has issued superseding forms.

Code of Civil Procedure § 695.010 (amended). Property subject to enforcement of money judgment

SEC. 17. Section 695.010 of the Code of Civil Procedure is amended to read:

695.010. (a) Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment.

(b) *If property of the judgment debtor was attached in the action but was transferred before entry of the money judgment in favor of the judgment creditor, the property is subject to enforcement of the money judgment so long as the attachment lien remains effective.*

Comment. Subdivision (b) is added to Section 695.010 to make clear that property attached in the action is subject to enforcement even though it has been transferred. See Section 488.500 (attachment lien). Such property may be levied upon under a writ of execution after judgment without the need to bring a separate action to foreclose the lien. See Section 699.710 (property subject to execution). See also Section 697.340 (judgment lien does not reach real property transferred before judgment).

Code of Civil Procedure § 697.340 (amended). Interests subject to judgment lien on real property

SEC. 18. Section 697.340 of the Code of Civil Procedure is amended to read:

697.340. Except as provided in Section 704.950:

(a) A judgment lien on real property attaches to all interests in real property in the county where the lien is created (whether present or future, vested or contingent, legal or equitable) that are subject to enforcement of the money judgment against the judgment debtor pursuant to Article 1 (commencing with Section 695.010) of Chapter 1 at the time the lien was created, but does not reach ~~a right to rents or rental payments~~, a leasehold estate with an unexpired term of less than two years ~~or~~, the interest of a beneficiary under a trust, *or real property that is subject to*

an attachment lien in favor of the creditor and was transferred before judgment.

(b) If any interest in real property in the county on which a judgment lien could be created under subdivision (a) is acquired after the judgment lien was created, the judgment lien attaches to such interest at the time it is acquired.

Comment. Subdivision (a) of Section 697.340 is amended to preserve the scope of the judgment lien in light of the amendment of Section 695.010. See Section 695.010(b) and the Comment thereto. The phrase "rental payments" is substituted for "right to rents" to make clear that the debtor's power to assign the right to future rent is subject to a judgment lien. The lien does not attach to rental payments being made to the debtor. However, the accruing rental payments are subject to an execution lien when levy is made under Section 700.170 (general intangibles). See also Sections 708.510 (assignment order covering debtor's right to rents), 708.530(b) (effect and priority of assignment).

Code of Civil Procedure § 697.390 (technical amendment).

Effect of transfer or encumbrance of interest subject to judgment lien

SEC. 19. Section 697.390 of the Code of Civil Procedure is amended to read:

697.390. If an interest in real property that is subject to a judgment lien is transferred or encumbered without satisfying *or extinguishing* the judgment lien:

(a) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.310 in the same amount as if the interest had not been transferred or encumbered.

(b) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.320 in the amount of the lien at the time of transfer or encumbrance plus interest thereafter accruing on such amount.

Comment. Section 697.390 is amended to make clear that this section does not continue judgment liens that are otherwise extinguished. See, *e.g.*, Section 701.630 (extinction of junior liens upon execution sale); *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870) (effect on junior liens of foreclosure of senior lien); *Hohn*

v. Riverside County Flood Control Dist., 228 Cal. App.2d 605, 613, 39 Cal. Rptr. 647 (1964) (purchaser at trustee's sale takes free of junior liens).

Code of Civil Procedure § 699.080 (technical amendment).

Levy by registered process server

SEC. 20. Section 699.080 of the Code of Civil Procedure is amended to read:

699.080. (a) A registered process server may levy under a writ of execution on the following types of property:

- (1) Real property, pursuant to Section 700.015.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 700.020.
- (3) Personal property in the custody of a levying officer, pursuant to Section 700.050.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (5) Deposit accounts, pursuant to Section 700.140 ~~or 700.160~~.
- (6) Property in a safe-deposit box, pursuant to Section 700.150 ~~or 700.160~~.
- (7) Accounts receivable or general intangibles, pursuant to Section 700.170.
- (8) Final money judgments, pursuant to Section 700.190.
- (9) Interest of a judgment debtor in personal property in the estate of a decedent, pursuant to Section 700.200.

(b) Before levying under the writ of execution, the registered process server shall deposit a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do ~~all~~ *both* of the following:

- (1) Comply with the applicable levy, posting, and service provisions of Article 4 (commencing with Section 700.010).

~~(2) Deliver any undertaking required by Section 700.160.~~

~~(3)~~ (2) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

(d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of levy on other persons as required by Article 4 (commencing with Section 700.010).

(4) Instructions in writing, as required by the provisions of Section 687.010.

(e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court.

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivisions (a) and (c) of Section 699.080 are amended to reflect the repeal of Section 700.160. See also Section 706.108 (service of earnings withholding order).

Code of Civil Procedure § 700.140 (technical amendment).

Levy on deposit accounts

SEC. 21. Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained. The execution lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) ~~Subject to Sections 700.160, 700.165, and 700.167, during~~ During the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section ~~and Section 700.160,~~ neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, ~~7601.5, 11203.5, 6854,~~ 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 700.140 are amended to reflect the repeal of Sections 700.160, 700.165, and 700.167 and the substitution of Section 6854 of the Financial Code for the sections deleted from subdivision (f) (2).

Code of Civil Procedure § 700.150 (technical amendment).

Levy on safe deposit boxes

SEC. 22. Section 700.150 of the Code of Civil Procedure is amended to read:

700.150. (a) To levy upon property in a safe deposit box, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the safe deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the safe deposit box stands. Service shall be made personally or by mail.

(c) ~~Subject to Section 700.160, during~~ *During* the time the execution lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe deposit box except pursuant to the levy.

(d) The levying officer may first give the person in whose name the safe deposit box stands an opportunity to open the safe deposit box to permit the removal pursuant to the levy of the property levied upon. The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied upon unless the judgment creditor pays in advance the cost of forcibly opening the safe deposit box and of repairing any damage caused thereby.

(e) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Refusal to permit access to the safe deposit box by the person in whose name it stands.

(3) Removal of any of the contents of the safe deposit box pursuant to the levy.

Comment. Subdivision (c) of Section 700.150 is amended to reflect the repeal of Section 700.160.

Code of Civil Procedure § 700.160 (repealed). Levy on deposit accounts and safe-deposit boxes not exclusively in name of judgment debtor

SEC. 23. Section 700.160 of the Code of Civil Procedure is repealed.

700.160. (a) The provisions of this section apply in addition to the provisions of Sections 700.140 and 700.150 if any of the following property is levied upon:

(1) A deposit account standing in the name of a third person or in the names of both the judgment debtor and a third person.

(2) Property in a safe/deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person.

(b) The judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the judgment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the levy on the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the levy is ineffective and the financial institution shall not comply with the requirements of this section or with the levy.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe/deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 5 (commencing with Section 701.010), from the time of levy and the delivery of the undertaking to the financial institution until 15 days

after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount levied upon. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe/deposit box except pursuant to the writ.

(c) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (d).

(3) Refusal to permit access to the safe/deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe/deposit box pursuant to the levy.

(f) Upon being notified by the levying officer of the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the levy and Sections 700.140 and 700.150 apply.

(g) This section does not apply in any case where the procedure provided in Section 700.165 or 700.167 is used.

Comment. Section 700.160, which required an undertaking as a prerequisite to levy on a deposit account or safe-deposit box not exclusively in the name of the defendant is repealed. See Sections 700.140(d), 700.150(e) (nonliability of financial institution for complying with levy). The nondebtor who is the holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Sections 720.110 *et seq.*

Code of Civil Procedure § 700.165 (repealed). Deposit account in name of judgment debtor and spouse

SEC. 24. Section 700.165 of the Code of Civil Procedure is repealed.

700.165. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands only in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, a notice that the judgment creditor has elected to use the procedure provided in Section 700.165 of the Code of Civil Procedure and that the levy reaches any deposit account that stands in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person and specifying the name of the spouse of the judgment debtor.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on the spouse of the judgment debtor. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (a) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).

Comment. Section 700.165 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 700.167 (repealed). Deposit account in fictitious business name

SEC. 25. Section 700.167 of the Code of Civil Procedure is repealed.

700.167. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands in a fictitious business name and the fictitious business name statement filed pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code lists as the persons doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but does not list any other person as doing business under the fictitious business name. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, both of the following:

(1) A notice that the judgment creditor has elected to use the procedure provided in Section 700.167 of the Code of Civil Procedure.

(2) A copy of an unexpired fictitious business name statement, certified as provided in Section 17926 of the Business and Professions Code, listing as the person doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but not listing any other person as doing business under the fictitious business name.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy upon each of the persons listed in the fictitious business name statement. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (b) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its

~~duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).~~

Comment. Section 700.167 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 704.740 (technical amendment).

Court order for sale; exemption claim where court order for sale not required

SEC. 26. Section 704.740 of the Code of Civil Procedure is amended to read:

704.740. (a) Except as provided in subdivision (b), a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article *and the dwelling exemption shall be determined under this article.*

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Comment. Subdivision (a) of Section 704.740 is amended to make clear that this article provides the exclusive procedure for determining real property dwelling exemptions (other than leaseholds of less than two years). Accordingly, the general procedures for claiming exemptions from execution are not applicable, except as otherwise provided.

Code of Civil Procedure § 704.995 (added). Effect of death of declared homestead owner

SEC. 27. Section 704.995 is added to the Code of Civil Procedure, to read:

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the

death of the declared homestead owner if, at the time of the death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased declared homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the declared homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the declared homestead or owned the declared homestead with the surviving spouse or a member of the decedent's family and regardless of whether the surviving spouse or the member of the decedent's family was a declared homestead owner at the time of the decedent's death.

(c) The amount of the homestead exemption is determined pursuant to Section 704.730 depending on the circumstances of the case at the time the amount is required to be determined.

Comment. Section 704.995 is added to make clear that the surviving spouse or resident family does not lose the declared homestead right by the death of a declared homestead owner. Hence, the protection afforded the declared homestead from creditors continues even though the person who recorded the homestead declaration or who was the sole or joint owner is dead. This section rejects a contrary dictum in *Estate of Grigsby*, 134 Cal. App.3d 611, 615, 184 Cal. Rptr. 886, 888 (1982) ("... the declared homestead does not survive the death of one of the spouses."). See also Prob. Code § 6528 (effect of probate homestead on declared homestead). Subdivision (c) makes clear that where the right to a declared homestead continues, the amount of the homestead exemption is determined under the normal rules. For example, if the surviving spouse is not 65 years of age or older and does not have another family member living in the dwelling, the dollar amount of the declared homestead that is protected from creditors will be reduced. See Sections 704.730 (amount of homestead exemption), 704.950 (attachment of judgment lien to surplus value).

**Code of Civil Procedure § 706.101 (technical amendment).
Manner of service of earnings withholding order and of
other notices and documents**

SEC. 28. Section 706.101 of the Code of Civil Procedure is amended to read:

706.101. (a) An earnings withholding order shall be served by the levying officer upon the employer by delivery of the order to any of the following:

(1) The managing agent or person in charge, at the time of service, of the branch or office where the employee works or the office from which the employee is paid. In the case of a state employee, the office from which the employee is paid does not include the Controller's office unless the employee works directly for the Controller's office.

(2) Any person to whom a copy of the summons and of the complaint may be delivered to make service on the employer under Article 4 (commencing with Section 416.10) of Chapter 4 of Title 5.

(b) Service of an earnings withholding order shall be made by personal delivery as provided in Section 415.10 or 415.20 or by delivery by registered or certified mail, postage prepaid, with return receipt requested. When service is made by mail, service is complete at the time the return receipt is executed by or on behalf of the recipient. If the levying officer attempts service by mail under this subdivision and does not receive a return receipt within 15 days from the date of deposit in the mail of the earnings withholding order, the levying officer shall make service as provided in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5.

(c) Except as provided in subdivision (b), service of any notice or document under this chapter may be made by first-class mail, postage prepaid. If service is made on the employer after the employer's return has been received by the levying officer, the service shall be made by first-class mail, postage prepaid, on the person designated in the employer's return to receive notices and at the address indicated in the employer's return, whether or not such address is within the county. Nothing in this subdivision precludes service by personal delivery (1) on the employer

before the employer's return has been received by the levying officer or (2) on the person designated in the employer's return after its receipt.

(d) Notwithstanding subdivision (b), if the judgment creditor so requests, the levying officer shall make service of the earnings withholding order by personal delivery as provided in Section 415.10 or 415.20. If the judgment creditor requests that service be made under this subdivision, the fee provided in Section 26750 of the Government Code shall be increased by one dollar and fifty cents (\$1.50).

~~(e) An earnings withholding order also may be served by a registered process server. When an earnings withholding order is served by a registered process server pursuant to this subdivision, the levying officer shall perform all other duties required by the provisions of this chapter, except for the actual service of the order, as if the levying officer had served the order. When an earnings withholding order is served by a registered process server, the court, in allowing costs for service pursuant to Section 1032.8, shall not allow a sum in excess of one dollar and fifty cents (\$1.50).~~

Comment. Former subdivision (e) of Section 706.101 is superseded by Section 706.108 (issuance and service of earnings withholding order by registered process server).

Code of Civil Procedure § 706.108 (added). Issuance and service of earnings withholding order by registered process server

SEC. 29. Section 706.108 is added to the Code of Civil Procedure, to read:

706.108. (a) If a writ of execution has been issued to the county where the judgment debtor's employer is to be served and the time specified in subdivision (b) of Section 699.530 for levy on property under the writ has not expired, a judgment creditor may deliver an application for issuance of an earnings withholding order to a registered process server who may then issue an earnings withholding order.

(b) If the registered process server has issued the earnings withholding order, the registered process server, before serving the earnings withholding order, shall deposit with the levying officer a copy of the writ of execution, the

application for issuance of an earnings withholding order, and a copy of the earnings withholding order, and shall pay the fee provided by Section 26750 of the Government Code.

(c) A registered process server may serve an earnings withholding order on an employer whether the earnings withholding order was issued by a levying officer or by a registered process server, but no earnings withholding order may be served after the time specified in subdivision (b) of Section 699.530. In performing this function, the registered process server shall serve upon the designated employer all of the following:

(1) The original and one copy of the earnings withholding order.

(2) The form for the employer's return.

(3) The notice to employee of earnings withholding order.

(4) A copy of the employer's instructions referred to in Section 706.127, except as otherwise prescribed in rules adopted by the Judicial Council.

(d) Within five days after service under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution, if it is not already in the hands of the levying officer.

(2) Proof of service on the employer of the papers listed in subdivision (c).

(3) Instructions in writing, as required by the provisions of Section 687.010.

(e) If the fee provided by Section 26750 of the Government Code has been paid, the levying officer shall perform all other duties required by the provisions of this chapter as if the levying officer had served the earnings withholding order.

(f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee is governed by Section 1032.8 but may not exceed one dollar and fifty cents (\$1.50).

Comment. Section 706.108 supersedes former subdivision (e) of Section 706.101 which provided for service of an earnings withholding order by a registered process server. The authority

of the registered process server to issue an earnings withholding order provided in subdivision (a) is new. This is comparable to the authority of a levying officer under Section 706.102. See also Section 706.121 (contents of application for earnings withholding order).

Subdivision (b) is comparable to subdivision (b) of Section 699.080 (levy by registered process server under writ of execution). The papers are required to be filed with the levying officer under this subdivision to give the levying officer an early opportunity to establish a file, thereby facilitating the handling of any exemption claim, the employer's return, and payments by the employer or judgment debtor. Of course, if the levying officer has issued the earnings withholding order, this step is not required since the necessary papers will already be on file before service on the employer.

Subdivision (c) is the same in substance as Section 706.103 which applies to service by a levying officer. The first sentence continues the authority provided by former subdivision (e) of Section 706.101.

Subdivision (d) is drawn from subdivision (d) of Section 699.080 (levy by registered process server under writ of execution). If the levying officer has issued the earnings withholding order, the writ of execution will already be in the hands of the levying officer, as is recognized in subdivision (d) (1). If the registered process server has issued the earnings withholding order, however, only a copy of the writ of execution is delivered to the levying officer under subdivision (b) and the writ itself is retained^d and filed with the levying officer only after service on the employer is complete.

Subdivision (e) continues the substance of the second sentence of former subdivision (e) of Section 706.101 and is comparable to subdivision (e) of Section 699.080 (duties of levying officer after levy by registered process server under writ of execution).

Subdivision (f) continues the limitation on the extra fee that may be allowed provided by former subdivision (e) of Section 706.101. Subdivision (f) is comparable in other respects to subdivision (f) of Section 699.080 (fee for levy under writ of execution).

**Code of Civil Procedure § 708.110 (amended).
Examination of judgment debtor**

SEC. 30. Section 708.110 of the Code of Civil Procedure is amended to read:

708.110. (a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment.

(b) If the judgment creditor has not caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order upon ex parte application of the judgment creditor.

(c) If the judgment creditor has caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order if the judgment creditor by affidavit or otherwise shows good cause for the order. The application shall be made on noticed motion if the court so directs or a court rule so requires. Otherwise, it may be made ex parte.

(d) The judgment creditor shall personally serve a copy of the order on the judgment debtor not less than 10 days before the date set for the examination. Service of the order creates a lien on the personal property of the judgment debtor *for a period of one year from the date of the order unless extended or sooner terminated by the court.*

(e) The order shall contain the following statement in 14-point boldface type if printed or in capital letters if typed: "NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fees incurred by the judgment creditor in this proceeding."

Comment. Subdivision (d) of Section 708.110 is amended to prescribe a one-year duration for the lien created under this section. This is consistent with the duration of a lien created under Section 708.120 (examination of third person).

**Code of Civil Procedure § 708.450 (technical amendment).
Judgment debtor's claim of exemption**

SEC. 31. Section 708.450 of the Code of Civil Procedure is amended to read:

708.450. (a) If a lien is created under this article, the judgment debtor may claim that all or any portion of the money or property that the judgment debtor may recover in the action or special proceeding is exempt from enforcement of a money judgment. The claim shall be made by application on noticed motion to the court in which the action or special proceeding is pending, filed and served on the judgment creditor not later than 30 days after the judgment debtor has notice of the creation of the lien. Service shall be made personally or by mail. The judgment debtor shall execute an affidavit in support of the application that includes all the matters set forth in subdivision (b) of Section 703.520. No notice of opposition to the claim of exemption is required. The failure of the judgment debtor to make a claim of exemption under this section constitutes a waiver of the exemption.

(b) ~~Unless continued for good cause shown, the~~ *The* court ~~shall may~~ determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding ~~and or~~ may consolidate the exemption hearing with the hearing on a motion pursuant to Section 708.470.

(c) If the judgment debtor establishes to the satisfaction of the court that the right of the judgment debtor to money or property under the judgment in the action or special proceeding is all or partially exempt from enforcement of a money judgment, the court shall order the termination of the lien created under this article on the exempt portion of the money or property.

Comment. Subdivision (b) of Section 708.450 is amended to clarify the procedure for determining exemptions.

Code of Civil Procedure § 708.530 (amended). Effect and priority of assignment

SEC. 32. Section 708.530 of the Code of Civil Procedure is amended to read:

708.530. ~~The~~ (a) *Except as provided in subdivision (b), the* effect and priority of an assignment ordered pursuant to this article is governed by Section 955.1 of the Civil Code. For the purpose of priority, an assignee of a right to payment pursuant to this article shall be deemed to be a

bona fide assignee for value under the terms of Section 955.1 of the Civil Code.

(b) An assignment of the right to future rent ordered under this article is recordable as an instrument affecting real property and the priority of such an assignment is governed by Section 1214 of the Civil Code.

Comment. Section 708.530 is amended to provide a special rule governing assignments of rights to future rent. Subdivision (b) recognizes such assignments as instruments affecting real property subject to the recording act.

Code of Civil Procedure § 995.930 (amended). Manner of objection to undertakings

SEC. 33. Section 995.930 of the Code of Civil Procedure is amended to read:

995.930. (a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond.

(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of *good cause for failure to make the objection within the time required by statute or of changed circumstances.*

Comment. Subdivision (c) of Section 995.930 is amended to permit an objection to a bond or undertaking after the time for making an objection has expired, upon a showing of good cause for the late objection. Facts constituting good cause might include inadequate time, under the circumstances, to investigate and respond. There is no maximum time limit for making a late objection under this provision.

Government Code § 26830 (amended). Filing fee for application for renewal of judgment

SEC. 34. Section 26830 of the Government Code is amended to read:

26830. The fee for filing any notice of motion, or any other paper requiring a hearing subsequent to the first paper, or any notice of intention to move for a new trial of any civil action or special proceeding, *or an application for renewal of a judgment*, is fourteen dollars (\$14), except that there shall be no fee for filing any of the following:

- (a) An amended notice of motion.
- (b) An ex parte motion.
- (c) A memorandum that a civil case is at issue.
- (d) A demurrer to the original proceeding.
- (e) A motion to strike when filed concurrently with the demurrer to the original pleading.
- (f) A hearing on a petition for emancipation of a minor.
- (g) Default hearings.
- (h) A show-cause hearing on a petition for an injunction prohibiting harassment.
- (i) A show-cause hearing on an application for an order prohibiting domestic violence.
- (j) A show-cause hearing on writs of review, mandate, or prohibition.
- (k) A show-cause hearing on a petition for a change of name.
- (l) A hearing to compromise a claim of a minor, an insane or incompetent person.
- (m) A stipulation by the parties for a continuance of a hearing.
- (n) Order of examination of judgment debtor.
- (o) Notice of motion for order determining claim of exemption.

Comment. Section 26830 is amended to provide the filing fee for an application for renewal of a judgment. See Code Civ. Proc. §§ 683.110-683.220.

APPENDIX XVII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Rights Among Cotenants In
Possession and Out of Possession
of Real Property

September 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

NOTE

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

Cite this recommendation as *Recommendation Relating to Rights Among Cotenants In Possession and Out of Possession of Real Property*, 17 Cal. L. Revision Comm'n Reports 1023 (1984).

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
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September 22, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission herewith submits its recommendation for a procedure by which a cotenant out of possession of property can assert the right to possession by service of a demand on the cotenant in possession. This procedure will provide a clear and peaceable means of determining whether an ouster has occurred and will be a useful procedure short of partition by which the cotenants can attempt to settle their rights. This recommendation is made pursuant to authority of 1983 Cal. Stats. res. ch. 40 (law relating to real and personal property).

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

RIGHTS AMONG COTENANTS IN POSSESSION AND OUT OF POSSESSION OF REAL PROPERTY

A distinctive feature of joint tenancy and tenancy in common tenure of real property is that each cotenant is entitled to concurrent possession of the entire premises—the cotenants share an undivided possessory interest. Each cotenant is entitled to occupy the premises and neither can exclude the other.¹

In the ordinary case the manner of sharing possession is worked out by agreement of the cotenants. Absent an agreement, a cotenant in possession need not account to a cotenant out of possession for the use value of the property,² unless the cotenant in possession has depleted the property by extraction of minerals,³ has rented the property to a third party,⁴ or has ousted the other cotenant from possession.⁵

The rule against accounting between cotenants except in special circumstances appears generally sound and consistent with the nature of cotenancy tenure that each cotenant is entitled to the occupation of the entire premises. A cotenant should not be required to pay rent as a condition of the exercise of the legal right to occupy the property.⁶ California law is the same as nearly all other common law jurisdictions in this respect,⁷ and is supported

¹ See, e.g., *Swartzbaugh v. Sampson*, 11 Cal. App.2d 451, 54 P.2d 73 (1936).

² See, e.g., *Black v. Black*, 91 Cal. App.2d 328, 204 P.2d 950 (1949); *McWhorter v. McWhorter*, 99 Cal. App. 293, 278 P. 454 (1929).

³ See, e.g., *McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, 27 P. 863 (1883); *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 52 P.2d 237 (1935).

⁴ See, e.g., *Howard v. Throckmorton*, 59 Cal. 79 (1881); *Goodenow v. Ewer*, 16 Cal. 461 (1860); *Rutledge v. Rutledge*, 119 Cal. App.2d 114, 259 P.2d 79 (1953).

⁵ See, e.g., *Zaslow v. Kroenert*, 29 Cal.2d 541, 176 P.2d 1 (1946).

⁶ *Pico v. Columbet*, 12 Cal. 414 (1859).

⁷ 4A R. Powell, *The Law of Real Property* § 603 (1982); W. Burby, *Handbook of the Law of Real Property* § 98 (3d ed. 1965); Annot., 51 A.L.R.2d 388 (1957); Weibel, *Accountability of Cotenants*, 29 Iowa L. Rev. 558 (1944); Note, 32 Notre Dame Law. 493 (1957).

by the overwhelming weight of legal scholarship.⁸ If the cotenants are unable to agree as to the manner of sharing possession, or for payment of rent by a cotenant in exclusive possession, the remedy of partition is available as a matter of right.⁹

One difficulty with existing law is that, although a cotenant in possession is required to account to a cotenant out of possession in case of an ouster, it is not always clear when an ouster has occurred.¹⁰ If one cotenant exclusively occupies property that is susceptible to occupancy only by one cotenant, is this an ouster? If one cotenant exclusively occupies property and refuses a request by another cotenant to share occupancy, is this an ouster? California law is that in order for the cotenant in possession to be held to account for a proportionate share of the use value of the property, the cotenant must forcibly exclude or prevent use by the cotenant out of possession.¹¹

The Commission recommends that the procedure outlined below be provided by statute so that a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. To establish that an ouster has occurred, a cotenant out of possession serves a written demand on a cotenant in possession to share possession of the premises. If the cotenant in possession does not offer unconditionally to share possession within 60 days, an ouster has occurred. If an ouster is so established, the cotenant in possession is liable for damages either directly or in another action such as for possession or partition of the property. In the ordinary case, damages will

⁸ See, e.g., C. Moynihan, *Introduction to the Law of Real Property* 226 (1962); 2 *American Law of Property* § 6.14, at 62, n.19 (1952); Comment, 25 *Calif. L. Rev.* 203 (1937); Note, 24 *Marquette L. Rev.* 148 (1940); Note, 19 *Wash. L. Rev.* 218 (1944); Note, 12 *Wyo. L.J.* 156 (1958); Comment, 37 *Wash. L. Rev.* 70 (1962). For an exception, see Berger, *An Analysis of the Economic Relations Between Cotenants*, 21 *Ariz. L. Rev.* 1015 (1979).

⁹ Code Civ. Proc. § 872.710.

¹⁰ 4A R. Powell, *The Law of Real Property* § 603, at 610 (1982) ("The practical borderline between privileged occupancy of the whole by a single cotenant and unprivileged greedy grabbing which subjects the greedy one to liability to his cotenant is not crystal clear.")

¹¹ See, e.g., *Brunscher v. Reagh*, 164 *Cal. App.2d* 174, 330 *P.2d* 396 (1958); *De Harlan v. Harlan*, 74 *Cal. App.2d* 555, 168 *P.2d* 985 (1946).

be the reasonable rental value of the ousted cotenant's share.

This new statutory remedy would have a number of advantages. It would enable a cotenant out of possession to assert his or her rights by means of a demand, rather than by attempting to take physical possession, with the resultant confrontation and possible violence. It would help clarify the acts that amount to an ouster and give assurance that the ouster could be determined with some certainty; this would also be economically efficient in that it would reduce litigation over whether an ouster has occurred. It would put the cotenant in possession on notice that either a sharing agreement must be reached by the cotenants or liability will be imposed, thereby encouraging private agreement between the cotenants; it provides a formal opening of negotiations. It is fair to require the cotenant in possession to account for the value of the possession thereafter if the cotenant refuses to share possession or to reach an agreement such as payment of rent to the cotenant out of possession. By providing interim relief for the tenant out of possession, the proposed remedy may help avoid a premature action for partition or possession of the property. The proposed remedy would not preclude either party from seeking a judicial partition or order for possession of the property where agreement is not possible.

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

An act to add Section 843 to the Civil Code, relating to owners of real property.

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

SECTION 1. Section 843 is added to the Civil Code, to read:

843. (a) If real property is owned concurrently by two or more persons, a tenant out of possession may establish an ouster from possession by a tenant in possession in the manner provided in this section. This section does not apply

to the extent the tenant out of possession is not entitled to possession or an alternative remedy is provided under the terms of an agreement between the cotenants or the instrument creating the cotenancy or another written instrument that indicates the possessory rights or remedies of the cotenants. This section supplements and does not limit any other means by which an ouster may be established.

(b) A tenant out of possession may serve on a tenant in possession a written demand for concurrent possession of the property. The written demand shall make specific reference to this section and to the time within which concurrent possession must be offered under this section. Service of the written demand shall be made in the same manner as service of summons in a civil action. An ouster is established 60 days after service is complete if, within that time, the tenant in possession does not offer unconditional concurrent possession of the property to the tenant out of possession.

(c) A claim for damages for an ouster established pursuant to this section may be asserted by an independent action or in an action for possession or partition of the property or another appropriate action or proceeding, subject to any applicable statute of limitation.

(d) Nothing in this section precludes the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement as to the right of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other terms that may be appropriate.

Comment. Section 843 provides a procedure by which a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. *Cf.* *Brunscher v. Reagh*, 164 Cal. App.2d 174, 330 P.2d 396 (1958); *De Harlan v. Harlan*, 74 Cal. App.2d 555, 168 P.2d 985 (1946) (forcible exclusion or prevention of use). One cotenant ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to a proportionate share of the value of the use and occupation of the land from the time of the ouster. *Zaslow v. Kroenert*, 29

Cal.2d 541, 176 P.2d 1 (1946). Nothing in this section changes the general law governing damages, defenses, and offsets in the case of an ouster. Establishment of an ouster under this section may also mark the beginning of the period required for the tenant in possession to establish title by adverse possession against the tenant out of possession. It should be noted that the provisions of this section are inapplicable to the extent the possessory rights and remedies of the cotenants are governed by a cotenancy agreement or other applicable instrument.

SEC. 2. This act applies to property acquired before, on, or after the operative date of the act.

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1960 Annual Report

1961 Annual Report

Recommendation and Study Relating to:

Evidence in Eminent Domain Proceedings

Taking Possession and Passage of Title in Eminent Domain Proceedings

The Reimbursement for Moving Expenses When Property is Acquired for Public Use

Rescission of Contracts

The Right to Counsel and the Separation of the Delinquent From the Nondelinquent

Minor in Juvenile Court Proceedings

Survival of Actions

Arbitration

The Presentation of Claims Against Public Officers and Employees

Inter Vivos Marital Property Rights in Property Acquired While Domiciled
 Elsewhere

Notice of Alibi in Criminal Actions

VOLUME 4 (1963)

[Out of Print]

1962 Annual Report

1963 Annual Report

1964 Annual Report

Recommendation and Study Relating to Condemnation Law and Procedure:

Number 4—Discovery in Eminent Domain Proceedings [The first three pamphlets
 (unnumbered) in Volume 3 also deal with the subject of condemnation
 law and procedure.]

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 [out of print]
- Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

VOLUME 5 (1963)

[Out of Print]

A Study Relating to Sovereign Immunity

VOLUME 6 (1964)

[Out of Print]

- Tentative Recommendations and Studies Relating to the Uniform Rules of Evidence:
 - Article I (General Provisions)
 - Article II (Judicial Notice)
 - Burden of Producing Evidence, Burden of Proof, and Presumptions (replacing URE Article III)
 - Article IV (Witnesses)
 - Article V (Privileges)
 - Article VI (Extrinsic Policies Affecting Admissibility)
 - Article VII (Expert and Other Opinion Testimony)
 - Article VIII (Hearsay Evidence) [same as publication in Volume 4]
 - Article IX (Authentication and Content of Writings)

VOLUME 7 (1965)

[Out of Print]

- 1965 Annual Report
- 1966 Annual Report
- Evidence Code with Official Comments [out of print]
- Recommendation Proposing an Evidence Code [out of print]
- Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act: Liability of Public Entities for Ownership and Operation of Motor Vehicles; Claims and Actions Against Public Entities and Public Employees

VOLUME 8 (1967)

- Annual Report (December 1966) includes the following recommendation:
 - Discovery in Eminent Domain Proceedings
- Annual Report (December 1967) includes the following recommendations:
 - Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding
 - Improvements Made in Good Faith Upon Land Owned by Another
 - Damages for Personal Injuries to a Married Person as Separate or Community Property
 - Service of Process on Unincorporated Associations
- Recommendation and Study Relating to:
 - Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property
 - Vehicle Code Section 17150 and Related Sections
 - Additur

Abandonment or Termination of a Lease
 The Good Faith Improver of Land Owned by Another
 Suit By or Against An Unincorporated Association

Recommendation Relating to the Evidence Code:

Number 1—Evidence Code Revisions
 Number 2—Agricultural Code Revisions
 Number 3—Commercial Code Revisions

Recommendation Relating to Escheat

Tentative Recommendation and A Study Relating to Condemnation Law and Procedure:

Number 1—Possession Prior to Final Judgment and Related Problems

VOLUME 9 (1969)

[Out of Print]

Annual Report (December 1968) includes the following recommendations:

Recommendation Relating to Sovereign Immunity: Number 9—Statute of
 Limitations in Actions Against Public Entities and Public Employees
 Recommendation Relating to Additur and Remittitur
 Recommendation Relating to Fictitious Business Names

Annual Report (December 1969) includes the following recommendations:

Recommendation Relating to Quasi-Community Property
 Recommendation Relating to Arbitration of Just Compensation
 Recommendation Relating to the Evidence Code: Number 5—Revisions of the
 Evidence Code
 Recommendation Relating to Real Property Leases
 Proposed Legislation Relating to Statute of Limitations in Actions Against Public
 Entities and Public Employees

Recommendation and Study Relating to:

Mutuality of Remedies in Suits for Specific Performance
 Powers of Appointment
 Fictitious Business Names
 Representations as to the Credit of Third Persons and the Statute of Frauds
 The "Vesting" of Interests Under the Rule Against Perpetuities

Recommendation Relating to:

Real Property Leases
 The Evidence Code: Number 4—Revision of the Privileges Article
 Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act

VOLUME 10 (1971)

Annual Report (December 1970) includes the following recommendation:

Recommendation Relating to Inverse Condemnation: Insurance Coverage

Annual Report (December 1971) includes the following recommendation:

Recommendation Relating to Attachment, Garnishment, and Exemptions From
 Execution: Discharge From Employment

California Inverse Condemnation Law [out of print]

Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of
 Causes of Action, and Related Provisions

Recommendation Relating to Attachment, Garnishment, and Exemptions From
 Execution: Employees' Earnings Protection Law [out of print]

VOLUME 11 (1973)

Annual Report (December 1972)

Annual Report (December 1973) includes the following recommendations:

Evidence Code Section 999—The "Criminal Conduct" Exception to the
 Physician-Patient Privilege
 Erroneously Ordered Disclosure of Privileged Information

Recommendation and Study Relating to:

- Civil Arrest
- Inheritance Rights of Nonresident Aliens
- Liquidated Damages

Recommendation Relating to:

- Wage Garnishment and Related Matters
- The Claim and Delivery Statute
- Unclaimed Property
- Enforcement of Sister State Money Judgments
- Prejudgment Attachment
- Landlord-Tenant Relations

Tentative Recommendation Relating to:

- Prejudgment Attachment

VOLUME 12 (1974)

Annual Report (December 1974) includes the following recommendations:

- Payment of Judgments Against Local Public Entities
- View by Trier of Fact in a Civil Case
- The Good Cause Exception to the Physician-Patient Privilege
- Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments

Recommendation Proposing the Eminent Domain Law

Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts

Recommendation Relating to Wage Garnishment Exemptions

Tentative Recommendations Relating to Condemnation Law and Procedure:

- The Eminent Domain Law
- Condemnation Authority of State Agencies
- Conforming Changes in Special District Statutes

VOLUME 13 (1976)

Annual Report (December 1975) includes the following recommendations:

- Admissibility of Copies of Business Records in Evidence
- Turnover Orders Under the Claim and Delivery Law
- Relocation Assistance by Private Condemnors
- Condemnation for Byroads and Utility Easements
- Transfer of Out-of-State Trusts to California
- Admissibility of Duplicates in Evidence
- Oral Modification of Contracts
- Liquidated Damages

Annual Report (December 1976) includes the following recommendations:

- Service of Process on Unincorporated Associations
- Sister State Money Judgments
- Damages in Action for Breach of Lease
- Wage Garnishment
- Liquidated Damages

Selected Legislation Relating to Creditors' Remedies [out of print]

Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments [out of print]

Recommendation and Study Relating to Oral Modification of Written Contracts

Recommendation Relating to:

- Partition of Real and Personal Property
- Wage Garnishment Procedure
- Revision of the Attachment Law
- Undertakings for Costs
- Nonprofit Corporation Law

VOLUME 14 (1978)

Annual Report (December 1977) includes the following recommendations:

- Use of Keepers Pursuant to Writs of Execution
- Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for Benefit of Creditors
- Review of Resolution of Necessity by Writ of Mandate
- Use of Court Commissioners Under the Attachment Law
- Evidence of Market Value of Property
- Psychotherapist-Patient Privilege
- Parol Evidence Rule

Annual Report (December 1978) includes the following recommendations:

- Technical Revisions in the Attachment Law: Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action"
- Ad Valorem Property Taxes in Eminent Domain Proceedings
- Security for Costs

Recommendation Relating to Guardianship-Conservatorship Law

VOLUME 15 (1980)

[This volume is published in two parts; each part is considered a separate volume in determining the price.]

Part I

Annual Report (December 1979) includes the following recommendations:

- Effect of New Bankruptcy Law on the Attachment Law
- Confessions of Judgment
- Special Assessment Liens on Property Taken for Public Use
- Assignments for the Benefit of Creditors
- Vacation of Public Streets, Highways, and Service Easements
- Quiet Title Actions
- Agreements for Entry of Paternity and Support Judgments
- Enforcement of Claims and Judgments Against Public Entities
- Uniform Veterans Guardianship Act
- Psychotherapist-Patient Privilege
- Enforcement of Obligations After Death

Guardianship-Conservatorship Law with Official Comments [out of print]

Recommendation Relating to:

- Enforcement of Judgments: Interest Rate on Judgments; Married Women as Sole Traders; State Tax Liens
- Application of Evidence Code Property Valuation Rules in Noncondemnation Cases
- Uniform Durable Power of Attorney Act
- Probate Homestead

Part II

Annual Report (December 1980) includes the following recommendation:

- Revision of the Guardianship-Conservatorship Law: Appointment of Successor Guardian or Conservator; Support of Conservatee Spouse from Community Property; Appealable Orders

Recommendation Relating to:

- Probate and Estate Planning: Non-Probate Transfers; Revision of the Powers of Appointment Statute

Tentative Recommendation Proposing the Enforcement of Judgments Law

VOLUME 16 (1982)

- Annual Report (December 1981) includes the following recommendation:
 Federal Military and Other Federal Pensions as Community Property
- Annual Report (December 1982) includes the following recommendations:
 Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage
 Creditors' Remedies: Amount Secured by Attachment; Execution of Writs by Registered Process Servers; Technical Amendments
 Dismissal for Lack of Prosecution
 Conforming Changes to the Bond and Undertaking Law
 Notice of Rejection of Late Claim Against Public Entity
- Recommendation Relating to:
 Holographic and Nuncupative Wills
 Marketable Title of Real Property
 Statutory Bonds and Undertakings
 Attachment
 Probate Law and Procedure: Missing Persons; Nonprobate Transfers; Emancipated Minors; Notice in Limited Conservatorship Proceedings; Disclaimer of Testamentary and Other Interests
- 1982 Creditors' Remedies Legislation [out of print]
 Tentative Recommendation Relating to Wills and Intestate Succession

VOLUME 17 (1984)

[Volume expected to be available September 1985]

- Annual Report (1983) includes the following recommendations:
 Effect of Death of Support Obligor
 Dismissal for Lack of Prosecution
 Severance of Joint Tenancy
 Effect of Quiet Title and Partition Judgments
 Dormant Mineral Rights
 Creditors' Remedies—Levy on Joint Deposit Accounts; Issuance of Earnings Withholding Orders by Registered Process Servers; Protection of Declared Homestead After Owner's Death; Jurisdiction of Condominium Assessment Lien Enforcement; Technical Amendments
 Rights Among Cotenants in Possession and Out of Possession of Real Property
- Recommendations Relating to:
 Liability of Marital Property for Debts
 Durable Power of Attorney for Health Care Decisions
 Family Law: Marital Property Presumptions and Transmutations; Disposition of Community Property; Reimbursement of Educational Expenses; Special Appearance in Family Law Proceedings; Liability of Stepparent for Child Support; Awarding Temporary Use of Family Home
 Probate Law: Independent Administration of Decedent's Estates; Distribution of Estates Without Administration; Execution of Witnessed Wills; Simultaneous Deaths; Notice of Will; Garnishment of Amounts Payable to Trust Beneficiary; Bonds for Personal Representatives; Revision of Wills and Intestate Succession Law; Recording Affidavit of Death
 Statutes of Limitation for Felonies
 Uniform Transfers to Minors Act
 Statutory Forms For Durable Powers of Attorney

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