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CALIFORNIA LAW REVISION COMMISSION

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CALIFORNIA LAW REVISION COMMISSION

School of Law

Stanford University

Stanford, California 94305

LIFORNIA LAW REVISION COMMISSION

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December 1, 1969

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

In conformity with Government Code Section 10335, the California Law Revision Commission herewith submits this report of its activities during 1969.

This report was printed during the first week of December 1969 so that it would be available in printed form early in January 1970. Accordingly, it does not reflect changes in Commission membership after December 1, 1969.

Respectfully submitted,

**SHO SATO
Chairman**

CONTENTS

	Page
FUNCTION AND PROCEDURE OF COMMISSION	87
PERSONNEL OF COMMISSION	90
SUMMARY OF WORK OF COMMISSION	91
1970 LEGISLATIVE PROGRAM	92
STUDIES IN PROGRESS	93
Inverse Condemnation	93
Condemnation Law and Procedure	94
Evidence	94
Sovereign Immunity	95
Other Topics Under Active Consideration	96
LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO	
1969 LEGISLATIVE SESSION	97
Resolutions Approving Topics for Study	97
Powers of Appointment	98
Statute of Limitations in Actions Against Public Entities and	
Public Employees	98
Real Property Leases	98
Fictitious Business Name Certificates	98
Evidence Code—Revision of the Privileges Article	98
Mutuality of Remedies in Suits for Specific Performance	99
Additur and Remittitur	99
CALENDAR OF TOPICS FOR STUDY	100
Topics Authorized for Study	100
Topics Under Active Consideration	100
Other Topics Authorized for Study	102
Topics Continued on Calendar for Further Study	103
Topics to Be Dropped From Calendar of Topics	105
Topics for Future Consideration	107
REPORT ON STATUTES REPEALED BY IMPLICATION OR	
HELD UNCONSTITUTIONAL	110
RECOMMENDATIONS	111

CONTENTS—Continued

APPENDICES	Page
I. Recommendation Relating to Quasi-Community Property---	113
II. Recommendation Relating to Arbitration of Just Compensation -----	123
III. Recommendation Relating to the Evidence Code: Number 5 —Revisions of the Evidence Code -----	137
IV. Recommendation Relating to Real Property Leases -----	153
V. Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees ----	175
VI. Report of the Assembly Committee on Judiciary on Senate Bills 98, 99, 104, and 105 -----	182

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION FOR THE YEAR 1969

FUNCTION AND PROCEDURE OF COMMISSION

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

The principal duties of the Law Revision Commission are to:

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

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

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

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

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

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

¹ See CAL. GOVT. CODE §§ 10300-10340.

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

³ See CAL. GOVT. CODE § 10335.

printed pamphlet.⁴ If the research study has not been previously published, it usually is published in the pamphlet containing the recommendation.

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

A total of 78 bills and two proposed constitutional amendments have been drafted by the Commission to effectuate its recommendations.⁶ Fifty-two of these bills were enacted at the first session to which they were presented; fourteen bills were enacted at subsequent sessions or their substance was incorporated into other legislation that was enacted. Thus, of the 78 bills recommended, 66 eventually became law.⁷

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

⁵ See CAL. GOV'T. CODE § 10333.

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

⁷ Cal. Stats. 1955, Ch. 799, p. 1400 and Ch. 877, p. 1494. (Revision of various sections of the Education Code relating to the Public School System.)

Cal. Stats. 1955, Ch. 1183, p. 2193. (Revision of Probate Code Sections 640 to 646—setting aside of estates.)

Cal. Stats. 1957, Ch. 102, p. 678. (Elimination of obsolete provisions in Penal Code Sections 1377 and 1378.)

Cal. Stats. 1957, Ch. 139, p. 733. (Maximum period of confinement in a county jail.)

Cal. Stats. 1957, Ch. 249, p. 902. (Judicial notice of the law of foreign countries.)

Cal. Stats. 1957, Ch. 456, p. 1308. (Recodification of Fish and Game Code.)

Cal. Stats. 1957, Ch. 490, p. 1520. (Rights of surviving spouse in property acquired by decedent while domiciled elsewhere.)

Cal. Stats. 1957, Ch. 540, p. 1589. (Notice of application for attorney's fees and costs in domestic relations actions.)

Cal. Stats. 1957, Ch. 1498, p. 2824. (Bringing new parties into civil actions.)

Cal. Stats. 1959, Ch. 122, p. 2005. (Doctrine of worthier title.)

Cal. Stats. 1959, Ch. 468, p. 2403. (Effective date of an order ruling on motion for new trial.)

Cal. Stats. 1959, Ch. 469, p. 2404. (Time within which motion for new trial may be made.)

Cal. Stats. 1959, Ch. 470, p. 2405. (Suspension of absolute power of alienation.)

Cal. Stats. 1959, Ch. 500, p. 2441. (Procedure for appointing guardians.)

Cal. Stats. 1959, Ch. 501, p. 2443. (Codification of laws relating to grand juries.)

Cal. Stats. 1959, Ch. 528, p. 2496. (Mortgages to secure future advances.)

Cal. Stats. 1959, Ch. 1715, p. 4115 and Chs. 1724-1728, pp. 4133-4156. (Presentation of claims against public entities.)

Cal. Stats. 1961, Ch. 461, p. 1540. (Arbitration.)

Cal. Stats. 1961, Ch. 589, p. 1733. (Rescission of contracts.)

Cal. Stats. 1961, Ch. 636, p. 1838. (Inter vivos marital property rights in property acquired while domiciled elsewhere.)

Cal. Stats. 1961, Ch. 657, p. 1867. (Survival of actions.)

Cal. Stats. 1961, Ch. 1612, p. 3439. (Tax apportionment in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1613, p. 3442. (Taking possession and passage of title in eminent domain proceedings.)

Cal. Stats. 1961, Ch. 1616, p. 3459. (Revision of Juvenile Court Law adopting the substance of two bills drafted by the Commission to effectuate its recommendations on this subject.)

Cal. Stats. 1963, Ch. 1631. (Sovereign immunity—tort liability of public entities and public employees.)

Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)

Cal. Stats. 1963, Ch. 1632. (Sovereign immunity)—insurance coverage for public entities and public employees.)

Cal. Stats. 1963, Ch. 1633. (Sovereign immunity—defense of public employees.)

Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)

One of the proposed constitutional amendments was approved and ratified by the people;⁸ the other was not approved by the Legislature.

Commission recommendations have resulted in the enactment of legislation affecting 1,971 sections of the California statutes: 1,010 sections have been added, 469 sections amended, and 492 sections repealed.

Cal. Stats. 1963, Ch. 1685. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 1686. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

Cal. Stats. 1965, Ch. 299. (Evidence Code.)

Cal. Stats. 1965, Ch. 653. (Sovereign immunity—claims and actions against public entities and public employees.)

Cal. Stats. 1965, Ch. 1151. (Evidence in eminent domain proceedings.)

Cal. Stats. 1965, Ch. 1527. (Sovereign immunity—liability of public entities for ownership and operation of motor vehicles.)

Cal. Stats. 1965, Chs. 1649, 1650. (Reimbursement for moving expenses.)

Cal. Stats. 1967, Ch. 72. (Additur.)

Cal. Stats. 1967, Ch. 262. (Evidence Code—Agricultural Code revisions.)

Cal. Stats. 1967, Ch. 650. (Evidence Code—Evidence Code revisions.)

Cal. Stats. 1967, Ch. 702. (Vehicle Code Section 17150 and related sections.)

Cal. Stats. 1967, Ch. 703. (Evidence Code—Commercial Code revisions.)

Cal. Stats. 1967, Ch. 1104. (Exchange of valuation data in eminent domain proceedings.)

Cal. Stats. 1967, Ch. 1324. (Suit by or against an unincorporated association.)

Cal. Stats. 1968, Ch. 132. (Unincorporated associations.)

Cal. Stats. 1968, Ch. 133. (Fees on abandonment of eminent domain proceeding.)

Cal. Stats. 1968, Ch. 150. (Good faith improvers.)

Cal. Stats. 1968, Ch. 247. (Escheat of decedent's estate.)

Cal. Stats. 1968, Ch. 356. (Unclaimed property act.)

Cal. Stats. 1968, Ch. 457. (Personal injury damages.)

Cal. Stats. 1968, Ch. 458. (Personal injury damages.)

Cal. Stats. 1969, Ch. 113. (Powers.)

Cal. Stats. 1969, Ch. 114. (Fictitious business names.)

Cal. Stats. 1969, Ch. 115. (Additur and remittitur.)

Cal. Stats. 1969, Ch. 155. (Powers of appointment.)

Cal. Stats. 1969, Ch. 156. (Specific performance of contracts.)

* CAL. CONST., Art. XI, § 10 (1960). (Power of Legislature to prescribe procedures governing claims against chartered cities and counties and employees thereof.)

PERSONNEL OF COMMISSION

In February 1969, Mr. John D. Miller was appointed by the Governor to complete the term of Mr. Joseph A. Ball, who had resigned in September 1968. In November 1969, Mr. Miller was reappointed by the Governor.

Honorable Carlos J. Moorhead, Member of the Assembly for the Forty-third Assembly District, was appointed the Assembly Member of the Commission to replace former Assemblyman F. James Bear.

As of December 1, 1969, the membership of the Law Revision Commission is:

	<i>Term expires</i>
Sho Sato, Berkeley, <i>Chairman</i> -----	October 1, 1969
Thomas E. Stanton, Jr., San Francisco, <i>Vice Chairman</i> -----	October 1, 1969
Hon. Alfred H. Song, Monterey Park, <i>Senate Member</i> -----	*
Hon. Carlos J. Moorhead, Glendale, <i>Assembly Member</i> -----	*
Roger Arnebergh, Los Angeles, <i>Member</i> -----	October 1, 1971
John D. Miller, Long Beach, <i>Member</i> -----	October 1, 1973
Lewis K. Uhler, Covina, <i>Member</i> -----	October 1, 1971
Richard H. Wolford, Beverly Hills, <i>Member</i> -----	October 1, 1971
William A. Yale, San Diego, <i>Member</i> -----	October 1, 1971
George H. Murphy, Sacramento, <i>ex officio Member</i> -----	†

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

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

SUMMARY OF WORK OF COMMISSION

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

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

During the past year, the Commission has received and considered a number of suggestions for topics that might be studied by the Commission. Some of these suggested topics appear to be in need of study. However, because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission has determined not to request authorization to study any but two of these topics at this time.

The Commission held one one-day meeting, six two-day meetings, and three three-day meetings in 1969.

¹ See pages 97-99, *infra*.

² See pages 92-96, 100-106, *infra*.

³ See page 110, *infra*.

1970 LEGISLATIVE PROGRAM

The Commission plans to submit recommendations to the 1970 Legislature on the following nine topics:

- (1) **Fictitious Business Name Statute.** See *Recommendation and Study Relating to Fictitious Business Names* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 601 (1969).
- (2) **Representations as to the Credit of Third Persons.** See *Recommendation and Study Relating to Representations as to the Credit of Third Persons and the Statute of Frauds* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701 (1969).
- (3) **Sovereign Immunity.** See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969).
- (4) **The Rule Against Perpetuities.** See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 901 (1969).
- (5) **Quasi-Community Property.** See *Recommendation Relating to Quasi-Community Property* (June 1969) (Appendix I to this Report).
- (6) **Arbitration of Just Compensation.** See *Recommendation Relating to Arbitration of Just Compensation* (September 1969) (Appendix II to this Report).
- (7) **Evidence Code.** See *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969) (Appendix III to this Report).
- (8) **Real Property Leases.** See *Recommendation Relating to Real Property Leases* (November 1969) (Appendix IV to this Report).
- (9) **Statute of Limitations in Action Against Public Entities and Public Employees.** See *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees* (Appendix V to this Report).

The Commission also recommends that two studies be removed from its calendar of topics (see pages 105–106, *infra*), that it be authorized to study two additional topics (see pages 107–108, *infra*), and that the scope of one previously authorized study be expanded (see pages 108–109, *infra*).

STUDIES IN PROGRESS

INVERSE CONDEMNATION

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to study "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects." The Commission intends to devote a substantial portion of its time during the next four years to the study of inverse condemnation and tentatively plans to submit a recommendation on this subject to the 1973 Legislature. Prior to 1973, the Commission may submit recommendations concerning inverse condemnation problems that appear to be in need of immediate attention.

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

Other aspects of inverse condemnation liability under active study by the Commission include liability for highway proximity damage and aircraft noise damage. Recommendations emanating from the inverse condemnation study are those relating to liability for ultrahazardous activities, liability for the use of pesticides, liability based on a theory of common law nuisance, and the rights and obligations arising when a public entity enters upon private property to survey, examine, and make tests in connection with the possible acquisition of the property for public use.¹

Professor Arvo Van Alstyne of the College of Law, University of Utah, has been retained as the Commission's research consultant on this topic. The first five portions of his research study have been completed and published in law reviews.² Additional portions of the study are in preparation.

¹ See *Recommendation Relating to Sovereign Immunity: Number 10—Revision of the Governmental Liability Act* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969).

² See Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAWYER 1 (1967); *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968); *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L. J. 431 (1969); *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969).

CONDEMNATION LAW AND PROCEDURE

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

As it did in connection with the Evidence Code study, the Commission will publish a series of reports containing tentative recommendations and research studies covering various aspects of condemnation law and procedure. The comments and criticisms received from interested persons and organizations on these tentative recommendations will be considered before the comprehensive statute is drafted. The first report in this series has been published. See *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967). The second research study in this series, dealing with the right to take, is nearly finished and arrangements will be made for its publication in a law review. The Commission's staff has begun work on the third study which will deal with compensation and the measure of damages. Two other research studies prepared for the Commission to cover various aspects of eminent domain were published in 1969.³

Prior to 1973, the Commission will submit recommendations concerning eminent domain problems that appear to be in need of immediate attention. The Commission submitted the first such recommendation (exchange of valuation data) to the 1967 Legislature,⁴ a second recommendation (recovery of the condemnee's expenses on abandonment of an eminent domain proceeding) to the 1968 Legislature,⁵ and will submit a third recommendation (arbitration of just compensation) to the 1970 Legislature.⁶

During 1969, the Commission prepared and sent out for comment a tentative recommendation relating to the extent to which the right of eminent domain may be used to acquire access to private property. The Commission also considered the extent to which the condemnee should be entitled to recover attorney's fees, appraisal fees, and other expenses of litigation.

EVIDENCE

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

³ See Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693 (1969); Matheson, *Excess Condemnation in California: Proposals for Statutory and Constitutional Change*, 42 SO. CAL. L. REV. 421 (1969).

⁴ See *Recommendation Relating to Discovery in Eminent Domain Proceedings*, 8 CAL. L. REVISION COMM'N REPORTS 19 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 1104.

⁵ See *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 133.

⁶ See *Recommendation Relating to Arbitration of Just Compensation* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 123 (1969).

The first is a continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others concerning the Evidence Code. As a result of this review, the Commission recommended to the 1967 Legislature that various changes be made in the Evidence Code,⁷ and to the 1969 Legislature that certain revisions be made in the Privileges Article of the Evidence Code.⁸ The Commission will submit a recommendation to the 1970 Legislature that various changes be made in the Evidence Code.⁹

The second project is a study of the other California codes to determine what changes, if any, are needed in view of the enactment of the Evidence Code. The Commission submitted recommendations relating to the Agricultural Code¹⁰ and the Commercial Code¹¹ to the 1967 legislative session. To the extent that its work schedule permits, the Commission will submit recommendations relating to additional codes to future sessions of the Legislature.

SOVEREIGN IMMUNITY

Sovereign immunity legislation was enacted in 1963 and 1965 upon recommendation of the Commission.¹² The Commission is continuing its study of this topic which is closely related to inverse condemnation. As a result of this review, the Commission will submit a recommendation to the 1970 Legislature that various changes be made in the governmental liability act.¹³ The recommendation to the 1970 Legislature includes such matters as ultrahazardous activity liability, liability arising out of correctional and health activities, immunity for injuries from plan or design of property, and liability arising out of the use of pesticides.

⁷ See *Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 101 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1315 (1967). Much of the recommended legislation was enacted. See Cal. Stats. 1967, Ch. 650.

⁸ See *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article* (November 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 501 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was not enacted.

⁹ See *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 137 (1969).

¹⁰ See *Recommendation Relating to the Evidence Code: Number 2—Agricultural Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 201 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 262.

¹¹ See *Recommendation Relating to the Evidence Code: Number 3—Commercial Code Revisions* (October 1966), reprinted in 8 CAL. L. REVISION COMM'N REPORTS 301 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS at 1316 (1967). Much of the recommended legislation was enacted. See Cal. Stats. 1967, Ch. 703.

¹² See note 3, *infra* at 100.

¹³ See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969). See also note 3, *infra* at 100.

OTHER TOPICS UNDER ACTIVE CONSIDERATION

During the 1970 legislative session, the Commission also will be occupied with the presentation of its legislative program. In addition to the recommendations mentioned above, the 1970 legislative program includes recommendations relating to quasi-community property,¹⁴ representations as to credit,¹⁵ the fictitious business name statute,¹⁶ and Civil Code Section 715.8 (rule against perpetuities).¹⁷

If work on eminent domain and inverse condemnation does not occupy substantially all of its time, the Commission plans to consider during 1970 other topics authorized for study. These include arbitration, Civil Code Section 1698 (oral modification of a contract in writing), liquidated damages, right of nonresident aliens to inherit, cross-complaints and counterclaims, and joinder of causes of action.

¹⁴ See *Recommendation Relating to Quasi-Community Property* (June 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 113 (1969).

¹⁵ See *Recommendation and Study Relating to Representations as to the Credit of Third Persons and the Statute of Frauds* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701 (1969).

¹⁶ See *Recommendation and Study Relating to Fictitious Business Names* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 601 (1969).

¹⁷ See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 901 (1969).

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1969 LEGISLATIVE SESSION

Eight bills and two concurrent resolutions were introduced to effectuate the Commission's recommendations to the 1969 session of the Legislature. Five of the bills were enacted. The concurrent resolutions were adopted.

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

RESOLUTIONS APPROVING TOPICS FOR STUDY

Senate Concurrent Resolution No. 16, introduced by Senator Alfred H. Song and adopted as Resolution Chapter 212 of the Statutes of 1969, authorizes the Commission to continue its study of topics previously authorized for study and to remove from its calendar one topic (whether Section 7031 of the Business and Professions Code, which precludes an unlicensed contractor from bringing an action to recover for work done, should be revised). The Commission has concluded that the determination of whether Section 7031 should be revised would not be particularly aided by the extensive legal research and analysis which the Commission undertakes to provide.

Senate Concurrent Resolution No. 17, introduced by Senator Song and Assemblyman Moorhead and adopted in amended form as Resolution Chapter 224 of the Statutes of 1969, authorizes the Commission to make studies of the following topics: (1) Whether the law relating to counterclaims and cross-complaints should be revised; (2) whether the law relating to liquidated damages in contracts and, particularly, in leases, should be revised; (3) whether the law relating to joinder of causes of action should be revised; (4) whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed; (5) whether the law relating to the right of nonresident aliens to inherit should be revised; and (6) whether the law giving preference to certain types of actions or proceedings in setting for hearing or trial should be revised.

POWERS OF APPOINTMENT

Senate Bill No. 98, which in amended form became Chapter 155 of the Statutes of 1969, and Senate Bill No. 99, which became Chapter 113 of the Statutes of 1969, were introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation and a Study Relating to Powers of Appointment*, 9 CAL. L. REVISION COMM'N REPORTS 301 (1969); *Report of Assembly Committee on Judiciary on Senate Bills 98, 99, 104, and 105*, ASSEMBLY J. (May 12, 1969) at 2990, reprinted as Appendix VI to this Report.

Senate Bill No. 98 was amended to add subdivision (c) to Section 1381.3 of the Civil Code. Senate Bill No. 99 was enacted as introduced.

STATUTE OF LIMITATIONS IN ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

Senate Bill No. 100 was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees*, 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); *Report of Assembly Committee on Judiciary on Senate Bill 100*, ASSEMBLY J. (June 10, 1969) at 4820. The bill was passed in amended form by the Legislature, but was vetoed by the Governor.

REAL PROPERTY LEASES

Senate Bill No. 101 was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Real Property Leases*, 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); *Report of Senate Committee on Judiciary on Senate Bill 101*, SENATE J. (March 3, 1969) at 577; *Report of Assembly Committee on Judiciary on Senate Bill 101*, ASSEMBLY J. (May 14, 1969) at 3218.

The bill was passed in amended form by the Senate. It was further amended and approved by the Assembly Judiciary Committee but was defeated on the Assembly floor. Reconsideration of the vote whereby the bill was defeated was granted, and the bill was placed on the inactive file. The bill was later rereferred to the Assembly Judiciary Committee and died in that committee.

FICTITIOUS BUSINESS NAME CERTIFICATES

Senate Bill No. 102, which became Chapter 114 of the Statutes of 1969, was introduced by Senator Song to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Fictitious Business Names*, 9 CAL. L. REVISION COMM'N REPORTS 71 (1969). Senate Bill 102 was enacted as introduced.

EVIDENCE CODE—REVISION OF THE PRIVILEGES ARTICLE

Senate Bill No. 103 was introduced by Senator Song and Assemblymen Foran, McCarthy, and Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to*

the Evidence Code: Number 4—Revision of the Privileges Article, 9 CAL. L. REVISION COMM'N REPORTS 501 (1969); Report of Assembly Committee on Judiciary on Senate Bill 103, ASSEMBLY J. (May 12, 1969) at 2989.

The bill was passed in amended form by the Legislature, but was vetoed by the Governor.

MUTUALITY OF REMEDIES IN SUITS FOR SPECIFIC PERFORMANCE

Senate Bill No. 104, which in amended form became Chapter 156 of the Statutes of 1969, was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation and a Study Relating to Mutuality of Remedies in Suits for Specific Performance, 9 CAL. L. REVISION COMM'N REPORTS 201 (1969); Report of Assembly Committee on Judiciary on Senate Bills 98, 99, 104, and 105, ASSEMBLY J. (May 12, 1969) at 2990, reprinted as Appendix VI to this Report.*

The following significant amendments were made to Senate Bill No. 104:

Civil Code Section 3386 was amended as follows:

(1) The introductory clause was amended to substitute "Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific performance may be compelled" for the proposed wording: "Specific performance may be compelled, whether or not the agreed counterperformance is or would have been specifically enforceable."

(2) Subdivision (b) was amended to insert the clause, "if the court deems necessary."

ADDITUR AND REMITTITUR

Senate Bill No. 105, which in amended form became Chapter 115 of the Statutes of 1969, was introduced by Senator Song and Assemblyman Moorhead to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Additur and Remittitur, 9 CAL. L. REVISION COMM'N REPORTS 63 (1969); Report of Assembly Committee on Judiciary on Senate Bills 98, 99, 104, and 105, ASSEMBLY J. (May 12, 1969) at 2990, reprinted as Appendix VI to this Report.*

The following significant amendments were made to Senate Bill No. 105:

Code of Civil Procedure Section 662.5 was amended as follows:

(1) The introductory clause was amended to insert the phrase, "after trial by jury" following the word, "where," and to insert the phrase "in its discretion" preceding the colon.

(2) Subdivision (a) was amended to substitute the words, "If the ground for granting a new trial is inadequate damages, make its order granting the new trial" for the phrase, "Grant a motion for a new trial on the ground of inadequate damages and make its order."

(3) Subdivision (b) was amended to substitute the words, "If the ground for granting a new trial is excessive damages, make its order granting the new trial" for the phrase, "Grant a motion for a new trial on the ground of excessive damages and make its order."

CALENDAR OF TOPICS FOR STUDY

TOPICS AUTHORIZED FOR STUDY

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

TOPICS UNDER ACTIVE CONSIDERATION

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

1. Whether the law and procedure relating to condemnation should be revised with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 4 CAL. L. REVISION COMM'N REPORTS at 115 (1963)).²
2. Whether the doctrine of sovereign or governmental immunity in California should be abolished or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).³

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

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

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

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

See also *Recommendation Relating to Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 183.

See also *Recommendation Relating to Arbitration of Just Compensation* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 123 (1969). This recommendation will be submitted to the 1970 Legislature.

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

³ See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits*

3. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects (Cal. Stats. 1965, Res. Ch. 130, p. 5289).
4. Whether the Evidence Code should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).⁴

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

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

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

See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act* (September 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 801 (1969); *Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees*, reprinted in 9 CAL. L. REVISION COMM'N REPORTS at 175 (1969). These recommendations will be submitted to the 1970 Legislature.

This topic will be considered in connection with the Commission's study of topic 3 (inverse condemnation).

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

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

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

See also *Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code* (September 1969), reprinted in 9 CAL. L. REVISION

5. Whether the law relating to arbitration should be revised (Cal. Stats. 1968, Res. Ch. 110; see also 8 CAL. L. REVISION COMM'N REPORTS at 1325 (1967)).⁵
6. Whether Civil Code Section 1698 should be repealed or revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 21 (1957)).
7. Whether the law relating to counterclaims and cross-complaints should be revised (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 25 (1969)).
8. Whether the law relating to liquidated damages in contracts and, particularly, in leases, should be revised (Cal. Stats. 1969, Res. Ch. 224).
9. Whether the law relating to joinder of causes of action should be revised (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 27 (1969)).
10. Whether the law relating to the right of nonresident aliens to inherit should be revised (Cal. Stats. 1969, Res. Ch. 224).
11. Whether the law giving preference to certain types of actions or proceedings in setting for hearing or trial should be revised (Cal. Stats. 1969, Res. Ch. 224).
12. Whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases (Cal. Stats. 1955, Res. Ch. 207, p. 4207).⁶

OTHER TOPICS AUTHORIZED FOR STUDY

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

1. Whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised (Cal. Stats. 1956, Res. Ch. 42, p. 263; see also 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 29 (1957)).
2. Whether the law relating to attachment, garnishment, and property exempt from execution should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589; see also 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 15 (1957)).
3. Whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of

COMM'N REPORTS 137 (1969). This recommendation will be submitted to the 1970 Legislature.

This topic is under continuing study to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code and whether changes are needed in other codes to conform them to the Evidence Code. See 9 CAL. L. REVISION COMM'N REPORTS 94 (1969).

⁵ This is a supplemental study; the present California arbitration law was enacted in 1961 upon Commission recommendation. See *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). See also Cal. Stats. 1961, Ch. 461.

⁶ See *Recommendation and Study Relating to Taking Instructions to the Jury Room*, 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 13 (1959). The recommended legislation was withdrawn by the Commission for further study.

the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales (Cal. Stats. 1959, Res. Ch. 218, p. 5792; see also Cal. Stats. 1956, Res. Ch. 42, p. 263; 1 CAL. L. REVISION COMM'N REPORTS, 1956 Report at 21 (1957)).

TOPICS CONTINUED ON CALENDAR FOR FURTHER STUDY

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

1. Whether an award of damages made to a married person in a personal injury action should be the separate property of such married person (Cal. Stats. 1957, Res. Ch. 202, p. 4589).¹
2. Whether the law relating to the doctrine of mutuality of remedy in suits for specific performance should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).²
3. Whether Vehicle Code Section 17150 and related statutes should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1962, Res. Ch. 23, p. 94).³
4. Whether the law relating to the rights of a good faith improver of property belonging to another should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁴
5. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the

¹ See *Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property*, 8 CAL. L. REVISION COMM'N REPORTS 401 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1318 (1967).

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

² See *Recommendation and a Study Relating to Mutuality of Remedies in Suits for Specific Performance* (September 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 201 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 99 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 156.

³ See *Recommendation and Study Relating to Vehicle Code Section 17150 and Related Sections*, 8 CAL. L. REVISION COMM'N REPORTS 501 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 702.

⁴ See *Recommendation and Study Relating to The Good Faith Improver of Land Owned by Another*, 8 CAL. L. REVISION COMM'N REPORTS 801 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

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

- law relating to the liability of such associations and their members should be revised (Cal. Stats. 1966, Res. Ch. 9; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).⁵
6. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised (Cal. Stats. 1967, Res. Ch. 81; see also Cal. Stats. 1956, Res. Ch. 42, p. 263).⁶
 7. Whether Section 1974 of the Code of Civil Procedure should be repealed or revised (Cal. Stats. 1958, Res. Ch. 61, p. 135).⁷
 8. Whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised (Cal. Stats. 1966, Res. Ch. 9).⁸
 9. Whether the law relating to a power of appointment should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289).⁹
 10. Whether the law relating to the use of fictitious names should be revised (Cal. Stats. 1957, Res. Ch. 202, p. 4589).¹⁰

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

See also *Recommendation Relating to Service of Process on Unincorporated Associations*, 8 CAL. L. REVISION COMM'N REPORTS at 1403 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 13-19 (1969). The recommended legislation was enacted. See Cal. Stats. 1968, Ch. 132.

⁶ See *Recommendation Relating to Escheat*, 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS at 16-18 (1969). Most of the recommended legislation was enacted. See Cal. Stats. 1968, Ch. 247 (escheat of decedent's estate) and Ch. 356 (unclaimed property act).

⁷ See *Recommendation and Study Relating to Representations as to the Credit of Third Persons and the Statute of Frauds* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 701 (1969). This recommendation will be submitted to the 1970 Legislature.

⁸ See *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957). For a legislative history of this recommendation, see 2 CAL. L. REVISION COMM'N REPORTS, 1953 Report at 13 (1959). The recommended legislation was enacted. See Cal. Stats. 1957, Ch. 490. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961). For a legislative history of this recommendation, see 4 CAL. L. REVISION COMM'N REPORTS 15 (1963). The recommended legislation was enacted. See Cal. Stats. 1961, Ch. 636.

See also *Recommendation Relating to Quasi-Community Property* (June 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 113 (1969). This recommendation will be submitted to the 1970 Legislature.

⁹ See *Recommendation and Study Relating to Powers of Appointment* (October 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 301 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Chs. 113, 155.

¹⁰ See *Recommendation Relating to Fictitious Business Names* (October 1968), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 71 (1969). For a legislative history of this recommendation, see 9 CAL. L. REVISION COMM'N REPORTS 98 (1969). The recommended legislation was enacted. See Cal. Stats. 1969, Ch. 114. See also *Recommendation and Study Relating to Fictitious Business Names* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 601 (1969). This recommendation will be submitted to the 1970 Legislature.

11. Whether the law relating to additur and remittitur should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).¹¹
12. Whether Civil Code Section 715.8 (rule against perpetuities) should be revised or repealed (Cal. Stats. 1969, Res. Ch. 224; see also 9 CAL. L. REVISION COMM'N REPORTS at 28 (1969)).¹²
13. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised (Cal. Stats. 1965, Res. Ch. 130, p. 5289; see also Cal. Stats. 1957, Res. Ch. 202, p. 4589).¹³

TOPICS TO BE DROPPED FROM CALENDAR OF TOPICS

STUDY RELATING TO SERVICE OF PROCESS BY PUBLICATION

In 1958, the Commission was authorized to make a study to determine whether the California statutes relating to service of process by publication should be revised.¹ The Commission requested authority to make this study because two United States Supreme Court decisions—one decided in 1950² and the other in 1956³—had placed new and substantial constitutional limitations on the service of process by publication in judicial proceedings. The Commission concluded that a comprehensive and detailed study was needed to make certain that all California statutory provisions which might be affected by the decisions were examined and any necessary revisions made.

The Commission delayed making such a study because the State Bar decided to undertake a study that included this topic.⁴ In 1966, the

¹¹ See *Recommendation and Study Relating to Additur*, 8 CAL. L. REVISION COMM'N REPORTS 601 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1317 (1967). The recommended legislation was enacted. See Cal. Stats. 1967, Ch. 72.

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

¹² See *Recommendation and Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities* (October 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS 901 (1969). This recommendation will be submitted to the 1970 Legislature.

¹³ See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967). For a legislative history of this recommendation, see 8 CAL. L. REVISION COMM'N REPORTS 1319 (1967).

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

See also *Recommendation Relating to Real Property Leases* (November 1969), reprinted in 9 CAL. L. REVISION COMM'N REPORTS at 53 (1969). This recommendation will be submitted to the 1970 Legislature.

¹ This study was authorized by Cal. Stats. 1958, Res. Ch. 61, p. 135. For a description of the topic, see 2 CAL. L. REVISION COMM'N REPORTS, 1958 Report at 18 (1959).

² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³ *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

⁴ See 41 CAL. S.B.J. 737 (1966); 38 CAL. S.B.J. 486 (1963); 37 CAL. S.B.J. 590 (1962).

State Bar forwarded a proposed statute to the Judicial Council for joint study. The 1969 session of the Legislature enacted legislation recommended by the State Bar and the Judicial Council.⁵ The legislation enacted by the 1969 Legislature is intended to provide a modern law on jurisdiction and service of process. Accordingly, the Commission has concluded that no useful purpose would be served by the Commission's making a study of service of process by publication.

STUDY RELATING TO THE SMALL CLAIMS COURT LAW

In 1957, the Commission was authorized to make a study to determine whether the Small Claims Court Law should be revised.⁶ The Commission requested authority to make this study because it had received communications from judges in various parts of the state suggesting that defects and gaps existed in the Small Claims Court Law. The communications suggested that a variety of matters merited study, including such matters as whether the monetary jurisdiction of the small claims court should be increased and whether the plaintiff should be permitted to appeal when the defendant prevailed on a counterclaim. Some—but far from all—of the questions which motivated the Commission to request authority to study this topic have been dealt with by the Legislature⁷ or by the courts.⁸

The Commission has concluded that any study of the Small Claims Court Law should be a comprehensive one and that such a study would be a substantial undertaking. The Commission is now devoting substantially all its resources to two major studies—condemnation law and procedure and inverse condemnation—and is unable to commence work on another major study at this time. It is likely that the Small Claims Court Law will receive continuing legislative attention.⁹ Moreover, a revision of the Small Claims Court Law would present policy questions concerning judicial administration that would be appropriate for study by the Judicial Council. Accordingly, the Commission recommends that this topic be dropped from its agenda.

⁵ Cal. Stats. 1969, Ch. 1610. See also *Revision of Title 5 (commencing with Section 405) of the Code of Civil Procedure Relating to Jurisdiction and Service of Process*, 1969 CAL. JUDICIAL COUNCIL REPORT 31 (1969).

⁶ This study was authorized by Cal. Stats. 1957, Res. Ch. 202, p. 4589. For a description of the topic, see 1 CAL. L. REVISION COMM'N REPORTS, 1957 Report at 16 (1957).

⁷ For example, the jurisdictional limit was increased from \$100 to \$150 in 1957, from \$150 to \$200 in 1961, and from \$200 to \$300 in 1967. CAL. CODE CIV. PROC. § 117 (West Supp. 1968).

⁸ For example, *Skaff v. Small Claims Court for Los Angeles Judicial Dist. of Los Angeles County*, 68 Cal.2d 76, 435 P.2d 825, 65 Cal. Rptr. 65 (1968), held that, where the defendant recovered on a counterclaim against the plaintiff, the plaintiff was entitled to appeal to the Superior Court from the judgment on the counterclaim.

⁹ A report prepared for the Assembly Committee on Judiciary in 1969 suggested that legislative hearings on the small claims courts would be worthwhile. See GOLDFARB, PROBLEMS IN THE ADMINISTRATION OF JUSTICE IN CALIFORNIA 96 (1969).

TOPICS FOR FUTURE CONSIDERATION

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

A study to determine whether the law relating to nonprofit corporations should be revised

The Corporations Code and special provisions in a number of other codes authorize and regulate the incorporation and operation of nonprofit corporations.¹ However, the scheme has developed piecemeal and, as noted recently, "historically the orphan of corporate law, nonprofit corporations [have] suffered from undefined and poorly articulated statutes governing their organization. . . ."² As an example, Section 9002 of the Corporations Code provides that the general business corporation law applies to nonprofit corporations, "except as to matters specifically otherwise provided for." Thus, it would appear that the general corporation law relating to the issuance and handling of shares should apply to nonprofit corporations, but the latter do not distribute profits or normally even issue stock.³ The situation is further confused by provisions that incorporate the nonprofit corporation provisions by reference,⁴ and thus requires reference first to the general nonprofit corporation law which in turn requires reference to the general business corporation law.

Such confusion and ambiguity could be excused or, at least, ignored except that:⁵

In recent decades nonprofit corporation law has taken on a new importance. . . .

Nonprofit corporations are no longer confined to the traditional category of political, religious, or social endeavor but have expanded to include community theaters, hospitals, thrift shops, conservation clubs, etc. Moreover, the tax problems, the state and local laws regulating fund-raising, the effect of various activities on the tax-exempt status, the effects of reorganization or dissolution, and

¹ See generally Divisions 2 and 3 of Title 1 of the Corporations Code. Other provisions are scattered throughout the codes. See, e.g., AGRIC. CODE § 54002 (nonprofit agricultural associations); EDUC. CODE §§ 29004, 29005 (private educational institutions); INS. CODE § 11496 (hospital corporation).

² Preface to CALIFORNIA NONPROFIT CORPORATIONS (Cal. Cont. Ed. Bar 1969).

³ See H. OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 6 (2d ed. 1965).

⁴ See CORP. CODE § 12205 (provisions relating to nonprofit corporations "apply to cooperative corporations formed under this part, except where such provisions are in conflict with those of this part").

⁵ Preface to CALIFORNIA NONPROFIT CORPORATIONS (Cal. Cont. Ed. Bar 1969).

many other problems are complex and difficult. Because of these reasons nonprofit corporation law has recently gained a greater vitality.

A study should, therefore, be made to determine whether the law relating to nonprofit corporations should be revised.⁶

Studies of problems concerning procedures in civil actions that would not require a substantial amount of Commission time or resources

Although certain areas of the law relating to civil procedure have received considerable attention and have been subject to substantial revision in relatively recent years,⁷ other areas have not been reviewed and have remained essentially unchanged for almost one hundred years.⁸ The Commission is frequently presented with relatively narrow, simple problems of civil practice, pleading, and procedure both in the course of its work on other topics and through communications from judges and attorneys. These problems would scarcely justify separate authorizations for study, but the Commission believes that they should be studied on a nonpriority basis as time and resources permit. The Commission would, of course, request separate authorization before undertaking the study of any aspect of practice, pleading, or procedure that would require a substantial amount of time or resources.

A study to determine 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

In 1965, the Legislature directed the Law Revision Commission to undertake a study to determine "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects."⁹ Pursuant to this directive, the Commission has initiated

⁶ It is anticipated that such a study would lead to a comprehensive revision of the law relating to nonprofit corporations, and, in this connection, the New York comprehensive Not-For Profit Corporation Law (effective September 1, 1970) and the Model Nonprofit Corporation Act, drafted by the American Bar Association Committee on Corporate Laws, may provide some guidance. See ABA COMMITTEE ON CORPORATE LAWS, MODEL NONPROFIT CORPORATION ACT (1964).

⁷ For example, completely new provisions relating to depositions and discovery, based largely on the Federal Rules of Civil Procedure, were enacted at the 1957 Regular Session of the California Legislature. Cal. Stats. 1957, Ch. 1904, § 3, p. 5322. See CODE CIV. PROC. §§ 2016-2036. Rules governing pretrial procedure were first promulgated by the Judicial Council in 1957; major changes were adopted in 1963, and significant amendments were made in 1967. See CAL. RULES OF CT., Rules 206-218.

⁸ The code pleading system, introduced in California by the Practice Act, had its origin in the New York Code of 1848 (known as the "Field Code") and has seen relatively little change since its codification in 1872. The existing rules can unfairly trap the unwary or inexperienced. See, e.g., *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191 (1926) (denial on the ground that "defendant has no knowledge or information sufficient to form a belief," does not directly deny for lack of belief, is therefore defective, and raises no issue); *Connecticut Mut. Life Ins. Co. v. Most*, 39 Cal. App.2d 634, 640, 103 P.2d 1013, 1017 (1940) (negative pregnant—specific denial of one admits all lesser included sums). Yet, at the same time, these rules can be easily circumvented by the skilled, although often requiring pleadings that are both cumbersome and meaningless.

⁹ Cal. Stats. 1965, Res. Ch. 130, p. 5289.

work, giving priority to the water damage and interference with land stability aspects of inverse condemnation. A research study has been prepared,¹⁰ and progress has been made in preparing a recommendation relating to these areas of the law.

The Commission's study of inverse liability discloses that, in the past, the California courts have relied frequently upon the rules of private law in dealing with inverse condemnation liability.¹¹ These rules appear unsatisfactory in certain situations as applied to public entities and may need to be changed. However, such changes in the public sphere alone and the resultant differences between the rules governing public and private activities could create serious problems. For example, should different rules of liability or immunity apply where public and private improvements combine to cause damage? In other words, is only one improver—either the private or the public improver—to be liable in some situations where public and private improvements combine to cause damage and, if so, how should the damages be computed? Should liability be imposed or immunity be granted merely because a private improvement is subsequently acquired by a public entity? The resolution of these and similar problems requires consideration of the law applicable to both private persons and public entities.

The Commission accordingly requests authority to study those related areas of the private law to determine whether changes in the private area are necessary or desirable in connection with revision of the law relating to inverse condemnation.

¹⁰ See Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L. J. 431 (1969). See also Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 18 SANTA CLARA LAWYER 1 (1967).

¹¹ See, e.g., Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L. J. 431, 448-449 (1969).

REPORT ON STATUTES REPEALED BY IMPLICATION OR HELD UNCONSTITUTIONAL

Section 10331 of the Government Code provides:

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

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

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

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

(3) Three decisions of the Supreme Court of California holding a statute of this state unconstitutional have been found.

Sections 478-504 of the Code of Civil Procedure authorized mesne civil arrest and bail but formerly did not require that the defendant be brought into court after his arrest or that he be notified of his rights.² In *In re Harris*,³ it was held that the former procedure for mesne process of civil arrest and bail did not provide the due process of law required by the Fourteenth Amendment to the United States Constitution and Article I, Section 13, of the California Constitution. Legislation intended to correct this defect in the mesne process of civil arrest and bail was enacted at the 1969 Regular Session.⁴

In *Purdy & Fitzpatrick v. State*,⁵ the California Supreme Court held Labor Code Section 1850 and related sections unconstitutional. Labor Code Sections 1850-1854 prohibit the employment of aliens on public work except in special cases.⁶

In *People v. Belous*,⁷ Penal Code Section 274, as it read prior to a 1967 amendment, was held unconstitutional. In 1967, Section 274 (the California penal abortion statute) was amended, and Sections 25950-25954 (the "Therapeutic Abortion Act") were added to the Health and Safety Code. The 1967 legislation broadened the lawful grounds for obtaining an abortion. The validity of Penal Code Section 274 as amended in 1967 was not determined in the *Belous* case.

¹ This study has been carried through 71 Adv. Cal. 1168 (1969) and 89 S. Ct. 2151 (1969).

² Section 503 of the Code of Civil Procedure provided that the arrested defendant could apply to the court at any time before trial or entry of judgment to vacate the arrest order or to reduce the amount of bail.

³ 69 Cal.2d 486, 447 P.2d 149, 72 Cal. Rptr. 341 (1968).

⁴ Cal. Stats. 1969, Ch. 690.

⁵ 71 Adv. Cal. 587, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

⁶ In view of *Purdy & Fitzpatrick*, Labor Code Sections 1940-1947 may also be constitutionally suspect. These sections prohibit the employment of an alien by a city, county, or department of the state.

⁷ 71 Adv. Cal. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study (see pages 100–105 of this Report), to study the new topics listed on pages 107–109 of this Report, and to drop from its calendar of topics the topics listed on pages 105–106 of this Report.

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends the repeal of Labor Code Section 1850 and related sections to the extent that those provisions are unconstitutional.

APPENDIX I
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Quasi-Community Property

June 1969

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

NOTE

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

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

June 30, 1969

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

The California Law Revision Commission was directed by Resolution Chapter 9 of the Statutes of 1966 to make a study to determine whether the law relating to quasi-community property and property described in Section 201.5 of the Probate Code should be revised.

The Commission has published several recommendations and studies on the subject of quasi-community property. *See Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957); *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961). The legislation recommended by the Commission was enacted. Cal. Stats. 1957, Ch. 490; Cal. Stats. 1961, Ch. 636.

The Commission has reviewed the legislation enacted in 1957 and 1961. As a result of this review, the Commission submits this recommendation.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION
relating to
Quasi-Community Property

Married persons who move to California have often acquired property during the marriage while they were domiciled elsewhere which would have been community property had they been domiciled here when it was acquired. This property is in some cases retained in the form in which it was first acquired; in other cases, it is exchanged for real or personal property here. The Legislature and the courts of this state have long been concerned with the problem of what rights, if any, the spouse of the person who originally acquired such property should have therein, or in the property for which it is exchanged, both during the lifetime of the acquiring spouse and upon his death.

The first legislation dealing with these problems was an amendment, made in 1917, to Section 164 of the Civil Code which purported to treat as community property for all purposes all property acquired during the marriage by either husband or wife while domiciled elsewhere which would not have been separate property had the owner been domiciled in California when it was acquired. This amendment was held unconstitutional in *Estate of Thornton*,¹ decided in 1934. In 1935, legislation, much narrower in scope, was enacted which dealt only with the disposition upon death of personal property acquired by a married person while domiciled elsewhere.² Finally, upon recommendation of the California Law Revision Commission, more comprehensive legislation was enacted in 1957 relating to the rights of a surviving spouse in property acquired by a decedent while domiciled elsewhere³ and in 1961 relating to inter vivos rights in property acquired by a husband and wife while domiciled elsewhere.⁴ This legislation, where appropriate, embraced not only personal property but also real property situated in California. Moreover, as indicated above, it dealt not only with disposition of the property upon death but also with its disposition in the event of divorce or legal separation, with homestead rights, and with treatment of the property for gift tax purposes. In these areas, the legislation was intended to equate the rights of married persons who acquire property elsewhere and then become domiciled here with the rights of persons who make their acquisitions while domiciled here. The constitutionality of the legislation has been upheld.⁵ A number of years have passed since its enactment, and the Commis-

¹ 1 Cal.2d 1, 33 P.2d 1 (1934).

² Cal. Stats. 1935, Ch. 831, p. 2248. See *In re Miller*, 31 Cal.2d 191, 187 P.2d 722 (1947).

³ Cal. Stats. 1957, Ch. 490, p. 1520. See *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957).

⁴ Cal. Stats. 1961, Ch. 636, p. 1838. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961).

⁵ *Addison v. Addison*, 62 Cal.2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965); *Estate of Rogers*, 245 Cal. App.2d 101, 53 Cal. Rptr. 572 (1966).

sion knows of no instance where the purpose of the legislation has been thwarted. Nevertheless, the Commission has been advised of ambiguities in certain of its provisions⁶ and believes that, in the area of divorce and legal separation, the coverage of the 1961 statute should be clarified and broadened.

Accordingly, the Commission makes the following recommendations:

1. Civil Code Section 4803⁷ defines "quasi-community property" as meaning

all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired as follows:

(a) By either spouse while domiciled elsewhere which would have been community property had the spouse acquiring the property been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

Subdivision (b) of Section 4803 might be construed to make certain property quasi-community property even though it would be separate property if acquired by a California domiciliary. Some property acquired during marriage "other than by gift, devise, bequest or descent" is not community property. Examples of this are the earnings of the husband after rendition of an interlocutory judgment of dissolution of the marriage,⁸ and of the wife while she is living separate from her husband.⁹ Such property is not generally of major significance, and in view of the clear purpose of Section 4803, the courts might construe subdivision (b) of that section as excluding such property from the definition of "quasi-community property."¹⁰ Nevertheless, the section should be clarified by conforming the operative description in subdivision (b) with that contained in subdivision (a). The identical defect is also present in Section 1237.5 of the Civil Code, Section 201.5 of the Probate Code, and Section 15300 of the Revenue and Taxation Code, and these sections should therefore also be amended in the same fashion.

2. Civil Code Section 4803 is significant only with respect to proceedings for the dissolution of the marriage and proceedings for legal separation.¹¹ The section now limits quasi-community property to "all personal property wherever situated and all real property situated in this state." However, in the context of a proceeding for dissolution of the marriage or for legal separation, the exclusion of real property located in another state seems undesirable and constitutionally unnecessary. Real property located in another state may often be an important or

⁶ See 1 ARMSTRONG, CALIFORNIA FAMILY LAW 91-93 (Cum. Supp. 1966).

⁷ Civil Code Section 4803 is a recodification of former Civil Code Section 140.5. Section 140.5 was enacted in 1961 and repealed in 1969.

⁸ CIVIL CODE § 5119.

⁹ CIVIL CODE § 5118. See also CIVIL CODE §§ 5109 and 5126.

¹⁰ See ARMSTRONG, *supra* note 6. See also *Cooper v. Cooper*, 269 Adv. Cal. App. 1, 74 Cal. Rptr. 439 (1969).

¹¹ The section also has applicability in certain support actions but its significance there is limited at most to establishment of a priority of liability. Whether treated as "separate" or "quasi-community" property, the property in question would still be subject to the support orders of the court. See CIVIL CODE §§ 4807 and 5132. See also CIVIL CODE §§ 4450-4455 (property division and support where a marriage is void or voidable).

even the primary asset acquired by a couple from earnings during their marriage while residing outside of California. However, Section 4803 precludes the court from making an appropriate allocation of this marital property in a California proceeding for dissolution of the marriage or for legal separation.

Real property situated in another state acquired by a California domiciliary with community funds is treated under present California law—by application of the tracing principle—as community property for the purpose of division of the property in a proceeding for dissolution of the marriage or for legal separation.¹² By a parity of reasoning, similar property acquired by a spouse while domiciled elsewhere with funds which would have been community property had the spouse acquiring the property been domiciled in California at the time of acquisition should be treated as quasi-community—not separate—property upon dissolution of the marriage or legal separation. The Commission believes that such treatment would create no constitutional problems, for example, in a proceeding for dissolution or legal separation where at least one of the spouses has become domiciled here and the court has personal jurisdiction over the other. In these circumstances, California has an interest more than sufficient to provide for the division of *all* the marital property,¹³ and California's power to effect the division should not be foreclosed by the fortuity of when or where the property was initially acquired. Accordingly, the Commission recommends that Section 4803 be amended to embrace all marital property wherever situated.

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

An act to amend Sections 1237.5 and 4803 of the Civil Code, Section 201.5 of the Probate Code, and Section 15300 of the Revenue and Taxation Code, relating to property.

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

Civil Code Section 1237.5 (amended)

SECTION 1. Section 1237.5 of the Civil Code is amended to read:

1237.5. As used in this title:

(a) "Quasi-community property" means real property situated in this state heretofore or hereafter acquired *in any of the following ways* :

¹² See, e.g., *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957). The 1961 amendment of Section 164, now Section 5110, of the Civil Code did not affect this rule. See *Recommendation and Study Relating to Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 CAL. L. REVISION COMM'N REPORTS at I-1, I-12, I-13 (1961).

¹³ See *Addison v. Addison*, 62 Cal.2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). See also Schreter, "Quasi-Community Property" in the Conflict of Laws, 50 CAL. L. REV. 206, 238 (1962). It should, however, be noted that, where real property is located in another state, a California court is limited to a declaration of the rights in that property of the parties properly before it; and, though its decree is entitled to full faith and credit in the situs state, California may not directly affect the title to the land. *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957).

(1) By either spouse while domiciled elsewhere which would have been community property of the husband and wife ~~had if the spouse acquiring who acquired the property had been domiciled in this state at the time of its acquisition ; or .~~

(2) In exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition .~~

(b) "Separate property" does not include quasi-community property.

Comment. See the second paragraph of the Comment to Section 4803.

The phrase "of the husband and wife" has been deleted from paragraph (1) of subdivision (a) as unnecessary. This deletion also makes the section conform to the language used in Civil Code Section 4803.

Civil Code Section 4803 (amended)

SEC. 2. Section 4803 of the Civil Code is amended to read:

4803. As used in this part, "quasi-community property" means all *real or* personal property, wherever situated, ~~and all real property situated in this state heretofore or hereafter acquired as follows in any of the following ways :~~

(a) By either spouse while domiciled elsewhere which would have been community property ~~had if the spouse acquiring who acquired the property had been domiciled in this state at the time of its acquisition.~~

(b) In exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition .~~

~~For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.~~

Comment. The definition of "quasi-community property" in Section 4803 is amended to include all property, wherever situated, which would have been treated as community property had the acquiring spouse been domiciled in California at the time of acquisition. This insures that the division of marital property upon judgment of nullity or upon dissolution of the marriage or legal separation will not be controlled by the fortuity of when or where the property was initially acquired. Under prior law, real property situated in another state was excluded from the definition and was subject therefore to characterization and treatment as separate property even though it was acquired with what would have been community funds had the spouse acquiring the property been domiciled in California at the time of acquisition. This undesirable disparity has been eliminated.

Subdivision (b) is also amended to equate more precisely its definition of quasi-community property to what would have been the community property of a spouse domiciled in California. The amendment makes clear that property of the type described in Civil Code Sections 5109, 5118, 5119, and 5126 is not quasi-community property.

Probate Code Section 201.5 (amended)

SEC. 3. Section 201.5 of the Probate Code is amended to read:

201.5. Upon the death of any married person domiciled in this state, one-half of the following property in his estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and, in the absence thereof, goes to the surviving spouse:

(a) ~~all~~ All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired ~~by~~ ~~(a)~~ By by the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse ~~had~~ if the decedent ~~had~~ been domiciled in this state at the time of its acquisition ~~;~~ ~~or~~.

(b) ~~In~~ All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by the decedent during the marriage while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.~~

All such property is subject to the debts of the decedent and to administration and disposal under the provisions of Division 3 (*commencing with Section 300*) of this code.

As used in this section, personal property does not include, and real property does include, leasehold interests in real property.

Comment. See the second paragraph of the Comment to Civil Code Section 4803.

Revenue and Taxation Code Section 15300 (amended)

SEC. 4. Section 15300 of the Revenue and Taxation Code is amended to read:

15300. For the purposes of this chapter, property is "quasi-community property" if it is heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere and would have been the community property of the husband and wife ~~had~~ if the spouse ~~acquiring~~ who acquired the property had been domiciled in this state at the time of its acquisition ~~;~~ ~~or~~.

(b) In exchange for real or personal property, wherever situated, ~~acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition .~~

Comment. See the second paragraph of the Comment to Civil Code Section 4803.

The phrase "of the husband and wife" has been deleted from subdivision (a) as unnecessary. This deletion also makes Section 15300 conform to the language used in Civil Code Section 4803.

APPENDIX II
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Arbitration of Just Compensation

September 1969

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

NOTE

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

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

September 10, 1969

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

The California Law Revision Commission was directed by Resolution Chapter 130 of the Statutes of 1965 to study condemnation law and procedure.

The Commission submits herewith its recommendation on one aspect of this subject that appears to be in need of immediate attention—arbitration of just compensation.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Arbitration of Just Compensation

Section 14 of Article I of the California Constitution forbids the taking of property for public use "without just compensation having first been made to, or paid into court for, the owner." The section also specifies that the compensation "shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." When adopted in 1879, this language merely confirmed the condemnation procedure already set forth in Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure. The provisions of the Code, in turn, were not new. They were taken from one of California's earliest "railroad laws" with the sections being "only modified where necessary to give perspicuity, and to make them general or adaptable to all cases of condemnation."¹

The imprint of these origins of California condemnation procedure remains with us. For the most part, the taking of property for public use is still viewed from the rather limited vantage point of the courtroom and, more particularly, of the jury room. This is so much the case that the heart of the matter—compensation—is often discussed solely in terms of jury behavior and the fortunes and hazards of jury verdicts.²

A specific consequence of California's traditional "jury trial" approach to the law of eminent domain has been a marked lack of experimentation with other methods for determining "just compensation." The only exceptions to jury trial in California law are (a) the little-used procedure for determining the value of public utility property by the Public Utilities Commission,³ (b) provisions for voluntary reference of the issue of compensation to "referees" in a few of the early improvement acts,⁴ (c) the provisions in the Code of Civil Procedure for factual determinations by referees in civil litigation generally,⁵ and (d) trial by court where a jury has been waived. In contrast, other jurisdictions have experimented extensively with alternatives to jury trial. A survey made in 1931⁶ disclosed that, at that time, there were over 300 distinguishable procedures in the United States for assessing compensation in connection with the taking of property.

In recent years, a number of persons have suggested that one practicable alternative to jury trial would be voluntary arbitration of the

¹ See the Code Commissioners' Note to CODE CIV. PROC. § 1238 (Deering 1967).

² For a discussion of the tactical positions of California condemnors and condemnees, and of the idiosyncrasies of juries, see *Recommendation and Study Relating to Evidence in Eminent Domain Proceedings*, 3 CAL. L. REVISION COMM'N REPORTS at A-1, A-11 (1961).

³ See CAL. CONST., ART. XII, § 23a; PUB. UTIL. CODE §§ 1401-1421.

⁴ E.g., the Street Opening Act of 1903 (STS. & HWYS. CODE §§ 4000-4443) and the Park and Playground Act of 1909 (GOVT. CODE §§ 38000-38213).

⁵ Section 1243 of the Code of Civil Procedure refers to the assessment of compensation by the "court, jury, or referee." The mention of "referees" alludes to Sections 638-645 which provide generally for referees and trials by referees.

⁶ See Rule 71A, Notes of Advisory Committee on Rules, Original Report, 28 U.S.C. at 6152 (1964).

issue of compensation. These persons believe that arbitration can reduce the costs, delays, and ill will frequently associated with judicial proceedings and, at the same time, relieve the overburdened courts of a heavy volume of jury cases.⁷ They point out that voluntary arbitration is a flexible and adaptable procedure eminently suitable for the determination of valuation questions⁸ and provides a practical method whereby owners of property of relatively low value as well as those who are asserting relatively narrow value differences may obtain an impartial determination of fair market value.⁹ It is seldom possible now to obtain an impartial review of the condemnor's offer in this type of case.¹⁰

There appears to be a substantial interest in the use of arbitration in condemnation cases in other parts of the United States. In June 1968, the American Arbitration Association published a set of "Eminent Domain Arbitration Rules" in response to the need for an efficient arbitration procedure adaptable to condemnation cases. In California, however, there is no statute expressly authorizing a public entity to submit the issue of compensation to arbitration, and it could be argued that the hundreds of California statutes authorizing acquisition of property for public use do not contemplate such a procedure. The typical provision authorizes acquisition by purchase "or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure"¹¹ so that, if authority to agree to arbitration exists, it must be implied from the authority to purchase by negotiation. Perhaps because of this uncertainty,¹² there has been little, if any, use of the

⁷ See Latin, *The Arbitration of Eminent Domain Cases*, 14 RIGHT OF WAY 57 (Oct. 1967); Hanford, *Problems Beyond Our Control?*, 16 RIGHT OF WAY 42, 44 (June 1969).

⁸ See Brundage, *The Adaptation of Judicial Procedures to the Arbitral Process*, 5 SAN DIEGO L. REV. 1, 3 (1968).

⁹ See Hanford, *Problems Beyond Our Control?*, 16 RIGHT OF WAY 42, 44 (June 1969).

¹⁰ Attorneys who specialize in condemnation cases have advised the Commission that normally they must decline to accept a case where the difference between the condemnor's offer and the probable award if the case is tried is less than \$3,000-\$5,000. The reason is that the unrecoverable costs of defending such a case will equal or exceed the potential increment between the offer and the award.

¹¹ See, e.g., CIVIL CODE § 1001. On the other hand, the only California statute that seems definitely to require judicial assessment of compensation is the Property Acquisition Law (GOVT. CODE §§ 15850-15866) which authorizes the State Public Works Board to acquire property for the general purposes of state agencies. See GOVT. CODE § 15854. That act, however, permits the board to agree with the owner as to the compensation to be paid and to incorporate that agreed figure in a stipulation in the condemnation proceeding (GOVT. CODE § 15857).

¹² Before 1961, an additional obstacle to arbitration existed. California judicial decisions had excluded valuations and appraisals from the coverage of the arbitration statute on the general grounds that they did not involve a "controversy" and, additionally, because the parties did not necessarily contemplate either a formal hearing or the taking of evidence. E.g., *Bewick v. Mechem*, 26 Cal.2d 92, 156 P.2d 757 (1945). In revising the California Arbitration Act in 1961, the Legislature provided expressly that enforceable arbitration agreements include "agreements providing for valuations, appraisals and similar proceedings." See CODE CIV. PROC. § 1280. See also *Recommendation and Study Relating to Arbitration*, 3 CAL. L. REVISION COMM'N REPORTS at G-1, G-5, G-6, G-34 (1961). This statutory approval of the arbitration of valuation questions did not, however, expressly authorize public condemnors to use this procedure in condemnation cases. *But cf. Viola, Inc. v. Santa Barbara High School Dist.*, 276 Adv. Cal. App. 513 (1969) (school district authorized to arbitrate dispute under construction contract).

arbitral process in condemnation cases in California. However, if enabling legislation were enacted, it seems likely that arbitration will be used—at least on an experimental basis—as an alternative to judicial proceedings.¹³

The Commission believes that voluntary arbitration of the amount of compensation can become a useful alternative to the determination of that issue by jury trial.¹⁴ Certainly, there is nothing sacrosanct about jury-determined valuation figures or the process by which they are reached.¹⁵ Inasmuch as “value” is determined solely from the opinions expressed by expert witnesses and the owner, the amounts determined by professional arbitrators might be considered more reliable and might even prove more satisfactory in the long run to both condemnors and condemnees.

Moreover, the arbitration procedure can be adapted to suit the particular type of case and the amount in controversy. For example, where a homeowner is offered \$3,000 less than what he claims is the fair market value of his home, he and the acquiring agency could select a disinterested appraiser as the arbitrator and agree to be bound by the value fixed by his appraisal. A formal hearing and the taking of evidence could be eliminated.¹⁶ Thus, time-consuming procedures which increase the cost to the homeowner of legal and expert assistance could be avoided, while still providing the parties with an impartial third-party determination of fair market value. In such a case, the relative economy and speed of the arbitral process would outweigh any possible advantage of a court determination of the value issue and might provide the homeowner with the only practical remedy short of accepting the condemnor’s final offer.¹⁷ The acquiring agency might also find that arbitration is desirable in this type of case. The Commission is advised that it is becoming more common for property owners to defend condemnation actions without the assistance of an attorney, and the cost

¹³ Representatives of some public entities have advised the Commission that such entities might use arbitration on an experimental basis in condemnation cases.

¹⁴ The Commission recognizes that voluntary arbitration is not “the answer” to the need for improvements in California condemnation procedure. Indeed, both condemning agencies and property owners may continue to display their traditional preference for jury assessment of compensation however clearly arbitration may be authorized and however practicable the arbitration process may be made to appear. Nonetheless, as long as resort to arbitration is authorized on a purely voluntary basis and the content of the arbitration agreement is left to the parties, arbitration might prove to be a valuable alternative to judicial proceedings notwithstanding the substantial changes that may subsequently be made in both the substantive and procedural aspects of California’s condemnation law as a result of the Commission’s study of this field of law. In short, the parties can be expected to adapt the terms upon which they are willing to arbitrate, and the particular content of their arbitration agreement, in accordance with those changes.

¹⁵ The difficulties inherent in the California jury-determined value system were noted in *State v. Wherity*:

In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor’s profit is often less than the public’s cost of maintaining the court during the days and weeks of trial. . . . [275 Adv. Cal. App. 279, 290, 79 Cal. Rptr. 591, 598 (1969) (dissenting opinion).]

¹⁶ In 1961, the California arbitration statute was broadened to include appraisals and valuations where the parties have agreed to dispense with a formal hearing and the taking of evidence. CODE CIV. PROC. § 1282.2.

¹⁷ See note 10, *supra*.

to the acquiring agency of trying such cases can be significantly greater than the cost of arbitration would be. In addition, the speed of the arbitral process would permit an acquiring agency that does not have the right of "immediate possession"¹⁸ to obtain possession of the property within a relatively short time.

Arbitration might also be a desirable alternative in a complex valuation case involving a substantial amount of money. In such a case, a formal arbitration hearing procedure with the parties offering expert evidence could provide the parties with a determination of value by a highly regarded, disinterested, and expert arbitrator. The delay in final resolution of the controversy that otherwise would occur because of court congestion could be avoided. The presentation of valuation evidence at the hearing would be more expeditious than at a trial because the arbitrator would be an expert in conducting such hearings and the hearing would not need to be conducted with the formality of a jury trial. Thus, significant savings in time and expense to both sides could be realized.

The Commission therefore recommends enactment of a statute explicitly authorizing condemnors to submit the issue of compensation to arbitration. Public entities and agencies *from whom property is taken* should be given a similar authority. The legislation should:

(1) Impose on the condemnor the expense of the arbitration proceeding, excluding the condemnnee's attorney's fees, expert witness fees, and other expenses incurred for his own benefit.

(2) Provide that agreements to arbitrate the amount of just compensation are subject to, and enforceable under, the California Arbitration Act.

(3) Resolve questions that might arise as to the effect of an agreement to arbitrate upon the condemnor's power to file an eminent domain proceeding, to abandon the acquisition, and the like.

(4) Authorize recordation of notice of the pending arbitration as a means of giving notice of the arbitration proceedings to subsequent purchasers or encumbrancers.

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

An act to add Chapter 3 (commencing with Section 1273.01) to Title 7 of Part 3 of the Code of Civil Procedure and to amend Section 15854 of the Government Code, relating to the acquisition of property for public use.

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

SECTION 1. Chapter 3 (commencing with Section 1273.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

¹⁸ See generally *Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems*, 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967).

CHAPTER 3. ARBITRATION OF COMPENSATION IN ACQUISITIONS OF PROPERTY FOR PUBLIC USE

Section 1273.01. "Public entity" defined

1273.01. As used in this chapter, "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 1273.01 uses the same language as Government Code Section 811.2, which defines "public entity" for the purposes of the governmental liability statute.

Section 1273.02. Arbitration of amount of compensation authorized

1273.02. (a) Any person authorized to acquire property for public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with the acquisition of the property.

(b) Where property is already appropriated to a public use, the person authorized to compromise or settle the claim arising from a taking or damaging of such property for another public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with such taking or damaging.

(c) For the purposes of this section, in the case of a public entity, "person" refers to the particular department, officer, commission, board, or governing body authorized to acquire property on behalf of the public entity or to compromise or settle a claim arising from the taking or damaging of the entity's property.

Comment. Section 1273.02 authorizes arbitration in connection with the acquisition of property for public use.

The phrase "compensation to be made in connection with the acquisition of the property" is intended to encompass any amounts that may be assessed or awarded in a condemnation proceeding and, specifically, to include severance or other damages.

The term "controversy" is defined, for purposes of arbitration, in subdivision (c) of Section 1280.

The enactment of this chapter does not imply that public entities authorized to purchase, but not to condemn, property are not authorized to agree to arbitration.

This chapter contains no provisions comparable to Code of Civil Procedure Sections 1244, 1246, and 1246.1, which require that *all* persons having an interest in the property be named as defendants in the condemnation complaint, permit any unnamed interest holder to intervene in the proceeding, and provide for allocation of the award among holders of various interests. The chapter assumes that prudence on the part of the acquiring agency will assure that it agrees to arbitrate with the person who owns the interest it seeks to acquire. Also,

the interests of persons other than parties to the arbitration would be unaffected by the arbitration agreement or the carrying out of that agreement. In short, unlike the *in rem* character of an eminent domain proceeding, an arbitration operates only as a contract and conveyance between the parties to the particular agreement.

Subdivision (a). Subdivision (a) authorizes any acquirer of property for public use to agree to arbitrate the question of compensation and to act in accordance with the agreement. The subdivision does not imply that the public entity must have complied with the formalities (such as the adoption of a formal condemnation resolution) commonly prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the subdivision contemplates that the question of compensation may be submitted to arbitration whenever acquisition has been authorized in the manner required of the particular entity or agency. As the arbitration agreement ordinarily would commit the public entity to purchase the property at the amount of the award (*see* Section 1273.05), the agreement should be approved and executed in the same manner as a contract to purchase property.

Subdivision (b). Subdivision (b) authorizes "persons" who own, hold, or control public property that may be taken by eminent domain proceedings to agree to arbitrate the amount of compensation. Public property may be taken by eminent domain proceedings whether or not it is already "appropriated to a public use" (*see* Sections 1240 and 1241), and condemnation by one public entity of property already devoted to a public use by another public entity is a fairly common occurrence.

Section 1273.03. Expenses of arbitration

1273.03. (a) Notwithstanding Sections 1283.2 and 1284.2, the party acquiring the property shall pay all of the expenses and fees of the neutral arbitrator and the statutory fees and mileage of all witnesses subpoenaed in the arbitration, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including attorney's fees or expert witness fees or other expenses incurred by other parties for their own benefit.

(b) An agreement authorized by this chapter may require that the party acquiring the property pay reasonable attorney's fees or expert witness fees, or both, to any other party to the arbitration. If the agreement requires the payment of such fees, the amount of the fees is a matter to be determined in the arbitration proceeding unless the agreement prescribes otherwise.

(c) The party acquiring the property may pay the expenses and fees referred to in subdivisions (a) and (b) from funds available for the acquisition of the property or other funds available for the purpose.

Comment. Subdivision (a) of Section 1273.03 is consistent with the rule applicable to eminent domain proceedings that the condemnee is entitled to recover all "taxable costs." *See City of Oakland v. Pacific*

Coast Lumber & Mill Co., 172 Cal. 332, 156 P. 468 (1916); *City & County of San Francisco v. Collins*, 98 Cal. 259, 33 P. 56 (1893). Subdivision (a) precludes the parties by agreement from imposing costs of this nature on the party from whom the property is being acquired.

Subdivision (b), on the other hand, does permit the parties to provide in the arbitration agreement that the party acquiring the property will pay reasonable attorney's fees or expert witness fees incurred by other parties to the agreement. Absent such provision in the agreement, the party from whom the property is being acquired must pay his own attorney's fees and expert witness fees.

Section 1273.04. Effect and enforceability of agreements

1273.04. (a) Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part.

(b) An agreement authorized by this chapter may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding.

(c) Notwithstanding Section 1281.4, an agreement authorized by this chapter does not waive or restrict the power of any person to commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that, upon motion of a party to the eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order.

(d) The effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings.

(e) Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2, any petition relating to arbitration authorized by this chapter shall be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Although Section 1273.04 provides that arbitration under this chapter is governed by the general arbitration statute (Sections 1280–1294.2), a few minor modifications in the procedure provided by the general statute are desirable when arbitration is used to determine the compensation for property acquired for public use.

Subdivision (a). Subdivision (a) makes clear that, in general, agreements to arbitrate under this chapter are subject to the general arbitration statute. See, in particular, Sections 1285–1288.8 (enforce-

ment of the award) and 1290-1294.2 (judicial proceedings relating to the arbitration or the award).

Subdivision (b). Subdivision (b) makes clear that it is not necessary to commence an eminent domain proceeding in order to arbitrate under this chapter and also provides a special rule concerning the court in which any petition or response relating to the arbitration shall be filed and determined when an eminent domain proceeding is pending.

Subdivision (c). Subdivision (c) makes clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation and that such an agreement does not impair the condemnor's power to take "immediate possession." There is, of course, nothing to preclude the parties from including a provision in the arbitration agreement that permits the condemnor to take possession of the property prior to the award in the arbitration proceeding. Subdivision (c) also provides for staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration—a practice provided for as to other arbitrations by Section 1281.4. Subdivision (c) contemplates that, if an eminent domain proceeding is pending, the arbitration award, whether confirmed or not (see Section 1287.4), may be entered as the amount of compensation in the judgment of condemnation. *See Cary v. Long*, 181 Cal. 443, 184 P. 857 (1919); *In re Silliman*, 159 Cal. 155, 113 P. 135 (1911).

Subdivision (d). Subdivision (d) makes clear that an agreement to arbitrate and to purchase and sell at the amount of the award does not require, and is not impaired by the acquirer's lack of, power to take the property by eminent domain. *Cf. People v. Nyrin*, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967); *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958).

Subdivision (e). Subdivision (e) requires that petitions relating to arbitration be filed in the county in which the property lies. The venue provided by this subdivision corresponds with the rule as to venue for eminent domain proceedings. *See* Section 1243.

Section 1273.05. Abandonment of acquisition

1273.05. (a) Except as provided in subdivision (b), an agreement authorized by this chapter may specify the terms and conditions under which the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement provides that the acquisition may not be abandoned, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding at any time not later than the time for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2.

(b) If the proceeding to acquire the property is abandoned after the arbitration agreement is executed, the party from whom the property was to be acquired is entitled to recover (1) all expenses reasonably and necessarily incurred (i) in

preparing for the arbitration proceeding and for any judicial proceedings in connection with the acquisition of the property, (ii) during the arbitration proceeding and during any judicial proceedings in connection with the acquisition, and (iii) in any subsequent judicial proceedings in connection with the acquisition and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect his interests in connection with the acquisition of the property. Unless the agreement otherwise provides, the amount of such expenses and fees shall be determined by arbitration in accordance with the agreement.

Comment. Subdivision (a) of Section 1273.05 permits the parties to the agreement to provide whether and under what conditions the acquirer may abandon the acquisition. If the agreement does not so provide, the party who was to have acquired the property may abandon the acquisition within the time within which a petition or response to vacate an arbitration award may be filed and served. Generally, this period is 100 days after service of the award or 10 days after service of a petition to confirm an award. See Sections 1288–1288.4. *See also Coordinated Constr., Inc. v. Canoga Big "A," Inc.*, 238 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965). Subdivision (b)—which makes clear that the right of the "condemnee" to recover certain expenses is not subject to modification under the arbitration agreement—is consistent with Section 1255a which prescribes the rule governing abandonment of a judicial condemnation action.

Section 1273.06. Recordation of agreements

1273.06. (a) An agreement authorized by this chapter may be acknowledged and recorded, and rerecorded, in the same manner and with the same effect as a conveyance of real property except that two years after the date the agreement is recorded, or rerecorded, the record ceases to be notice to any person for any purpose.

(b) In lieu of recording the agreement, there may be recorded a memorandum thereof, executed by the parties to the agreement, containing at least the following information: the names of the parties to the agreement, a description of the property, and a statement that an arbitration agreement affecting such property has been entered into pursuant to this chapter. Such memorandum when acknowledged and recorded, or rerecorded, in the same manner as a conveyance of real property has the same effect as if the agreement itself were recorded or rerecorded.

Comment. Section 1273.06 permits an agreement authorized by this chapter, or a memorandum thereof, to be acknowledged and recorded to afford "constructive notice" to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (*see, e.g.*, Sections 1, 44, and 45 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1,

1968)), but such an escrow would not, of itself, protect the "condemnor" against subsequent transferees. Section 1273.06 provides a means for obtaining such protection (*see* Civil Code Sections 1213-1220) and is calculated to make unnecessary the filing of an eminent domain proceeding for no purpose other than to obtain the effect of a *lis pendens*.

Conforming amendment

SEC. 2. Section 15854 of the Government Code is amended to read:

15854. Property shall be acquired pursuant to this part by condemnation in the manner provided for in Title 7 (*commencing with Section 1237*) of Part 3 of the Code of Civil Procedure, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars (\$5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars (\$5,000) which the board by resolution exempts from this requirement.

(d) Any acquisition as to which the owner and the State have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) *Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate the amount of the compensation to be paid in accordance with Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure.*

APPENDIX III
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

The Evidence Code

Number 5—Revisions of the Evidence Code

September 1969

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

NOTE

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

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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GEORGE H. MURPHY
Ex Officio

September 11, 1969

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

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

The Commission submitted recommendations for revisions in the Evidence Code to the Legislature in 1967 and 1969. *See Recommendation Relating to the Evidence Code: Number 1—Evidence Code Revisions*, 8 CAL. L. REVISION COMM'N REPORTS 101 (1967); *Recommendation Relating to the Evidence Code: Number 4—Revision of the Privileges Article*, 9 CAL. L. REVISION COMM'N REPORTS 501 (1969).

Most of the revisions recommended in 1967 were enacted, but one section—relating to *res ipsa loquitur*—was deleted from the bill introduced to effectuate the Commission's recommendation before the bill was enacted. This section was deleted so that it could be given further study. As a result of such study, the Commission has included in this recommendation a provision dealing with *res ipsa loquitur*.

The revisions recommended in 1969 did not become law. The bill introduced to effectuate the Commission's recommendation passed the Legislature in amended form but was vetoed by the Governor. This new recommendation includes most of the provisions that were included in the 1969 recommendation. However, it omits a provision that would have extended the psychotherapist-patient privilege to cover communications to school psychologists, clinical social workers, and marriage, family, and child counselors. The Governor vetoed the 1969 bill because he objected to so extending the privilege.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 5—Revisions of the Evidence Code

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. The Legislature has directed the Commission to continue its study of the law of evidence. Pursuant to this directive, the Commission has concluded that a number of substantive, technical, or clarifying changes are needed in the Evidence Code.

RES IPSA LOQUITUR

The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the fact-finding process. *See* EVIDENCE CODE §§ 600–607. Although several specific presumptions are listed and classified in the Evidence Code, the code does not codify most of the presumptions found in California statutory and decisional law; the Evidence Code contains primarily statutory presumptions that were formerly found in the Code of Civil Procedure and a few common law presumptions that were identified closely with those statutory presumptions. Unless classified by legislation enacted for that purpose, the other presumptions will be classified by the courts as particular cases arise in accordance with the classification scheme established by the code.

Under the Evidence Code, it seems clear that the doctrine of *res ipsa loquitur* is actually a presumption,¹ for its effect as stated in the pre-Evidence Code cases² is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact.³ The Evidence Code, however, does not state specifically whether *res ipsa loquitur* is a presumption affecting the

¹*See* WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966) (“The problem of characterization is now solved by the Evidence Code, under which the judicially created doctrine must be deemed a presumption.”).

²Before the enactment of the Evidence Code, the California courts held that the doctrine of *res ipsa loquitur* was an inference, not a presumption. But it was “a special kind of inference” whose effect was “somewhat akin to that of a presumption,” for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954).

³*See* EVIDENCE CODE §§ 600, 604, 606, and the *Comments* thereto.

burden of proof or a presumption affecting the burden of producing evidence.⁴

The Commission recommends that *res ipsa loquitur* be classified as a presumption affecting the burden of producing evidence in order to eliminate any uncertainties concerning the manner in which it will function under the Evidence Code. It is likely that this classification will codify existing law.⁵ Such a classification will also eliminate any vestiges of the presumption-is-evidence doctrine that may now inhere in it.⁶ The result will be that, as under prior law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the adverse party comes forward with contrary evidence. If contrary evidence is produced, the trier of fact will then be required to weigh the conflicting evidence—deciding for the party relying on the doctrine if the inference of negligence preponderates in convincing force, and deciding for the adverse party if it does not.

This classification accords with the purpose of the doctrine. Like other presumptions affecting the burden of producing evidence, it is based on an underlying logical inference; and “evidence of the non-existence of the presumed fact . . . is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence.”⁷

The requirement of the prior law that, upon request, an instruction be given on the effect of *res ipsa loquitur* is not inconsistent with the Evidence Code and should be retained.⁸

⁴ Prior to the Evidence Code, the doctrine of *res ipsa loquitur* did not shift the burden of proof. The cases considering the doctrine stated, however, that it required the adverse party to come forward with evidence not merely sufficient to support a finding that he was not negligent but sufficient to balance the inference of negligence. See, e.g., *Hardin v. San Jose City Lines, Inc.*, 41 Cal.2d 432, 437, 260 P.2d 63, 65 (1953). If such statements merely meant that the trier of fact was to follow its usual procedure in balancing conflicting evidence—i.e., the party with the burden of proof wins on the issue if the inference of negligence arising from the evidence in his favor preponderates in convincing force, but the adverse party wins if it does not—then *res ipsa loquitur* in the California cases has been what the Evidence Code describes as a presumption affecting the burden of producing evidence. If such statements meant, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence of his freedom from negligence against the legal requirement that negligence be found, then the doctrine of *res ipsa loquitur* represented a specific application of the former rule (repudiated by the Evidence Code) that a presumption is “evidence” to be weighed against the conflicting evidence. See the *Comment to EVIDENCE CODE* § 600.

⁵ Witkin states that “our prior cases make it clear that [*res ipsa loquitur*] belongs in the class of presumptions which merely affect the burden of producing evidence.” WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966). McBaine takes the view that whether *res ipsa loquitur* “must be regarded as a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof cannot be determined with certainty until the courts rule on the matter or the Legislature enacts clarifying legislation.” MCBAIN, CALIFORNIA EVIDENCE MANUAL § 1245 (Supp. 1969). The Committee on Standard Jury Instructions has classified *res ipsa loquitur* as a presumption affecting the burden of producing evidence. See *Comments to BAJI* (5th ed. 1969) No. 4.02. See also CALIFORNIA NONPROFIT CORPORATIONS, Ludlam, Robertson & Saunders, *Tort and Contract Liability*, § 7.9 at 262 (Cal. Cont. Ed. Bar 1969) (“*res ipsa loquitur* appears to be a presumption affecting the burden of producing evidence”).

⁶ See note 4, *supra*.

⁷ *Comment to EVIDENCE CODE* § 603.

⁸ See *Bischoff v. Newby's Tire Service*, 166 Cal. App.2d 563, 333 P.2d 44 (1958); 36 CAL. JUR.2d *Negligence* § 340 at 79 (1957).

MARITAL PRIVILEGE

Privilege not to be called in civil action

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege *not to be called* as a witness by any adverse party unless the witness spouse consents or the adverse party has no knowledge of the marriage. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person *not to testify* against his spouse (Evidence Code Section 970).

In a multi-party action, the privilege of a married person not to be called as a witness may have undesirable consequences. The privilege not to be called apparently permits the married person to refuse to take the stand even though the testimony sought would relate to a part of the case totally unconnected with his spouse. As worded, the privilege is unconditional; it is violated by calling the married person as a witness whether or not the testimony will be "against" his spouse.

Edwin A. Heafey, Jr., has stated the problem as follows:

For example, if a plaintiff has causes of action against *A* and *B* but sues *A* alone, neither privilege can prevent the plaintiff from calling Mrs. *B* as a witness and obtaining her testimony on matters that are relevant to the cause of action against *A* and do not adversely affect *B*. However, if plaintiff joins *A* and *B* in the same action and wants to call Mrs. *B* for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party adverse to her spouse . . . and from questioning her by her privilege not to testify against her spouse⁹

The privilege not to be called as a witness also may lead to complications where both spouses are parties to the proceeding. Where an action is defended or prosecuted by a married person for the "immediate benefit" of his spouse or of himself and his spouse, Evidence Code Section 973(b) provides that either spouse may be required to testify against the other. Evidence Code Section 972(a) provides that either spouse may be required to testify in litigation between the spouses. Thus, the privilege not to be called and the privilege not to testify against the other spouse are not available in most cases in which both spouses are parties.¹⁰ However, where the spouses are co-plaintiffs or co-defendants and the action of each is not considered to be for the "immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case.¹¹ Moreover, the adverse party

⁹ HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).
¹⁰ See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 39.18 at 308 (Cal. Cont. Ed. Bar 1967).

¹¹ "[A]llowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship." HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.9 at 317 (Cal. Cont. Ed. Bar 1967).

apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.¹²

If the privilege of a spouse not to be called as a witness were limited to criminal cases,¹³ the significant problems identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against" the party spouse. Accordingly, the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.

Waiver of privilege

Section 973(a) provides that a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under Section 971 (privilege not to be called) or 970 (privilege not to testify against spouse) in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation, the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges—including the privilege not to testify against the party spouse—are waived, despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.¹⁴ The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

¹² *Id.* § 40.10 at 317.

¹³ Apparently this privilege was not recognized in civil cases before adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See *People v. Carmelo*, 94 Cal. App.2d 301, 210 P.2d 538 (1949); *People v. Moore*, 111 Cal. App. 632, 295 P. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury. But see *People v. Coleman*, 71 Adv. Cal. 1201, 1209, 459 P.2d 248, 253, 80 Cal. Rptr. 920, 925 (1969) (not misconduct for prosecution to comment on failure of defendant to call his spouse as witness on his behalf).

¹⁴ See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

PSYCHOTHERAPIST-PATIENT PRIVILEGE

Group therapy

Section 1012 defines a "confidential communication between patient and psychotherapist" to include:

information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than . . . those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation or examination

Although "persons . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose of the consultation" would seem to include other patients present at group therapy treatment, the language might be narrowly construed to make information disclosed at a group therapy session not privileged.

In the light of the frequent use of group therapy for the treatment of emotional and mental problems, it is important that this form of treatment be covered by the psychotherapist-patient privilege. The policy considerations underlying the privilege dictate that it encompass communications made in the course of group therapy. Psychotherapy, including group therapy, requires the candid revelation of matters that not only are intimate and embarrassing, but also possibly harmful or prejudicial to the patient's interests. The Commission has been advised that persons in need of treatment sometimes refuse group therapy treatment because the psychotherapist cannot assure the patient that the confidentiality of his communications will be preserved.

The Commission, therefore, recommends that Section 1012 be amended to make clear that the psychotherapist-patient privilege protects against disclosure of communications made during group therapy.¹⁵ It should be noted that, if Section 1012 were so amended, the general restrictions embodied in Section 1012 would apply to group therapy. Thus, communications made in the course of group therapy would be within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted."

Exception for child who is victim of crime

Evidence Code Section 1014 provides that a patient has, under certain conditions, "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist" However, this section is subject to several exceptions based upon the general policy consideration that the public's interest in the disclosure of certain information outweighs the patient's interest in the confidentiality of these communications. See EVIDENCE CODE §§ 1016-1026. For example, Evidence Code Section 1024 provides that:

¹⁵ Section 1014 provides that the privilege permits the holder of the privilege (normally the patient) "to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist"

There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

In this case, the public's interest in preventing harm to the patient and to others outweighs the patient's interest in keeping such information confidential, so the patient cannot invoke the privilege.

The Commission recommends that a new section—Section 1027—be added to the psychotherapist-patient privilege article to establish an analogous exception where disclosure of the communication is sought in a proceeding in which the commission of a crime is a subject of inquiry and the psychotherapist has reasonable cause to believe that a child patient has been the victim of the crime and that disclosure of the communication would be in the best interest of the child. Under these circumstances, the Commission believes that facilitation of the prosecution of persons who perpetrate crimes upon children outweighs any inhibition of the psychotherapist-patient relationship which might result from the possibility of disclosure of the patient's communications.

RECOMMENDED LEGISLATION

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

An act to amend Sections 971, 973, and 1012 of, and to add Sections 646 and 1027 to, the Evidence Code, relating to evidence.

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

Evidence Code Section 646 (new)

SECTION 1. Section 646 is added to the Evidence Code, to read:

646. (a) As used in this section, "defendant" includes any party against whom the *res ipsa loquitur* presumption operates.

(b) The judicial doctrine of *res ipsa loquitur* is a presumption affecting the burden of producing evidence.

(c) If the evidence, or facts otherwise established, would support a *res ipsa loquitur* presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:

(1) If the facts which would give rise to a *res ipsa loquitur* presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the

defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

Comment. Section 646 is designed to clarify the manner in which the doctrine of *res ipsa loquitur* functions under the provisions of the Evidence Code relating to presumptions.

The doctrine of *res ipsa loquitur*, as developed by the California courts, is applicable in an action to recover damages for negligence when the plaintiff establishes three conditions:

First, that it is the kind of [accident] [injury] which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and

Third, that the [accident] [injury] was not due to any voluntary action or contribution on the part of the plaintiff which was the responsible cause of his injury [BAJI (5th ed. 1969) No. 4.00 (brackets in original).]

Section 646 provides that the doctrine of *res ipsa loquitur* is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. EVIDENCE CODE § 604. If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. *See* EVIDENCE CODE § 604 and the *Comment* thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. *See, e.g., Leonard v. Watsonville Community Hosp.*, 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

To assist the jury in the performance of its factfinding function, the court may instruct that the facts that give rise to *res ipsa loquitur* are themselves circumstantial evidence from which the jury can infer that the accident resulted from the defendant's failure to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should so find will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more probable than not that the accident resulted from the defendant's negligence.

At times the doctrine of *res ipsa loquitur* will coincide in a particular case with another presumption or with another rule of law that

requires the defendant to discharge the burden of proof on the issue. See Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where *res ipsa loquitur* appears to apply. But because of the allocation of the burden of proof to the defendant, the doctrine of *res ipsa loquitur* will serve no function in the disposition of the case. However, the facts that would give rise to the doctrine may nevertheless be used as circumstantial evidence tending to rebut the evidence produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence unless the damage resulted from a fire. See discussion in *Redfoot v. J. T. Jenkins Co.*, 138 Cal. App.2d 108, 112, 291 P.2d 134, 135 (1955). See COM. CODE § 7403 (1)(b). When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of *res ipsa loquitur* may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because the bailee has both the burden of producing evidence and the burden of proving that the damage was not caused by his negligence, the presumption of negligence arising from *res ipsa loquitur* cannot have any effect on the proceeding.

Effect of the Failure of the Plaintiff to Establish All the Preliminary Facts That Give Rise to the Presumption

The fact that the plaintiff fails to establish all of the facts giving rise to the *res ipsa* presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The requirements of *res ipsa loquitur* are merely those that must be met to give rise to a compelled conclusion (or presumption) of negligence in the absence of contrary evidence. An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of *res ipsa loquitur*. See Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 So. CAL. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the *res ipsa loquitur* doctrine.

Examples of Operation of Res Ipsa Loquitur Presumption

The doctrine of *res ipsa loquitur* may be applicable to a case under four varying sets of circumstances:

(1) Where the facts giving rise to the doctrine are established as a matter of law (by the pleadings, by stipulation, by pretrial order, or by some other means) and there is no evidence sufficient to sustain a

finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent.

(2) Where the facts giving rise to the doctrine are established as a matter of law, but the defendant has introduced evidence sufficient to sustain a finding either of his due care or of some cause for the accident other than his negligence.

(3) Where the defendant introduces evidence tending to show the nonexistence of the essential conditions of the doctrine but does not introduce evidence to rebut the presumption.

(4) Where the defendant introduces evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident.

Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

Basic facts established as a matter of law; no rebuttal evidence. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by pretrial order, etc.), the presumption requires that the jury find that the defendant's negligence was the proximate cause of the accident unless evidence is introduced sufficient to sustain a finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent. When the defendant fails to introduce such evidence, the court must simply instruct the jury that it is required to find that the accident was caused by the defendant's negligence.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. *Cf. Phillips v. Noble*, 50 Cal.2d 163, 323 P.2d 385 (1958); *Fiske v. Wilkie*, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence sufficient to sustain a finding either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. Except in those rare cases where the inference is dispelled as a matter of law, the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case, that it is more probable than not that the accident was caused by the defendant's negligence.

Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not because the basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional *res ipsa loquitur*.

Where the basic facts are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the accident was caused by some negligent conduct on the part of the defendant.

Basic facts contested; evidence introduced to rebut presumption. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of *res ipsa loquitur* and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

In this situation, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. But the court shall also instruct the jury that it should not find that a proximate cause of the accident was some negligent conduct on the part of the defendant unless it believes, after weighing all of the evidence, that it is more probable than not that the defendant was negligent and that the accident resulted from his negligence.

Other Appropriate Instructions

The jury instructions referred to in Section 646 do not preclude the judge from giving the jury any additional instructions on *res ipsa loquitur* that are appropriate to the particular case.

Evidence Code Section 971 (amended)

SEC. 2. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a ~~party to a~~ *defendant in a criminal proceeding* has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended to preclude the assertion by a married person of a privilege not to be called as a witness in a civil proceeding. As to any proceeding to which his spouse was a party, the former wording of Section 971 appeared to authorize a married person to refuse to take the stand when called by a party adverse to his spouse even in multi-party litigation where the testimony sought related to a part of the case wholly unconnected with the party spouse. *See HEAFY,*

CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. *Id.* § 40.10 at 317.

Elimination of the privilege *not to be called* in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege *not to testify* against one's spouse in any proceeding (Section 970) and the privilege for confidential marital communications (Section 980) are available in a civil proceeding. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case, the non-party spouse should be required to testify. If the testimony would be "against" the party spouse, the witness spouse may claim the privilege not to testify given by Section 970. In connection with the procedure for ruling on the claim of privilege, see Section 402(b) (hearing and determination out of presence or hearing of the jury).

Evidence Code Section 973 (amended)

SEC. 3. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who ~~testifies in a proceeding to which his spouse is a party, or who~~ testifies *for or* against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which ~~such~~ *the* testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment. Subdivision (a) of Section 973 is amended to eliminate a problem that otherwise could arise in litigation involving more than two parties. In multi-party civil litigation, if a married person is called as a witness by a party other than his spouse in an action to which his spouse is a party, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the former wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges—including the privilege not to testify against the party spouse—were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.

Evidence Code Section 1012 (amended)

SEC. 4. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the

interest of the patient in the consultation ~~or examination~~, *including other patients present at joint therapy*, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose ~~of the consultation or examination for which the psychotherapist is consulted~~, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. Section 1012 is amended to add "including other patients present at joint therapy" in order to foreclose the possibility that the section would be construed not to embrace marriage counseling, family counseling, and other forms of group therapy. However, it should be noted that communications made in the course of joint therapy are within the privilege only if they are made "in confidence" and "by a means which . . . discloses the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted." The making of a communication that meets these two requirements in the course of joint therapy would not amount to a waiver of the privilege. See Evidence Code Section 912(c) and (d).

The other amendments are technical and conform the language of Section 1012 to that of Section 992, the comparable section relating to the physician-patient privilege. Deletion of the words "or examination" makes no substantive change since "consultation" is broad enough to cover an examination. See Section 992. Substitution of "for which the psychotherapist is consulted" for "of the consultation or examination" adopts the broader language used in subdivision (d) of Section 912 and in Section 992.

Evidence Code Section 1027 (new)

SEC. 5. Section 1027 is added to the Evidence Code, to read:

1027. There is no privilege under this article if all of the following circumstances exist:

- (a) The patient is a child under the age of 16.
- (b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.
- (c) Disclosure of the communication is sought in a proceeding in which the commission of such crime is a subject of inquiry.

Comment. Section 1027 provides an exception to the psychotherapist-patient privilege that is analogous to the exception provided by Section 1024 (patient dangerous to himself or others). The exception provided by Section 1027 is necessary to permit court disclosure of communications to a psychotherapist by a child who has been the victim of a crime (such as child abuse) in a proceeding in which the commission of such crime is a subject of inquiry. Although the exception provided by Section 1027 might inhibit the relationship between the patient and his psychotherapist to a limited extent, it is essential that appropriate action be taken if the psychotherapist becomes convinced during the course of treatment that the patient is the victim of a crime and that disclosure of the communication would be in the best interest of the child.

APPENDIX IV
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Real Property Leases

November 1969

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

NOTE

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

RE.

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



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Ex Officio

November 21, 1969

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

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

The Commission has made previous recommendations on this subject. See *Recommendation and Study Relating to Abandonment or Termination of a Lease*, 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); *Recommendation Relating to Real Property Leases*, 9 CAL. L. REVISION COMM'N REPORTS 401 (1969). However, the legislation previously recommended was not enacted.

This recommendation is the result of further study of this topic by the Commission.

Respectfully submitted,

SHO SATO
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Real Property Leases

BACKGROUND

Section 1925 of the Civil Code provides that a lease is a contract. Historically, however, a lease of real property has been regarded as a conveyance of an interest in land. The influence of the common law of real property remains strong despite the trend in recent years to divorce the law of leases from its medieval setting and to adapt it to current conditions by the application of modern contract principles. The California courts state that a lease is both a contract and a conveyance and apply a mixture of contract and property law principles to lease cases. This mixture, however, is generally unsatisfactory and, depending upon the circumstances, its application may result in injustice to either the lessor or the lessee.

RECOMMENDATIONS

Right of Lessor to Recover Damages Upon Lessee's Abandonment

Under existing law, a lessee's abandonment of the property and refusal to perform his remaining obligations under the lease does not—absent a provision to the contrary in the lease—give rise to the usual contractual remedy of an immediate action for damages. Such conduct merely amounts to an offer to “surrender” the remainder of the term. *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369 (1891). As stated in *Kulawitz v. Pacific Woodenware & Paper Co.*, 25 Cal.2d 664, 671, 155 P.2d 24, 28 (1944), the lessor confronted with such an offer has three alternatives:

(1) He may refuse to accept the offered surrender and sue for the accruing rent as it becomes due under the terms of the lease. From the lessor's standpoint, this remedy is seldom satisfactory because he must rely on the continued availability and solvency of a lessee who has already demonstrated his unreliability. Moreover, he must let the property remain vacant, for it still belongs to the lessee for the duration of the term. In addition, repeated actions may be necessary to recover all of the rent due under the lease. This remedy is also unsatisfactory from the lessee's standpoint, for it permits the lessor to refuse to make any effort to mitigate or minimize the damages caused by the lessee's default. See *De Hart v. Allen*, 26 Cal.2d 829, 832, 161 P.2d. 453, 455 (1945).

(2) He may accept the surrender and regard the lease as terminated. This amounts to a cancellation of the lease or a rescission of its unexpired portion. In common law theory, however, the lessee's obligation to pay rent is inseparable from his leasehold interest in the property.

Accordingly, termination of the lease in this manner terminates the remaining rental obligation. The lessor can recover neither the unpaid future rent nor damages for its loss. *Welcome v. Hess*, *supra*. Moreover, any conduct by the lessor that is inconsistent with the lessee's continuing interest in the property is considered to be an acceptance of the lessee's offer of surrender, whether or not such an acceptance is intended. *Dorcich v. Time Oil Co.*, 103 Cal. App.2d 677, 230 P.2d 10 (1951). Hence, efforts by a lessor to minimize his damages frequently result in loss of the right to unpaid future rent as well as the right to damages for its loss.

(3) He may notify the lessee that the property will be relet for the lessee's benefit, take possession and relet the property, and sue for the damages caused by the lessee's default. This remedy, too, is unsatisfactory because the courts have held that the cause of action for damages does not accrue until the end of the original lease term. *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932). Hence, an action to recover any portion of the damages will be dismissed as premature if brought before expiration of the entire term. This leaves the lessor without an effective remedy where the term of the lease is of such duration that waiting for it to end would be impractical. The tenant under a 20-year lease, for example, may abandon the property after only one year. In addition, any profit made on the reletting probably belongs to the lessee, not the lessor, inasmuch as the lessee's interest in the property theoretically continues. Moreover, the lessor must be careful in utilizing this remedy or he will find that he has forfeited his right to the remaining rentals from his original lessee despite his lack of intention to do so. See, e.g., *A. H. Busch Co. v. Strauss*, 103 Cal. App. 647, 284 Pac. 966 (1930). See also *Neuhaus v. Norgard*, 140 Cal. App. 735, 35 P.2d 1039 (1934).

The Commission has concluded that, when a lessee breaches the lease and abandons the property, the lessor should be permitted to sue immediately for all damages—present and future—caused by the breach. This, in substance, is the remedy that is now available under Civil Code Section 3308 if the parties provide for this remedy in the lease. Absent such a provision in the lease, the lessor under existing law must defer his damage action until the end of the term and run the risk that the defaulting lessee will be insolvent or unavailable at that time. The availability of a suit for damages would not abrogate the present right to rescind the lease or to sue for specific or preventive relief if the lessor has no adequate remedy at law. Rather, an action for damages would provide the lessor with a reasonable choice of remedies comparable to that available to the promisee when the promisor has breached a contract.

Right of Lessor to Recover Damages Upon Breach by Lessee Justifying Termination of Lease

Under existing law, the lessor whose lessee commits a sufficiently material breach of the lease to warrant termination has a choice of three remedies:

(1) He may treat the breach as only partial, decline to terminate the lease, and sue for the damages caused by the particular breach. If he does so, however, he obviously is continuing to deal with a lessee who has proven unsatisfactory.

(2) He may terminate the lease and force the lessee to relinquish the property, resorting to an action for unlawful detainer to recover possession if necessary. In such a case, his right to the remaining rent due under the lease ceases upon the termination of the lease. *Costello v. Martin Bros.*, 74 Cal. App. 782, 241 Pac. 588 (1925).

(3) Under some circumstances, he may decline to terminate the lease but still evict the lessee and relet the property for the account of the lessee. *Lawrence Barker, Inc. v. Briggs*, 39 Cal.2d 654, 248 P.2d 897 (1952); *Burke v. Norton*, 42 Cal. App. 705, 184 Pac. 45 (1919). See CODE CIV. PROC. § 1174. As noted in connection with the remedies on abandonment, this procedure often proves unsatisfactory.

In dealing with these cases of material breach, the courts have felt bound to apply the mentioned common law rule that the lessee's obligation to pay rent depends entirely upon the continued existence of the term under technical property law concepts. When the term is ended, whether voluntarily by abandonment and repossession by the lessor or involuntarily under the compulsion of an unlawful detainer proceeding, the rental obligation also ends. In cases where the lessor has no reason to expect the lessee to remain available and solvent until the end of the term, continued adherence to this rule denies the lessor any effective remedy for the loss caused by a defaulting lessee.

The Commission has concluded that the lessor should be permitted to sue for the loss of present and future rentals and other damages at the time the lease is terminated because of a substantial breach by the lessee. This remedy—the substance of which is now available under Civil Code Section 3308 if the lease so provides—would be an alternative to other existing remedies that would continue to be available: (1) the right to treat the breach as partial, regard the lease as continuing in force, and recover damages for the particular default and (2) the right to rescind or cancel the lease, *i.e.*, declare a forfeiture of the lessee's interest.

Duty of Lessor to Mitigate Damages

Existing Law

As mentioned in connection with abandonment, if the lessee breaches the lease and abandons the property, the lessor may refuse to accept the lessee's offer to surrender the leasehold interest and may (1) sue for the accruing rent as it becomes due or (2) relet the property for the benefit of the lessee and sue at the end of the lease term for the damages caused by the lessee's default. Thus, although the lessor may mitigate damages—by reletting for the benefit of the lessee—he is not required to do so. Moreover, if the lessor does attempt to mitigate damages, he may lose his right to the future rent if the court finds he has accepted the lessee's offer to surrender his leasehold interest when he did not mean to do so as, for example, when his notice to the lessee is found to be insufficient. *Dorcich v. Time Oil Co.*, *supra*. The unfortunate result is that the existing law tends to discourage lessors from attempts to mitigate damages.

Recommendations

General duty to mitigate damages. Absent a contrary provision in the lease, when the lessee has breached the lease and abandoned the property or has been evicted because of his failure to perform, the lessor

should not be permitted to let the property remain vacant and still recover the rent as it accrues. Instead, the lessor should be required to make a reasonable effort to mitigate the damages by reletting the property.

To achieve this objective, the basic measure of the lessor's damages should be made the loss of the bargain represented by the lease—i.e., the amount by which the unpaid rent provided in the lease exceeds the amount of rental loss that the lessee proves could have been or could be reasonably avoided. More specifically, the lessor should be entitled to recover (1) the rent that was due and unpaid at the time of termination plus interest from the time each installment was due; (2) the unpaid rent that would have been earned from the time of termination to the time of judgment less the amount of rental loss that could have been reasonably avoided plus interest on the difference from the time of accrual of each installment; and (3) the unpaid rent after the time of judgment less the amount of rental loss that could be reasonably avoided, the difference discounted to reflect prepayment to the lessor. The lessor should, of course, be permitted to relet the property for a rent that is more or less than the rent provided in the original lease if he acts reasonably and in good faith.

Discounting of the value of unpaid future rent is simply a substitute for payment as installments accrue. The rate of discount should therefore permit the lessor to invest the lump sum award at interest rates currently available in the investment market and recover over the period of the former term of the lease an amount equal to the unpaid future rentals less the amount of rental loss that could be reasonably avoided. The Federal Reserve Bank discount rate plus one percent satisfies this test. Moreover, it provides a rate subject to judicial notice under Evidence Code Section 452(h) and one that automatically adjusts to changes in the investment market.

The burden of proving the amount of rental loss that could have been or could be obtained by acting reasonably in reletting the property should be placed on the lessee. This allocation of the burden of proof is similar to the one applied in actions for breach of employment contracts. See *Erler v. Five Points Motors, Inc.*, 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967). The recommended measure of damages is essentially the same as that now provided in Civil Code Section 3308, but the measure of damages provided by that section applies only when the lease so specifies and the section is silent as to burden of proof.

In addition, the lessor should be entitled to recover other damages necessary to compensate him for all the detriment caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom. This is the rule applicable in contract cases under Civil Code Section 3300 and would permit the lessor to recover, for example, his expenses in retaking possession of the property, making repairs that the lessee was obligated to make, and in reletting the property.

The requirement of existing law that the lessor notify the lessee before reletting the property to mitigate the damages should be eliminated. This requirement has discouraged lessors from attempting to mitigate damages and serves no useful purpose in view of the recommended requirement that the lessor be required to relet the property to mitigate

damages in any case where he seeks to recover damages from the lessee for the loss of future rents. However, if the lessee has made an advance payment that exceeds the amount of rent due and unpaid, the lessor should be required—if the lessee so requests—to notify the lessee of the length of the term of the new lease and the amount of the rent under the new lease. Such notice should be required only upon the initial reletting of the property.

Lease provisions relieving lessor of duty to mitigate damages. The parties to a lease should be permitted to include provisions that will guarantee to the lessor that the lessee will remain obligated to pay the rent for the entire term if, but only if, the lease also permits the lessee to assign the lease or to sublet the property. If the lease contains such provisions, the lessor should be permitted to collect the rent as it accrues so long as he does not terminate the lessee's right to possession of the property. These lease provisions would allow the lessor to guard against the loss of the rentals provided in the lease and, at the same time, permit the lessee to protect his interests by obtaining a new tenant.

The lessor should be permitted to impose reasonable restrictions on the right to sublet or assign so that he can exercise reasonable control over the types of businesses and persons who will occupy his property.

The need to retain this traditional remedy for the lessor arises primarily from the advent of "net lease financing," a practice which has turned the lease into an important instrument for investing and for financing property acquisition and construction. An essential requirement in net lease financing is that there be no termination except in such drastic situations as a taking of the whole property by eminent domain, rejection of the lease by the tenant's trustee in bankruptcy, or a complete destruction of the land and building by a flood which does not recede. See Williams, *The Role of the Commercial Lease in Corporate Finance*, 22 BUS. LAW. 751, 752-753 (1967). Thus, it seems imperative that any change in the law of leases in California preserve the ability of the lessor under such a financing arrangement to hold the lessee unconditionally to the payment of the "rent."¹

¹ These arrangements are often complex. One example of such a transaction is described in Williams, *The Role of the Commercial Lease in Corporate Finance*, 22 BUS. LAW. 751, 762, (1967): A Co. needs a new building to expand its operations. It arranges for X to purchase the land for the building. X purchases the land and leases it to A Co. on a short-term lease. A Co. builds the improvement and sells it to X. X makes payment by means of an unsecured promissory note. X then sells the land at cost to Investment Co., but retains the fee in the improvement. Investment Co. leases the land to X on a long-term lease with a net return that will provide Investment Co. with a fair rate of interest on its investment. X leases the improvement back to A Co. on a net lease basis, and subleases the land to A Co. on the same basis. X then mortgages the ground lease and the improvement to Investment Co. for an amount equal to the cost of the building. X uses the proceeds of the mortgage transaction to pay the promissory note given by X to A Co. for the purchase of the improvement. Thus, A Co. has possession of the land and the improvement and has paid out no cash which has not been returned; the only obligation of A Co. is to pay the periodic rentals. X has spent no money which has not been returned, is the mortgagor of the improvement and the sublease, and is primarily liable on the ground lease. X has security for the performance of A Co. in his ownership of the equity in the improvement. Investment Co., the investor, owns the land and has it and the improvement as security for the payment of rent by A Co. Investment Co. also has the obligation of X, as sublessor, as security. Investment Co. has an investment which is now paying interest equivalent to a mortgage in the form of rent.

Where the lease is used as a financing instrument, the "rent" is in substance interest and return of capital investment and the rate of the rent depends on the credit rating of the lessee. Ordinarily, a major lessee with a prime credit rating will be given a long-term lease at a lower rent than would be asked of another lessee. If the original lessee abandons, the lessor may be able to relet at a higher rental, but the new lessee may not have the credit rating of the former lessee and, if the lease had been made with the new lessee originally, a higher rent would have been charged to reflect the increased risk in lending the money secured by the lease. In this case, a requirement to mitigate damages would deprive the lessor of the benefit of the transaction since the credit rating of the lessee involved in the transaction determines the rent. Even where the lease is not part of a financing arrangement, the same consideration applies because a lessee with a prime credit rating will often be required to pay less rent than a tenant whose ability to pay the rent is suspect. In addition, where a financing arrangement is not involved, the desirability of a particular tenant may be a factor that significantly influences the amount of the rental. For example, the lessor of a shopping center may offer a very favorable rental to a particular tenant who will attract customers for the entire center. If this tenant later wishes to leave the location, the available replacements may be stores that cater to a different clientele; but the lessor may not want any of these stores because he wishes to preserve the quality of the merchandising in the shopping center. Under existing law, the coercive effect of the full rental obligation can be used by the lessor to make the original tenant live up to its bargain. This recommended remedy will permit the parties to retain this effect of the existing law.

Effect on Unlawful Detainer

Section 1174 of the Code of Civil Procedure provides that the lessor may notify the lessee to quit the premises and that such a notice does not terminate the leasehold interest unless the notice so specifies. This permits a lessor to evict the lessee, relet the property, and recover from the lessee at the end of the term for any deficiency in the rentals. The statutory remedy falls short of providing full protection to the rights of both parties. It does not permit the lessor to recover damages immediately for future losses; nor does it require the lessor to mitigate damages.

An eviction under Section 1174 should terminate the lessee's rights under the lease and the lessor should be required to relet the property to minimize the damages. The lessor's right to recover damages for loss of the benefits of the lease should be independent of his right to bring an action for unlawful detainer to recover the possession of the property. The damages should be recoverable in a separate action in addition to any damages recovered as part of the unlawful detainer action. Of course, the lessor should not be entitled to recover twice for the same items of damages.

Civil Code Section 3308

Section 3308 of the Civil Code provides, in effect, that a lessor of real or personal property may recover the measure of damages recommended above *if* the lease so provides and the lessor chooses to pursue that remedy. Enactment of legislation effectuating the other recommenda-

tions of the Commission would make Section 3308 superfluous insofar as real property is concerned. The section should, therefore, be amended to limit its application to personal property. The Commission has not made a study of personal property leases, and no attempt has been made to deal with this body of law in the recommended legislation.

Effective Date; Application to Existing Leases

The recommended legislation should take effect on July 1, 1971. This will permit interested persons to become familiar with the new legislation before it becomes effective.

The legislation should not apply to any leases executed before July 1, 1971. This is necessary because the parties did not take the recommended legislation into account in drafting leases now in existence.

PROPOSED LEGISLATION

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

An act to add Sections 1951, 1951.2, 1951.4, 1951.5, 1951.6, 1951.7, 1951.8, 1952, 1952.2, 1952.4, and 1952.6 to, and to amend Section 3308 of, the Civil Code, and to add Sections 337.2 and 339.5 to the Code of Civil Procedure, relating to leases.

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

SECTIONS ADDED TO CIVIL CODE

§ 1951. "Rent" and "lease" defined

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

1951. As used in Sections 1951.2 to 1952.6, inclusive:

(a) "Rent" includes charges equivalent to rent.

(b) "Lease" includes a sublease.

Comment. Subdivision (a) makes clear that "rent" includes all charges or expenses to be met or defrayed by the lessee in exchange for use of the leased property. Inclusion of these items in "rent" is necessary to make various subsequent sections apply appropriately. For example, if the defaulting lessee had promised to pay the taxes on the leased property and the lessor could not relet the property under a lease either containing such a provision or providing sufficient additional rental to cover the accruing taxes, the loss of the defaulting lessee's assumption of the tax obligation should be included in the damages the lessor is entitled to recover under Section 1951.2. The same would be true where the lease imposes on the lessee the obligation to provide fire, earthquake, or liability insurance.

Subdivision (b) merely makes clear that the provisions of the statute apply to subleases as well as leases.

§ 1951.2. Termination of real property lease; damages recoverable

SEC. 2. Section 1951.2 is added to the Civil Code, to read:

1951.2. (a) Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his

right to possession is terminated by the lessor because of a breach of the lease, the lease terminates. Upon such termination, the lessor may recover from the lessee:

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

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

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

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

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

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

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

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

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

Subdivisions (a) and (b). Under paragraph (1) of subdivision (a), the lessor is entitled to recover the unpaid rent which had been earned at the time the lease terminated. Pursuant to subdivision (b), interest must be added to such rent at such lawful rate as may be specified in the lease or, if none is specified, at the legal rate of seven percent. Interest accrues on each unpaid rental installment from the time it becomes due until the time of award, *i.e.*, the entry of judgment or the similar point of determination if the matter is determined by a tribunal other than a court.

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

The lump sum award of future rentals under paragraph (3) of subdivision (a) is discounted pursuant to subdivision (b) to reflect prepayment. The amount by which each future rental installment exceeds the amount of avoidable rental loss for that rent period is discounted from the due date under the lease to the time of award at the discount rate of the Federal Reserve Bank of San Francisco plus one percent. Judicial notice can be taken of this rate pursuant to Evidence Code Section 452(h).

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

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

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

The doctrine does not require the injured party to take measures which are unreasonable or impractical or which would involve expenditures disproportionate to the loss sought to be avoided or which may be beyond his financial means. . . . The reasonableness of the efforts of the injured party must be judged in the light of the situation confronting him at the time the loss was threatened and not by the judgment of hindsight. . . . The fact that reason-

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

Paragraph (4) of subdivision (a) makes clear that the measure of the lessor's recoverable damages is not limited to damages for the loss of past and future rentals. This paragraph adopts language used in Civil Code Section 3300 and provides, in substance, that all of the other damages a person is entitled to recover for the breach of a contract may be recovered by a lessor for the breach of his lease. For example, to the extent that he would not have had to incur such expense, had the lessee performed his obligations under the lease, the lessor is entitled to recover his reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting the property. Other damages necessary to compensate the lessor for all of the detriment proximately caused by the lessee would include damages for the lessee's breach of specific covenants of the lease—for example, a promise to maintain or improve the premises or to restore the premises upon termination of the lease. Attorney's fees may be recovered only if they are recoverable under Section 1951.6.

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

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

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

P.2d 10 (1951). One of the purposes of Section 1951.2 is to require mitigation by the lessor, and subdivision (c) is included to insure that efforts by the lessor to mitigate do not result in a waiver of his right to damages under Section 1951.2.

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

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

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

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

§ 1951.4. Continuance of lease after breach and abandonment

SEC. 3. Section 1951.4 is added to the Civil Code, to read: 1951.4. (a) The remedy described in this section is available only if the lease provides for this remedy.

(b) Even though a lessee of real property has breached his lease and abandoned the property, the lease continues in effect for so long as the lessor does not terminate the lessee's right to possession, and the lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:

(1) Sublet the property, assign his interest in the lease, or both.

(2) Sublet the property, assign his interest in the lease, or both, subject to standards or conditions, and the lessor does not require compliance with any unreasonable standard for, nor any unreasonable condition on, such subletting or assignment.

(3) Sublet the property, assign his interest in the lease, or both, with the consent of the lessor, and the lease provides that such consent shall not unreasonably be withheld.

(c) For the purposes of subdivision (b), the following do not constitute a termination of the lessee's right to possession:

(1) Acts of maintenance or preservation or efforts to relet the property.

(2) The appointment of a receiver upon initiative of the lessor to protect the lessor's interest under the lease.

Comment. Even though the lessee has breached the lease and abandoned the property, Section 1951.4 permits the lessor to continue to collect the rent as it becomes due under the lease rather than to recover damages based primarily on the loss of future rent under Section 1951.2. This remedy is available only if the lease so provides and contains a provision permitting the lessee to mitigate the damages by subletting or assigning his interest in the property. The lease may give the lessee unlimited discretion in choosing a subtenant or assignee. See subdivision (b) (1). However, generally the lease will impose standards for or conditions on such subletting or assignment or require the consent of the lessor. See subdivision (b) (2), (3). In the latter case, the lessor may not require compliance with an unreasonable standard or condition nor unreasonably withhold his consent. Occasionally, a standard or condition, although reasonable at the time it was included in the lease, is unreasonable under circumstances existing at the time of subletting or assignment. In such a situation, the lessor may resort to the remedy provided by Section 1951.4 if he does not require compliance with the now unreasonable standard or condition. Common factors that may be considered in determining whether standards or conditions on subletting or assignment are reasonable include: the credit rating of the new tenant; the similarity of the proposed use to the previous use; the nature or character of the new tenant—the use may be similar, but the quality of the tenant quite different; the requirements of the new tenant for services furnished by the lessor; the impact of the new tenant on common facilities.

The right to continue to collect the rent as it becomes due terminates when the lessor evicts the lessee; in such case, the damages are computed under Section 1951.2. The availability of a remedy under Section 1951.4 does not preclude the lessor from terminating the right of a defaulting lessee to possession of the property and then utilizing the remedy provided by Section 1951.2. However, nothing in Section 1951.4 affects the rules of law that determine when the lessor may terminate the lessee's right to possession. See generally 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Real Property* §§ 276-278 (1960). Thus, for example, the lessor's right to terminate the lessee's right to possession may be waived under certain circumstances. *Id.* at § 278.

Where the lease complies with Section 1951.4, the lessor may recover the rent as it becomes due under the terms of the lease and at the same time has no obligation to retake possession and relet the property in the event the lessee abandons the property. This allocation of the burden of minimizing the loss is most useful where the lessor does not have the desire, facilities, or ability to manage the property and to acquire a suitable tenant and for this reason desires to avoid the burden that Section 1951.2 places on the lessor to mitigate the damages by reletting the property.

The allocation of the duty to minimize damages under Section 1951.4 is important. It permits arrangements for financing the purchase or improvement of real property that might otherwise be seriously jeopardized if the lessor's only right upon breach of the lease and abandonment of the property were the right to recover damages under Section 1951.2. For example, because the lessee's obligation to pay rent under a lease could be enforced under former law, leases were utilized by public entities to finance the construction of public improvements. The lessor constructed the improvement to the specifications of the public entity-lessee, leased the property as improved to the public entity, and at the end of the term of the lease all interest in the property and the improvement vested in the public entity. See, *e.g.*, *Dean v. Kuchel*, 35 Cal.2d 444, 218 P.2d 521 (1950). Similarly, a lessor could, in reliance on the lessee's rental obligation under a long-term lease, construct an improvement to the specifications of the lessee for the use of the lessee during the lease term. The remedy available under Section 1951.4 retains the substance of the former law and gives the lessor, in effect, security for the repayment of the cost of the improvement in these cases.

Section 1951.4 also facilitates assignment by the lessor under a long-term lease of the right to receive the rent under the lease in return for the discounted value of the future rent. The remedy provided by Section 1951.4 makes the right to receive the rental payments an attractive investment since the assignee is assured that the rent will be paid if the tenant is financially responsible.

Subdivision (c) makes clear that certain acts by the lessor do not constitute a termination of the lessee's right to possession. The first paragraph of the subdivision permits the lessor, for example, to show the leased premises to prospective tenants after the lessee has breached the lease and abandoned the property.

The second paragraph of subdivision (c) makes clear that appointment of a receiver to protect the lessor's rights under the lease does not constitute a termination of the lessee's right to possession. For example, an apartment building may be leased under a "master lease" to a lessee who then leases the individual apartments to subtenants. The appointment of a receiver may be appropriate if the lessee under the master lease collects the rent from the subtenants but fails to pay the lessor the rent payable under the master lease. The receiver would collect the rent from the subtenants on behalf of the lessee and pay to the lessor the amount he is entitled to receive under the master lease. This form of relief would protect the lessor against the lessee's misappropriation of the rent from subtenants and at the same time would preserve the lessee's obligation to pay the rent provided in the master lease.

Under this section, in contrast to Section 1951.2, so long as the lessor does not terminate the lease, he is obliged to continue to perform his obligations under the lease.

§ 1951.5. Liquidated damages

SEC. 4. Section 1951.5 is added to the Civil Code, to read:

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

Comment. The amount of the lessor's damages may be difficult to determine in some cases since the lessor's right to damages accrues at the time of the breach and abandonment or when the lease is terminated by the lessor. See Section 1951.2. This difficulty may be avoided in appropriate cases by a liquidated damage provision that meets the requirements of Civil Code Sections 1670 and 1671.

Under former law, provisions in real property leases for liquidated damages upon breach by the lessee were held to be void. *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130 (1899). However, such holdings were based on the former rule that the lessor's cause of action upon breach of the lease and abandonment of the property or upon termination of the lessee's right to possession was either for the rent as it became due or for the rental deficiency at the end of the lease term.

So far as provisions for liquidated damages upon a lessor's breach are concerned, such provisions were upheld under the preexisting law if reasonable. See *Seid Pak Sing v. Barker*, 197 Cal. 321, 240 Pac. 765 (1925). Nothing in Section 1951.5 changes this rule.

§ 1951.6. Attorney's fees

SEC. 5. Section 1951.6 is added to the Civil Code, to read:

1951.6. Section 1717, relating to contract provisions for attorney's fees, applies to leases of real property and the attorney's fees provided for by Section 1717 shall be recoverable in addition to any other relief or amount to which the lessor or lessee may be entitled.

Comment. Leases, like other contracts, sometimes provide that a party is entitled to recover reasonable attorney's fees incurred in successfully enforcing or defending his rights in litigation arising out of the lease. Section 1951.6 makes clear that nothing in the other sections of the statute impairs a party's rights under such a provision and that Civil Code Section 1717 applies to leases of real property. Thus, attorney's fees are recoverable only if the lease so provides and if the lease provides that one party to the lease may recover attorney's fees, both parties have this right. See CIVIL CODE § 1717.

§ 1951.7. Notice required upon reletting property

SEC. 6. Section 1951.7 is added to the Civil Code, to read:

1951.7. (a) As used in this section, "advance payment" means moneys paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or any other payment which is the substantial equivalent of either of these. A payment that is not in excess of the amount of one month's rent is not an advance payment for the purposes of this section.

(b) The notice provided by subdivision (c) is required to be given only if:

- (1) The lessee has made an advance payment;
- (2) The lease is terminated pursuant to Section 1951.2; and
- (3) The lessee has made a request, in writing, to the lessor that he be given notice under subdivision (c).

(c) Upon the initial reletting of the property, the lessor shall send a written notice to the lessee stating that the prop-

erty has been relet, the name and address of the new lessee, and the length of the new lease and the amount of the rent. The notice shall be delivered to the lessee personally, or be sent by regular mail to the lessee at the address shown on the request, not later than 30 days after the new lessee takes possession of the property. No notice is required if the amount of the rent due and unpaid at the time of termination exceeds the amount of the advance payment.

Comment. Section 1951.7 does not in any way affect the right of the lessor to recover damages nor the right of a lessee to recover prepaid rent, a security deposit, or other payment. The section is included merely to provide a means whereby the lessee whose lease has been terminated under Section 1951.2 may obtain information concerning the length of the term of the new lease and the rent provided in the new lease. The notice is required only if the lessee so requests and only upon the initial reletting of the property. If the new lease is terminated, the notice, if any, required by Section 1951.7 need be given only to the lessee under the new lease.

§ 1951.8. Equitable relief

SEC. 7. Section 1951.8 is added to the Civil Code, to read:

1951.8. Nothing in Section 1951.2 or 1951.4 affects the right of the lessor under a lease of real property to equitable relief where such relief is appropriate.

Comment. Generally, where the lessee has breached a lease of real property, the lessor will simply recover damages pursuant to Civil Code Section 1951.2. However, Section 1951.8 makes clear that the lessor remains entitled to equitable relief where such relief is appropriate. For example, even though the lease has terminated pursuant to subdivision (a) of Section 1951.2 and the lessor has recovered damages under that section for loss of rent, he is not precluded from obtaining equitable relief, *e.g.*, an injunction enforcing the lessee's covenant not to compete.

§ 1952. Effect on unlawful detainer actions

SEC. 8. Section 1952 is added to the Civil Code, to read:

1952. (a) Except as provided in subdivision (c), nothing in Sections 1951 to 1951.8, inclusive, affects the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, relating to actions for unlawful detainer, forcible entry, and forcible detainer.

(b) The bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, 1951.6, and 1951.8, but no damages shall be recovered in the subsequent action for any detriment for which a claim for damages was made and determined on the merits in the previous action.

(c) After the lessor obtains possession of the property under a judgment pursuant to Section 1174 of the Code of Civil Procedure, he is no longer entitled to the remedy pro-

vided under Section 1951.4 unless the lessee obtains relief under Section 1179 of the Code of Civil Procedure.

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

Subdivision (b) provides that the fact that a lessor has recovered possession of the property by an unlawful detainer action does not preclude him from bringing a separate action to secure the relief to which he is entitled under Sections 1951.2, 1951.5, 1951.6, and 1951.8. Some of the incidental damages to which the lessor is entitled may be recovered in either the unlawful detainer action or in an action to recover the damages specified in Sections 1951.2, 1951.5, and 1951.6. Under Section 1952, such damages may be recovered in either action, but the lessor is entitled to but one determination of the merits of a claim for damages for any particular detriment.

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

§ 1952.2. Leases executed before July 1, 1971

SEC. 9. Section 1952.2 is added to the Civil Code, to read: 1952.2. Sections 1951 to 1952, inclusive, do not apply to:

(a) Any lease executed before July 1, 1971.

(b) Any lease executed on or after July 1, 1971, if the terms of the lease were fixed by a lease, option, or other agreement executed before July 1, 1971.

Comment. Section 1952.2 is included because the contents of the leases therein described may have been determined without reference to the effect of the added sections.

§ 1952.4. Natural resources agreements

SEC. 10. Section 1952.4 is added to the Civil Code, to read:

1952.4. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of Sections 1951 to 1952.2, inclusive.

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been

characterized by the California Supreme Court as a *profit à prendre* in gross. See *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962 (1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the extraction of the valuable resources of the property with compensation for such extraction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

Sections 1951–1952.2 are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 1952.4 limits these sections to their intended purpose. Section 1952.4 does not prohibit application to such agreements of any of the principles expressed in Sections 1951 to 1951.8; it merely provides that nothing in those sections requires such application.

§ 1952.6. Lease-purchase agreements of public entities

SEC. 11. Section 1952.6 is added to the Civil Code, to read:

1952.6. Where a lease or an agreement for a lease of real property from or to any public entity or any nonprofit corporation whose title or interest in the property is subject to reversion to or vesting in a public entity would be made invalid if any provision of Sections 1951 to 1952.2, inclusive, were applicable, such provision shall not be applicable to such a lease. As used in this section, “public entity” includes the state, a county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.

Comment. Section 1952.6 is included to prevent the application of any provision of Sections 1951 to 1952.2 to lease-purchase agreements by public entities if such application would make the agreement invalid.

CONFORMING AMENDMENT OF CIVIL CODE SECTION 3308

SEC. 12. Section 3308 of the Civil Code is amended to read:

3308. The parties to any lease of ~~real or~~ personal property may agree therein that if such lease shall be terminated by the lessor by reason of any breach thereof by the lessee, the lessor shall thereupon be entitled to recover from the lessee the worth at the time of such termination, of the excess, if any, of the amount of rent and charges equivalent to rent reserved in the lease for the balance of the stated term or any shorter period of time over the then reasonable rental value of the ~~premises~~ property for the same period.

The rights of the lessor under such agreement shall be cumulative to all other rights or remedies now or hereafter given to the lessor by law or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy hereinabove permitted shall be binding upon him and exclude recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of the covenant to pay such rent or charges accruing subsequent to the time of such termination. The parties to such lease may further agree therein that unless the remedy provided by this

section is exercised by the lessor within a specified time the right thereto shall be barred.

Comment. Section 3308 has been amended to exclude reference to leases of real property; insofar as the section related to real property, it has been superseded by Sections 1951-1952.6. Neither deletion of real property leases from Section 3308 nor enactment of Sections 1951-1952.6 affects any remedy or benefit available to a lessor or a lessee of personal property under Section 3308, under Section 3300, or under the rules applicable to contracts generally.

SECTIONS TO BE ADDED TO CODE OF CIVIL PROCEDURE

§ 337.2. Damages recoverable upon abandonment or termination of written lease of real property

SEC. 13. Section 337.2 is added to the Code of Civil Procedure, to read:

337.2. Where a lease of real property is in writing, no action shall be brought under Section 1951.2 of the Civil Code more than four years after the breach of the lease and abandonment of the property, or more than four years after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Comment. The four-year period provided in Section 337.2 is consistent with the general statute of limitations applicable to written contracts. See Section 337. Although the former law was not clear, it appears that, if the lessor terminated a lease because of the lessee's breach and evicted the lessee, his cause of action for the damages resulting from the loss of the rentals due under the lease did not accrue until the end of the original lease term. See *De Hart v. Allen*, 26 Cal.2d 829, 161 P.2d 453 (1945); *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932). Under Civil Code Section 1951.2, however, an aggrieved lessor may sue immediately for the damages resulting from the loss of the rentals that would have accrued under the lease. Accordingly, Section 337.2 relates the period of limitations to breach and abandonment or to termination of the right of the lessee to possession.

§ 339.5. Damages recoverable upon abandonment or termination of oral lease of real property

SEC. 14. Section 339.5 is added to the Code of Civil Procedure, to read:

339.5. Where a lease of real property is not in writing, no action shall be brought under Section 1951.2 of the Civil Code more than two years after the breach of the lease and abandonment of the property, or more than two years after the termination of the right of the lessee to possession of the property, whichever is the earlier time.

Comment. The two-year period provided in Section 339.5 is consistent with the general statute of limitations applicable to contracts not in writing. See Section 339. See also the Comment to Section 337.2.

APPENDIX V

PROPOSED LEGISLATION

relating to

STATUTE OF LIMITATIONS IN ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

The measure set out below would effectuate a recommendation made by the Law Revision Commission in 1968. See *Recommendation Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees* (September 1968), 9 CAL. L. REVISION COMM'N REPORTS 49 (1969). The measure set out below is substantially the same as the one recommended in September 1968. Only a few technical changes have been made.

An act to amend Section 352 of the Code of Civil Procedure and to amend Sections 910.8, 911.8, 913, 945.6, and 950.6 of, and to add Section 915.4 to, the Government Code, and to amend Section 34 of the San Joaquin County Flood Control and Water Conservation District Act (Chapter 46 of the Statutes of 1956, First Extraordinary Session), Section 10 of the Kern County Water Agency Act (Chapter 1003 of the Statutes of 1961), Section 23 of the Desert Water Agency Law (Chapter 1069 of the Statutes of 1961), Section 23 of the San Geronio Pass Water Agency Law (Chapter 1435 of the Statutes of 1961) and Section 23 of the Bighorn Mountains Water Agency Law (Chapter 1175 of the Statutes of 1969), relating to claims against public entities and public employees.

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

SECTION 1. Section 352 of the Code of Civil Procedure is amended to read:

352. (a) If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, either:

1. Under the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life;

or,

4. A married woman, and her husband be a necessary party with her in commencing such action;
the time of such disability is not a part of the time limited for the commencement of the action.

(b) *This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter*

1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code.

Comment. Subdivision (b) has been added so that Section 352, which operates to toll the statute of limitations for minors, insane persons, and prisoners, will not apply to the causes of action against a public entity or public employee described in this subdivision. Such actions are governed by the period of limitations specified in subdivision (a) of Section 945.6 of the Government Code. To safeguard the minor or incompetent from an inadvertent reliance on the tolling provision of Section 352, notice of rejection of his claim in the form provided in Government Code Section 913 is required to be given by the public entity. If notice is not given, the claimant has two years from the accrual of his cause of action in which to sue. See Government Code Section 945.6(a).

Special exceptions for prisoners exist in both subdivision (b) of Section 945.6 and subdivision (c) of Section 950.6 of the Government Code, which toll the statute of limitations during the period of their civil disability.

The other general provisions of the Code of Civil Procedure relating to the time within which actions must be commenced—Sections 350, 351, 353–363—are applicable to actions against public entities and public employees. See *Williams v. Los Angeles Metropolitan Transit Authority*, 68 Cal.2d 599, 68 Cal. Rptr. 297, 440 P.2d 497 (1968). See also Government Code Sections 950.2 and 950.4.

SEC. 2. Section 910.8 of the Government Code is amended to read:

910.8. ~~(a)~~ If in the opinion of the board or the person designated by it a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, or with the requirements of a form provided under Section 910.4 if a claim is presented pursuant thereto, the board or such person may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. ~~(b)~~ Such notice ~~may~~ shall be given *in the manner prescribed by Section 915.4.* ~~personally to the person presenting the claim or by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notices to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim.~~ ~~(c)~~ The board may not take action on the claim for a period of 15 days after such notice is given.

Comment. See the Comment to Section 915.4.

SEC. 3. Section 911.8 of the Government Code is amended to read:

911.8. Written notice of the board's action upon the application shall be given *in the manner prescribed by Section 915.4.* ~~to the claimant personally or by mailing it to the ad-~~

dress, if any, stated in the proposed claim as the address to which the person making the application desires notices to be sent. If no such address is stated in the claim, the notice shall be mailed to the address, if any, of the claimant as stated in the claim. No notice need be given when the proposed claim fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

Comment. See the Comment to Section 915.4.

SEC. 4. Section 913 of the Government Code is amended to read:

913. (a) Written notice of ~~any~~ the action taken under Section 912.6 or 912.8 ~~or the inaction which is deemed rejection under Section 912.4 rejecting a claim in whole or in part~~ shall be given in the manner prescribed by Section 915.4. Such notice may be in substantially the following form:

~~to the person who presented the claim. Such notice may be given by mailing it to the address, if any, stated in the claim as the address to which the person presenting the claim desires notice to be sent. If no such address is stated in the claim, the notice may be mailed to the address, if any, of the claimant as stated in the claim. No notice need be given when the claim fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.~~

“Notice is hereby given that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of \$----- and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law).”

(b) If the claim is rejected in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form:

“WARNING

“Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6.

“You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.”

Comment. Subdivision (a) of Section 913 is amended to require that written notice of either acceptance or rejection be given by the public entity in every case in which a claim is required to be presented under Chapters 1 and 2 of Part 3 of Division 3.6. The notice serves to keep each claimant aware of the status of his claim and guards against an inadvertent failure to sue on a rejected claim within the applicable time limit. The notice must be given in compliance with the uniform procedure prescribed by Section 915.4. An optional form of notice is set forth in subdivision (a).

If the claim is rejected either in whole or in part, subdivision (b) requires the public entity to include with the notice a warning concerning the applicable statute of limitations and advice to secure the services of an attorney. The notice and warning will alert the claimant, at the time of rejection, of the time allowed to pursue his claim in the courts and will protect a minor or incompetent against an inadvertent reliance on the general tolling provisions of Code of Civil Procedure Section 352. See Code of Civil Procedure Section 352 and Government Code Section 945.6(a). The last two sentences of the notice are based on the language of the notice required by Code of Civil Procedure Section 407 to be included in a summons.

SEC. 5. Section 915.4 is added to the Government Code, to read:

915.4. (a) The notices provided for in Sections 910.8, 911.8, and 913 shall be given by:

(1) Personally delivering the notice to the person presenting the claim or making the application; or

(2) Mailing the notice to the address, if any, stated in the claim or application as the address to which the person presenting the claim or making the application desires notices to be sent or, if no such address is stated in the claim or application, by mailing the notice to the address, if any, of the claimant as stated in the claim or application.

(b) No notice need be given where the claim or application fails to state either an address to which the person presenting the claim or making the application desires notices to be sent or an address of the claimant.

Comment. Section 915.4 is new, but it incorporates the substance of former Sections 910.8(b), 911.8, and 913. It makes uniform the manner of giving all notices under this chapter. Where notice is given by mail, Section 915.2 is applicable.

SEC. 6. Section 945.6 of the Government Code is amended to read:

945.6. (a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b) of this section, any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) *If written notice is given in accordance with Section 913, within not later than six months after the date the claim is acted upon by the board, or is deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division, or such notice is personally delivered or deposited in the mail.*

(2) *If written notice is not given in accordance with Section 913, within one year two years from the accrual of the cause of action, whichever period expires later. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of*

such extension is not part of the time limited for the commencement of the action under this paragraph.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limited for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division.

Comment. Subdivision (a) of Section 945.6 is amended to require that an action be commenced within six months after notice of rejection (by action or nonaction) is given pursuant to Section 913. If such notice is not given, the claimant has two years from the accrual of his cause of action in which to file suit. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is added to the two years allowed.

The triggering date generally will be the date the notice is deposited in the mail or personally delivered to the claimant, at which time the claimant will receive a warning that he has a limited time within which to sue and a suggestion that he consult an attorney of his choice. See Government Code Section 913. No time limit is prescribed within which the public entity must give the notice, but the claimant is permitted six months from the date that the notice is given to file suit.

If notice is not given, the two-year period allows ample time within which the claimant may file a court action.

Section 945.6 does not, of course, preclude the claimant from filing an action at an earlier date after his claim is deemed to have been rejected pursuant to Sections 912.4 and 945.4.

Section 352 of the Code of Civil Procedure does not apply to actions described in Section 945.6. See Code of Civil Procedure Section 352(b). However, the other general provisions of the Code of Civil Procedure relating to the time within which actions must be commenced—Sections 350, 351, 353–363—are applicable. See *Williams v. Los Angeles Metropolitan Transit Authority*, 68 Cal.2d 599, 68 Cal. Rptr. 297, 440 P.2d 497 (1968).

SEC. 7. Section 950.6 of the Government Code is amended to read:

950.6. When a written claim for money or damages for injury has been presented to the employing public entity:

(a) A cause of action for such injury may not be maintained against the public employee or former public employee

whose act or omission caused such injury until the claim has been rejected, or has been deemed to have been rejected, in whole or in part by the public entity.

(b) A suit against the public employee or former public employee for such injury must be commenced within ~~six~~ months after the date the claim is acted upon by the board, or is deemed to have been rejected by the board, in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division the time prescribed in Section 945.6 for bringing an action against the public entity.

(c) When a person is unable to commence the suit within the time prescribed in subdivision (b) because he has been sentenced to imprisonment in a state prison, the time limited for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public employee or former public employee establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (b).

Comment. The amendment of subdivision (b) of Section 950.6 conforms that subdivision to subdivision (a) of Section 945.6. The effect of this amendment is indicated in the Comment to Section 945.6.

SEC. 8. Section 34 of the San Joaquin County Flood Control and Water Conservation District Act (Ch. 46, Stats. 1956, 1st Ex. Sess.) is amended to read:

Sec. 34. Claims against the district whether arising out of contract, tort, or the taking or damaging of property without compensation ~~must be made in writing and filed with the board within six months after the cause of action arises. Claims shall be presented in the general form and manner prescribed by general law relating to the making and filing of claims against counties. Such claims may be amended within said six months to correct defects in form or statement of facts. No action against the district shall be commenced or maintained unless such claim relating thereto has been filed as hereinabove prescribed and action thereon commenced within one year after the cause of action arose shall be governed by Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code.~~

SEC. 9. Section 10 of the Kern County Water Agency Act (Ch. 1003, Stats. 1961) is amended to read:

Sec. 10. Claims against the agency whether arising out of contract, tort, or the taking or damaging of property without compensation shall be governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5~~ Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code.

SEC. 10. Section 23 of the Desert Water Agency Law (Ch. 1069, Stats. 1961) is amended to read:

Sec. 23. All claims for money or damages against this agency are governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5 Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6~~ of Title 1 of the Government Code, except as provided therein, or by other statutes or regulations expressly applicable thereto.

SEC. 11. Section 23 of the San Geronio Pass Water Agency Law (Ch. 1435, Stats. 1961) is amended to read:

Sec. 23. All claims for money or damages against this agency are governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5 Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6~~ of Title 1 of the Government Code, except as provided therein, or by other statutes or regulations expressly applicable thereto.

SEC. 12. Section 23 of the Bighorn Mountains Water Agency Law (Ch. 1175, Stats. 1969) is amended to read:

Sec. 23. All claims for money or damages against this agency are governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5 Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6~~ of Title 1 of the Government Code, except as provided therein, or by other statutes or regulations expressly applicable thereto.

APPENDIX VI

REPORT OF THE ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILLS 98, 99, 104, AND 105

[Extract from Assembly Journal for May 12, 1969 (1969 Regular Session).]

In order to indicate more fully its intent with respect to Senate Bills 98, 99, 104, and 105, the Assembly Committee on Judiciary makes the following report:

Senate Bills 98 and 99 were introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Powers of Appointment* (October 1968). The comments contained under the various sections of Senate Bills 98 and 99 as set out in the commission's recommendation reflect the intent of the Assembly committee in approving those bills.

Senate Bill 104 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Mutuality of Remedies in Suits for Specific Performance* (September 1968). The comment under Senate Bill 104 as set out in the commission's recommendation reflects the intent of the Assembly committee in approving the bill.

Senate Bill 105 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Additur and Remittitur* (September 1968). The comment under Senate Bill 105 as set out in the commission's recommendation reflects the intent of the Assembly committee in approving that bill.

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