STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report

December 1978

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 14 of the Commission's *Reports, Recommendations and Studies* which is scheduled to be published late in 1979.

Cite this pamphlet as *Annual Report,* 14 CAL. L. REVISION COMM'N REPORTS 201 (1978).

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SUMMARY OF WORK OF COMMISSION

Two resolutions and eight bills were submitted to the 1978 session by the Commission. Both resolutions were adopted and seven of the bills were enacted. The bills that were enacted dealt with a variety of subjects: the parol evidence rule, duties of court commissioners, review of eminent domain resolution of necessity, powers of appointment, evidence of market value, wage garnishment procedure, and attachment of property.

The Commission's major recommendation to the 1979 session will modernize almost 30 percent of the Probate Code by revising and consolidating the divisions relating to guardianships and conservatorships. Other recommendations will be submitted to the 1979 session. During 1979, the Commission plans to distribute for review and comment a draft of a new comprehensive statute relating to enforcement of judgments, including such matters as exemptions from execution. Soon to be commenced is a study whether a Marketable Title Act should be enacted in California and a study of community property. Other topics will be considered as time permits.

During 1978, the Commission also reviewed decisions of the Supreme Court of the United States and the Supreme Court of California, as required by Section 10331 of the Government Code, to determine whether any statutes of this state have been held to be unconstitutional or have been impliedly repealed.

During 1978, the Commission held 12 separate meetings, consisting of 24 days of working sessions.

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305
(415) 497-1731

December 1, 1978

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

In conformity with Government Code Section 10335, the California Law Revision Commission herewith submits this report of its activities during 1978.

I am pleased to report that at the 1978 legislative session the two concurrent resolutions recommended by the Commission were adopted and seven of the eight bills introduced to implement the Commission's recommendations were enacted.

I would also like to give special recognition to Assemblyman Alister McAlister who carried five bills recommended by the Commission, to Senator George Deukmejian who carried two bills recommended by the Commission, to Assemblyman Charles Imbrecht who carried one bill recommended by the Commission, and to Senator Robert G. Beverly and Senator Alan Robbins who managed and explained bills recommended by the Commission on the Senate floor.

Respectfully submitted,

HOWARD R. WILLIAMS
Chairperson

CONTENTS

APPENDICES

ANNUAL REPORT FOR THE YEAR 1978

INTRODUCTION

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

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

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

(1) Intensively studying complex and sometimes controversial subjects;

(2) Identifying major policy questions for legislative attention;

(3) Gathering the views of interested persons and organizations; and

(4) Drafting recommended legislation for legislative consideration.

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

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has a calendar of 26 topics,[1] including five topics added by the Legislature at the 1978 session. The Commission recommends that one topic be removed from its calendar[2] and that the Legislature authorize the study of two new topics.[3]

Commission recommendations have resulted in the enactment of legislation affecting 4,405 sections of the California statutes:

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

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

[3] See "Topics for Future Consideration" *infra.*

1,815 sections have been added, 944 sections amended, and 1,646 sections repealed. Of the 114 Commission recommendations submitted to the Legislature, 102 (90%) have been enacted into law either in whole or in substantial part.[4]

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

[4] See listing of recommendations and legislative action in Appendix I *infra*.

1979 LEGISLATIVE PROGRAM

The Commission plans to submit the following recommendations to the 1979 Legislature:

(1) *Recommendation Relating to Guardianship–Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978).

(2) *Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings* (September 1978), published as Appendix VII to this Report.

(3) *Recommendation Relating to Security for Costs* (October 1978), published as Appendix VIII to this Report.

CALENDAR OF TOPICS FOR STUDY

Topics Authorized for Study

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

Topics Under Active Consideration

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

Creditors' remedies. Whether the law relating to creditors' remedies including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code repossession of property provisions), civil arrest, confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, and related matters should be revised.[2]

The Commission is now engaged in drafting a comprehensive statute governing enforcement of judgments. Professor Stefan A. Riesenfeld of Boalt Hall, U.C. Berkeley, is serving as the consultant to the Commission. The Commission plans to publish a tentative draft of the comprehensive statute in 1979.

Child custody, guardianship, and related matters. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.[3]

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

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[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 study.

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

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

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

The Commission plans to submit to the 1979 Legislature a recommendation proposing the enactment of a new consolidated guardianship–conservatorship law. See *Recommendation Relating to Guardianship–Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978).

Eminent domain. Whether the law relating to eminent domain should be revised.[4]

The Commission plans to submit a recommendation on one aspect of this topic to the 1979 Legislature. See *Recommendation Relating to Ad Valorem Property Taxes in Eminent Domain Proceedings* (September 1978), published as Appendix VII to this Report.

Marketable Title Act and related matters. Whether a Marketable Title Act should be enacted in California and whether the law relating to covenants and servitudes relating to land, and the law relating to nominal, remote, and obsolete covenants, conditions, and restrictions on land use should be revised.[5]

The Commission has retained Professor James L. Blawie, Santa Clara Law School, as a consultant on this topic and the following topic. Professor Blawie is now engaged in preparing an analysis of the areas and problems that might be covered in a study of these topics.

Possibilities of reverter and powers of termination. Whether the law relating to possibilities of reverter and powers of termination should be revised.[6]

Community property. Whether the law relating to community property should be revised.[7]

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[4] Authorized by 1977 Cal. Stats., Res. ch. 17. See also 1965 Cal. Stats., Res. ch. 130; 1956 Cal. Stats., Res. ch. 42; 4 Cal. L. Revision Comm'n Reports 115 (1963).

[5] Authorized by 1976 Cal. Stats., Res. ch. 30. See also 1975 Cal. Stats., Res. ch. 82.

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

[7] Authorized by 1978 Cal. Stats., Res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 22 (1978).

The Commission has retained Professor Susan Westerberg Prager, U.C.L.A. Law School, to prepare a background study on one aspect of this topic. She is preparing a study relating to the liability of various kinds of community and separate property to third-party creditors for debts and tort obligations of either or both of the spouses. The study will also cover related matters, such as whether the statute pertaining to married women as sole traders (Code Civ. Proc. §§ 1811–1821) should be revised or repealed.

During 1979, the Commission also plans to commence a study of problems in connection with the equal management and control of community property provisions.

Other Topics Authorized for Study

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

Prejudgment interest. Whether the law relating to the award of prejudgment interest in civil actions and related matters should be revised.[8]

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

Class actions. Whether the law relating to class actions should be revised.[9]

Offers of compromise. Whether the law relating to offers of compromise should be revised.[10]

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

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.[11]

Quiet title actions. Whether the law relating to quiet title actions should be revised.[12]

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[8] Authorized by 1971 Cal. Stats., Res. ch. 75.

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

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

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

[12] Authorized by 1978 Cal. Stats., Res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 22 (1978).

Involuntary dismissal for lack of prosecution. Whether the law relating to involuntary dismissal for lack of prosecution should be revised.[13]

Civil Code Section 1464. Whether Section 1464 of the Civil Code should be repealed or revised.[14]

Abandonment or vacation of streets and highways. Whether the law relating to the abandonment or vacation of public streets and highways by cities, counties, and the state should be revised.[15]

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.

Evidence. Whether the Evidence Code should be revised.[16]

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

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

Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised.[18]

Unincorporated associations. Whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised.[19]

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[13] Authorized by 1978 Cal. Stats., Res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 23 (1978).

[14] Authorized by 1978 Cal. Stats., Res. ch. 65.

[15] Authorized by 1978 Cal. Stats., Res. ch. 65.

[16] Authorized by 1965 Cal. Stats., Res. ch. 130.

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

[18] Authorized by 1967 Cal. Stats., Res. ch. 81. See also 1956 Cal. Stats., Res. ch. 42.

[19] Authorized by 1966 Cal. Stats., Res. ch. 9. See also 1957 Cal. Stats., Res. ch. 202.

Partition. Whether the law relating to partition should be revised.[20]

Modification of contracts. Whether the law relating to modification of contracts should be revised.[21]

Governmental liability. Whether the law relating to sovereign or governmental immunity in California should be revised.[22]

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

Inverse condemnation. Whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised (including but not limited to liability for damages resulting from flood control projects) and whether the law relating to the liability of private persons under similar circumstances should be revised.[23]

Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.[24]

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised.[25]

Parol evidence rule. Whether the parol evidence rule should be revised.[26]

Topics to Be Removed From Calendar of Topics

The Commission has been authorized to study whether the law relating to nonprofit corporations should be revised.[27] The Commission published its recommendation on this topic in 1976.

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[20] Authorized by 1977 Cal. Stats., Res. ch. 17. See also 1959 Cal. Stats., Res. ch. 218; 1956 Cal. Stats., Res. ch. 42; 1 Cal. L. Revision Comm'n Reports, "1956 Report" at 21 (1957).

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

[22] Authorized by 1977 Cal. Stats., Res. ch. 17. See also 1957 Cal. Stats., Res. ch. 202.

[23] Authorized by 1970 Cal. Stats., Res. ch. 46. See also 1965 Cal. Stats., Res. ch. 130.

[24] Authorized by 1965 Cal. Stats., Res. ch. 130. See also 1957 Cal. Stats., Res. ch. 202.

[25] Authorized by 1973 Cal. Stats., Res. ch. 39. See also 1969 Cal. Stats., Res. ch. 224.

[26] Authorized by 1971 Cal. Stats., Res. ch. 75. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).

[27] Authorized by 1970 Cal. Stats., Res. ch. 54. See also 9 Cal. L. Revision Comm'n Reports 107 (1969).

See *Recommendation Relating to Nonprofit Corporation Law,* 13 Cal. L. Revision Comm'n Reports 2201 (1976). The Commission suspended further work on the topic because the Assembly Select Committee on Revision of the Non-profit Corporation Code had undertaken a study of nonprofit corporation law. See 14 Cal. L. Revision Comm'n Reports at 11 (1978). The Select Committee prepared comprehensive legislation in this field which was enacted by the Legislature. 1978 Cal. Stats., chs. 567, 1305. Accordingly, the Commission recommends that the following topic be dropped from its calendar of topics:

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

Topics for Future Consideration

The Commission recommends that it be authorized to study the new topics described below.

A study to determine whether the law relating to the rights and disabilities of minors and incompetent persons should be revised. Major national studies of the law governing the legal capacity of persons under disabilities such as minority and incompetence have revealed fundamental defects in the law of California and other jurisdictions.[28]

California law is inadequate in a number of respects:

(1) The statutes that specify legal capacity for various purposes are often disorganized[29] and unclear[30] or employ ambiguous[31] or inconsistent[32] standards.

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[28] See, *e.g.,* American Bar Foundation, The Mentally Disabled and the Law (rev. ed. 1971) and Allen, Ferster, and Weihofen, Mental Impairment and Legal Incompetency (1968).

[29] The law relating to the ability of a minor to give consent to medical treatment, for example, is characterized by a disorganized series of provisions that address particular problems with no coherent overall scheme. See Civil Code §§ 25.5 (blood donation), 25.6 (married minor), 25.7 (minor in armed services), 25.8 (consent by custodian), 34.5 (pregnancy), 34.6 (minor living apart from parents), 34.7 (venereal disease), 34.8 (rape victim), 34.9 (victim of sexual assault), 34.10 (drugs and alcoholism).

[30] Marriage, for example, is a personal relation arising out of a civil contract to which the consent of the parties "capable of making that contract" is necessary. Civil Code § 4100. Despite this requirement, the marriage is subject to annulment if a party was of "unsound mind" at the time of marriage (Civil Code § 4425(c)) and is subject to dissolution if a party has "incurable insanity" (Civil Code § 4506(2)).

[31] California statutes impose disabilities on persons for such undefined conditions as "incompetence," "unsoundness of mind," "insanity," "incapacity," and "disability." See, *e.g.,* Civil Code §§ 39 ("unsound mind" as basis of contractual capacity), 2355 ("incapacity" to act as agent), 2810 ("disability" of principal in suretyship); Code Civ. Proc. § 372 (guardian ad litem for "insane" or "incompetent" person). See also *In re* Zanetti, 34 Cal.2d 136, 141, 208 P.2d 657, 659 (1949) (discussion of the various meanings of the term "insane").

[32] For example, Code of Civil Procedure Section 352(a)(2) provides for the tolling of the

(2) Fundamental questions concerning personal and property rights are left unanswered.[33]

(3) Procedural issues, such as the manner of adjudicating that a person is incapacitated, the burden of proof on the issue, and the manner of restoration to capacity, are not addressed.[34]

A comprehensive study and review of California law should be made to determine whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

A study relating to whether the law relating to powers of appointment should be revised. Upon recommendation of the Law Revision Commission,[35] a fairly comprehensive statute relating to powers of appointment was enacted in 1969.[36] Professor Susan F. French of the Law School at the University of California at Davis has written an article on the application of the antilapse statutes to appointments made by will.[37] This article takes the position that Civil Code Section 1389.4 (the antilapse provision of the powers of appointment statute) is inadequate. A review of Section 1389.4 should be made to determine whether revision is needed and the other provisions of the powers of appointment statute should also be reviewed to determine whether any other changes in the statute are desirable.

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statute of limitations when a person is "insane." However, the statute does not accurately state the law since cases have held that statutes of limitation must also be tolled while an incompetent person is under conservatorship. See, *e.g.*, Gottesman v. Simon, 169 Cal. App.2d 494, 337 P.2d 906 (1959).

[33] For example, the consequences of guardianship or conservatorship for the ward or conservatee are not specified. The Law Revision Commission, in its recommended revision of guardianship and conservatorship law, has proposed to clarify the impact of the protective proceeding on the ability of the conservatee to bind or obligate his or her estate. See *Recommendation Relating to Guardianship–Conservatorship Law,* 14 Cal. L. Revision Comm'n Reports 501 (1978). Other rights and powers of a conservatee should also be addressed and clarified.

[34] At present, such matters are addressed to a limited extent only in guardianship and conservatorship proceedings. See, *e.g.*, Prob. Code §§ 1460–1463 (appointment of guardians for insane or incompetent persons), 1470–1472 (restoration to capacity).

[35] *Recommendation and a Study Relating to Powers of Appointment,* 9 Cal. L. Revision Comm'n Reports 301 (1969).

[36] 1969 Cal. Stats., ch. 155 (enacting Civil Code §§ 1380.1–1392.1). See also 1969 Cal. Stats., ch. 113. The Commission drafted supplemental legislation which was enacted in 1978. 1978 Cal. Stats., ch. 266.

[37] French, *Application of Antilapse Statutes to Appointments Made by Will,* 53 Wash. L. Rev. 405 (1978).

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 principle duties of the Law Revision Commission are to:

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

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

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

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

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

The research study includes a discussion of the existing law and the defects therein and suggests possible methods of eliminating those defects. The study is given careful consideration by the Commission and, after making its preliminary decisions on the subject, the Commission ordinarily distributes a tentative recommendation to the State Bar and to numerous other

[1] See Govt. Code §§ 10300–10340.

[2] See Govt. Code § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the Supreme Court of the United States. Govt. Code § 10331.

[3] See Govt. Code § 10335.

interested persons. Comments on the tentative recomendation are considered by the Commission in determining what report and recommendation it will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a printed pamphlet.[4] If the research study has not been previously published,[5] it usually is published in the pamphlet containing the recommendation.

The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports[6] to reflect amendments[7] made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and potential problems in its meaning or application. The Comments are written as if the legislation were enacted since their primary purpose is to explain the statute to those who will have occasion to use it after it is in effect. They are entitled to substantial weight in construing the statutory provisions.[8] However, while the Commission endeavors in the Comment to explain any changes in the law made by the section, the Commission does not claim that every inconsistent case is noted in the Comment, nor can it anticipate judicial conclusions as to the significance of existing case authorities.[9] Hence, failure to note a change in prior law or

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

[5] For a listing of background studies published in law reviews, see 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971), 11 Cal. L. Revision Comm'n Reports 1008 n.5 & 1108 n.5 (1973), and 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976).

[6] Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see Arellano v. Moreno, 33 Cal. App.3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). For an example of such a report, see 13 Cal. L. Revision Comm'n Reports 1701–1702 (1976).

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

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

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

to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.[10]

The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the state.[11] Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is considered for enactment by the Legislature.[12] The annual reports and the recommendations and studies of the Commission are bound in a set of volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state.

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[10] The Commission does not concur in the *Kaplan* approach to statutory construction. See Kaplan v. Superior Court, 6 Cal.3d 150, 158–159, 491 P.2d 1, 5–6, 98 Cal. Rptr. 649, 653–654 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information,* 11 Cal. L. Revision Comm'n Reports 1163 (1973). See also 1974 Cal. Stats., ch. 227.

[11] See Govt. Code § 10333.

[12] For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMoully, *Fact Finding for Legislation: A Case Study,* 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965).

PERSONNEL OF COMMISSION

As of December 1, 1978, the membership of the Law Revision Commission is:

	Term expires
Howard R. Williams, Stanford, *Chairperson*	October 1, 1977
Beatrice P. Lawson, Los Angeles, *Vice Chairperson*	October 1, 1979
Hon. George Deukmejian, Los Angeles, *Senate Member*	*
Hon. Alister McAlister, San Jose, *Assembly Member*	*
Judith Meisels Ashmann, Los Angeles, *Member*	October 1, 1979
George Y. Chinn, San Francisco, *Member*	October 1, 1981
Ernest M. Hiroshige, Los Angeles, *Member*	October 1, 1981
Jean C. Love, Davis, *Member*	October 1, 1979
Laurence N. Walker, Berkeley, *Member*	October 1, 1979
Bion M. Gregory, Sacramento, *ex officio Member*	†

* 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

In January 1978, Governor Brown appointed Judith Meisels Ashmann, Los Angeles, to replace John N. McLaurin whose term had expired. In September 1978, Governor Brown appointed George Y. Chinn, San Francisco (replacing Thomas E. Stanton whose term had expired) and Ernest M. Hiroshige, Los Angeles (replacing John D. Miller who had resigned).

As of December 1, 1978, the staff of the Commission is:

Legal

John H. DeMoully
Executive Secretary

Robert J. Murphy III
Staff Counsel

Nathaniel Sterling
Assistant Executive Secretary

Stan G. Ulrich
Staff Counsel

Administrative-Secretarial

Juan C. Rogers
Administrative Assistant

Violet S. Harju
Word Processing Technician

Linda L. Johnson
Word Processing Technician

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1978 LEGISLATIVE SESSION

The Commission recommended two concurrent resolutions and seven bills for enactment at the 1978 session. The concurrent resolutions were adopted and six bills were enacted. Another bill prepared by the Commission was enacted to make technical and clarifying changes in a statute enacted as a result of an earlier Commission recommendation.

Creditors' Remedies

Three bills relating to creditors' remedies were recommended by the Commission for enactment at the 1978 session.

Wage garnishment. Assembly Bill 393, which became Chapter 1133 of the Statutes of 1978, was introduced by Assemblyman Alister McAlister in 1977 to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Wage Garnishment,* 13 Cal. L. Revision Comm'n Reports 1703 (1976). The Law Revision Commission Comments to the various sections of Assembly Bill 393 as enacted are set forth in Appendix VI to this Report.

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

(1) Code of Civil Procedure Section 723.022 was amended to substitute "100th" for "130th" in subdivision (a)(1).

(2) Code of Civil Procedure Section 723.024 was deleted.

(3) Code of Civil Procedure Section 723.050 was amended to substitute a new section for the one which was included in the bill as introduced.

(4) Code of Civil Procedure Section 723.051 was amended as follows: The words "or is incurred by the debtor, or his or her spouse or family for the common necessaries of life" were inserted at the end of the first sentence; the second sentence was deleted.

(5) Code of Civil Procedure Section 723.072 was amended to substitute "July" for "January" in subdivision (c).

(6) Code of Civil Procedure Section 723.103 was amended to delete "and withholding tables" from subdivision (b).

(7) Code of Civil Procedure Section 723.105 was amended as follows: In the third sentence of subdivision (e), "notice of" was inserted preceding "motion" in two places and "20" was substituted for "15"; in the fourth sentence of subdivision (e), the word order was rearranged somewhat, the number "10" was substituted for the word "five", the words "on the judgment debtor" were deleted following the word "served", and "to the claim of exemption by first-class mail on the judgment debtor and, if the claim of exemption so requested, on the attorney for the judgment debtor" was inserted at the end of the sentence; a new sentence was substituted for the fifth sentence of subdivision (e); a new sentence was substituted for the sixth sentence of subdivision (e); in subdivision (h), "100" was substituted for "130."

(8) Code of Civil Procedure Section 723.124 was amended in subdivision (d) to substitute "the" for "all" and to delete "and of the persons listed in subdivision (a)."

(9) Code of Civil Procedure Section 723.125 was amended in subdivision (g) to insert the words "and paid over" following the word "withheld."

(10) Code of Civil Procedure Section 723.127 was amended to delete "and the withholding tables adopted pursuant to Section 723.050" from subdivision (b).

(11) Code of Civil Procedure Section 723.150 was deleted.

(12) Section 11 of the bill as introduced, which concerns the effectiveness of writs of execution levied upon earnings of an employee pursuant to former law, was amended to substitute "July 1, 1979" for "January 1, 1979."

(13) Section 12 of the bill as introduced, which prescribes the operative date and requires officials responsible for implementing the act to take necessary measures before the operative date, was amended to substitute "July 1, 1979" for "January 1, 1979."

Technical amendments were also made.

Technical revisions in the Attachment Law. Assembly Bill 2631, which became Chapter 273 of the Statutes of 1978, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Technical Revisions in the Attachment Law* (February 1978), published as Appendix II to this Report. The bill was enacted as introduced.

Use of court commissioners under the Attachment Law. Senate Bill 1425, which became Chapter 151 of the Statutes of 1978, was introduced by Senator George Deukmejian to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Use of Court Commissioners Under the Attachment Law,* 14 Cal. L. Revision Comm'n Reports 93 (1978). The bill was enacted as introduced.

Parol Evidence Rule

Senate Bill 1395, which became Chapter 150 of the Statutes of 1978, was introduced by Senator Deukmejian to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Parol Evidence Rule,* 14 Cal. L. Revision Comm'n Reports 143 (1978). The bill was enacted as introduced.

Eminent Domain

Two bills relating to eminent domain were introduced in 1978.

Review of resolution of necessity by writ of mandate. Assembly Bill 2230, which became Chapter 286 of the Statutes of 1978, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Review of Resolution of Necessity by Writ of Mandate,* 14 Cal. L. Revision Comm'n Reports 83 (1978). See also *Report of Senate Committee on Judiciary on Assembly Bill 2230,* Senate J. (June 8, 1978), at 11579, reprinted as Appendix III to this Report.

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

Code of Civil Procedure Section 1245.255 was amended as follows: In the introductory paragraph of subdivision (a), "A person having an interest in the property described in" was substituted for "The validity of"; following the word "article" the words "may obtain judicial review of the validity of the resolution" were substituted for the phrase "is subject to review."

Technical amendments were also made.

Evidence of market value of property. Assembly Bill 2282, which became Chapter 294 of the Statutes of 1978, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Evidence of Market Value of Property,* 14 Cal. L. Revision Comm'n Reports 105 (1978). See also *Report of Senate Committee on Judiciary on Assembly Bill 2282,* Senate J. (June 8, 1978), at 11580, reprinted as Appendix IV to this Report. The following amendments were made to this bill in response to requests from the California State Bar:

(1) Evidence Code Section 810 was amended to read "This article provides special rules of evidence applicable only to eminent domain and inverse condemnation proceedings."

(2) Evidence Code Section 812 was amended as follows: The words "denominated 'fair market value' or otherwise" were substituted for the words "denominated 'fair market value,' 'market price,' 'actual value,' or otherwise."

(3) Evidence Code Section 813 was amended to add subdivision (c).

(4) Evidence Code Section 817 was amended as follows: The words "is entered into" in subdivision (a) were substituted for the word "occurs."

Powers of Appointment

Assembly Bill 2281, which became Chapter 266 of the Statutes of 1978, was introduced by Assemblyman McAlister to make technical changes in the powers of appointment legislation enacted in 1969 upon recommendation of the Law Revision Commission. See 1969 Cal. Stats., chs. 113, 155; *Recommendation and a Study Relating to Powers of Appointment,* 9 Cal. L. Revision Comm'n Reports 301 (1969). Chapter 266 makes a technical change and a clarifying change to deal with problems that came to the attention of the Commission. For background material relating to Chapter 266, see Appendix V to this Report. The bill was enacted as introduced.

Psychotherapist–Patient Privilege

Assembly Bill 2517 was introduced by Assemblyman Charles Imbrecht to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Psychotherapist–Patient Privilege,* 14 Cal. L. Revision Comm'n Reports 127 (1978). The bill passed the Legislature but was vetoed by the Governor.

Resolution Approving Topics for Study

Assembly Concurrent Resolution No. 89, introduced by Assemblyman McAlister and adopted as Resolution Chapter 49 of the Statutes of 1978, authorizes the Commission to continue the study of 21 topics previously authorized for study on the Commission's calendar of topics.

Assembly Concurrent Resolution No. 85, introduced by Assemblyman McAlister and adopted as Resolution Chapter 65 of the Statutes of 1978, approves and authorizes Commission study of five new topics: quiet title actions, community property law, involuntary dismissal for lack of prosecution, Section 1464 of the Civil Code (relating to covenants running with the land), and abandonment or vacation of public streets and highways by cities, counties, and the state.

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 reviewed the decisions of the United States Supreme Court and of the California Supreme Court published since the Commission's last Annual Report was prepared,[1] and has the following to report:

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

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

(3) Four decisions of the California Supreme Court held state statutes unconstitutional.[2]

In *Isbell v. County of Sonoma*,[3] the court held that Code of Civil Procedure Sections 1132(a), 1133, and 1134, which provide for confessions of judgment in nonconsumer cases, were unconstitutional under the due process clause of the United States Constitution because the confession was insufficient to show that the defendant had voluntarily, knowingly, and intelligently waived due process rights to notice and an opportunity for a hearing.

In *Rice v. Alcoholic Beverage Control Appeals Board*,[4] the court held that the liquor retail price maintenance provisions of Business and Professions Code Section 24755 and its implementing regulations violate the antitrust policies of the

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[1] This study has been carried through 98 S. Ct. 3148 (Adv. Sh. No. 18A, July 15, 1978) and 22 Cal.3d 156 (Adv. Sh. No. 26, Sept. 28, 1978).

[2] Two other decisions of the California Supreme Court imposed constitutional qualifications on the application of state statutes without invalidating any specific statutory language:

In Britt v. Superior Court, 20 Cal.3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978), the court held that a discovery order seeking the wholesale disclosure of plaintiffs' affiliations and activities in certain associations unconstitutionally infringed upon the right of associational privacy.

In Jesse W. v. Superior Court, 20 Cal.3d 893, 576 P.2d 963, 145 Cal. Rptr. 1 (1978), the court held that after a referee had dismissed charges against a juvenile, a de novo hearing before a juvenile court judge to determine the juvenile's status as a ward of court pursuant to Welfare and Institutions Code Sections 559 and 560 (now Sections 253 and 254) exposed the juvenile to double jeopardy in contravention of the fifth amendment to the United States Constitution.

[3] 21 Cal.3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978).

[4] 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978).

Sherman Act and thus are unconstitutional under the supremacy clause of the United States Constitution.

In *Merco Construction Engineers, Inc. v. Municipal Court*,[5] the court held that Code of Civil Procedure Section 90 (now Section 87), which permits a nonlawyer director, officer, or employee to appear for a corporation in municipal court, is unconstitutional under the separation of powers clause of the California Constitution pursuant to which the power to make rules for admission to the practice of law is vested in the judicial branch.

In *Cooper v. Bray*,[6] the court held that Vehicle Code Section 17158, which bars a vehicle owner injured while riding as a passenger from recovering damages from the permissive driver of the owner–passenger's vehicle unless the injuries resulted from the driver's intoxication or willful misconduct, is an unconstitutional statutory classification under the equal protection clauses of the California and United States Constitutions.

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[5] 21 Cal.3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978).

[6] 21 Cal.3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978).

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission to complete its study of the topics previously authorized for study, to study the new topics the Commission recommends it be authorized to study (see "Calendar of Topics for Study" *supra*), and to remove from its calendar of topics the topic listed under "Topics to Be Removed From Calendar of Topics" *supra.*

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

APPENDIX I
LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

Recommendation	Action by Legislature
1. *Partial Revision of Education Code,* 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 12 (1957)	Enacted. Cal. Stats. 1955, Chs. 799, 877
2. *Summary Distribution of Small Estates Under Probate Code Sections 640 to 646,* 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 50 (1957)	Enacted. Cal. Stats. 1955, Ch. 1183
3. *Fish and Game Code,* 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1957 at 13 (1957); 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1956 at 13 (1957)	Enacted. Cal. Stats. 1957, Ch. 456
4. *Maximum Period of Confinement in a County Jail,* 1 CAL. L. REVISION COMM'N REPORTS at A-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 139
5. *Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions,* 1 CAL. L. REVISION COMM'N REPORTS at B-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 540
6. *Taking Instructions to Jury Room,* 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see Cal. Stats. 1975, Ch. 461, enacting substance of this recommendation.
7. *The Dead Man Statute,* 1 CAL. L. REVISION COMM'N REPORTS at D-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 1261.
8. *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere,* 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 490
9. *The Marital "For and Against" Testimonial Privilege,* 1 CAL. L. REVISION COMM'N REPORTS at F-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 970.
10. *Suspension of the Absolute Power of Alienation,* 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 14 (1959)	Enacted. Cal. Stats. 1959, Ch. 470

Recommendation	Action by Legislature
11. *Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378,* 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 102
12. *Judicial Notice of the Law of Foreign Countries,* 1 CAL. L. REVISION COMM'N REPORTS at I-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 249
13. *Choice of Law Governing Survival of Actions,* 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957)	No legislation recommended.
14. *Effective Date of Order Ruling on a Motion for New Trial,* 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959)	Enacted. Cal. Stats. 1959, Ch. 468
15. *Retention of Venue for Convenience of Witnesses,* 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957)	Not enacted.
16. *Bringing New Parties Into Civil Actions,* 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957)	Enacted. Cal. Stats. 1957, Ch. 1498
17. *Grand Juries,* 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959)	Enacted. Cal. Stats. 1959, Ch. 501
18. *Procedure for Appointing Guardians,* 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959)	Enacted. Cal. Stats. 1959, Ch. 500
19. *Appointment of Administrator in Quiet Title Action,* 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959)	No legislation recommended.
20. *Presentation of Claims Against Public Entities,* 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959)	Enacted. Cal. Stats. 1959, Chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., Art. XI, § 10 (1960)
21. *Right of Nonresident Aliens to Inherit,* 2 CAL. L. REVISION COMM'N REPORTS at B-1 (1959); 11 CAL. L. REVISION COMM'N REPORTS 421 (1973)	Enacted. Cal. Stats. 1974, Ch. 425.
22. *Mortgages to Secure Future Advances,* 2 CAL. L. REVISION COMM'N REPORTS at C-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 528

Recommendation	Action by Legislature
23. *Doctrine of Worthier Title,* 2 CAL. L. REVISION COMM'N REPORTS at D-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 122
24. *Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving,* 2 CAL. L. REVISION COMM'N REPORTS at E-1 (1959)	Not enacted. But see Cal. Stats. 1972, Ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. *Time Within Which Motion for New Trial May Be Made,* 2 CAL. L. REVISION COMM'N REPORTS at F-1 (1959)	Enacted. Cal. Stats. 1959, Ch. 469
26. *Notice to Shareholders of Sale of Corporate Assets,* 2 CAL. L. REVISION COMM'N REPORTS at G-1 (1959)	Not enacted. But see CORP. CODE §§ 1001, 1002 (effective January 1, 1977) enacting substance of recommendation.
27. *Evidence in Eminent Domain Proceedings,* 3 CAL. L. REVISION COMM'N REPORTS at A-1 (1961)	Not enacted. But see EVID. CODE § 810 *et seq.* enacting substance of recommendation.
28. *Taking Possession and Passage of Title in Eminent Domain Proceedings,* 3 CAL. L. REVISION COMM'N REPORTS at B-1 (1961)	Enacted. Cal. Stats. 1961, Chs. 1612, 1613
29. *Reimbursement for Moving Expenses When Property Is Acquired for Public Use,* 3 CAL. L. REVISION COMM'N REPORTS at C-1 (1961)	Not enacted. But see GOVT. CODE § 7260 *et seq.* enacting substance of recommendation.
30. *Rescission of Contracts,* 3 CAL. L. REVISION COMM'N REPORTS at D-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 589
31. *Right to Counsel and Separation of Delinquent From Nondelinquent Minor In Juvenile Court Proceedings,* 3 CAL. L. REVISION COMM'N REPORTS at E-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 1616
32. *Survival of Actions,* 3 CAL. L. REVISION COMM'N REPORTS at F-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 657
33. *Arbitration,* 3 CAL. L. REVISION COMM'N REPORTS at G-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 461
34. *Presentation of Claims Against Public Officers and Employees,* 3 CAL. L. REVISION COMM'N REPORTS at H-1 (1961)	Not enacted 1961. See recommendation to 1963 session (item 39 *infra*) which was enacted.

Recommendation	Action by Legislature
35. *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere,* 3 CAL. L. REVISION COMM'N REPORTS at I-1 (1961)	Enacted. Cal. Stats. 1961, Ch. 636
36. *Notice of Alibi in Criminal Actions,* 3 CAL. L. REVISION COMM'N REPORTS at J-1 (1961)	Not enacted.
37. *Discovery in Eminent Domain Proceedings,* 4 CAL. L. REVISION COMM'N REPORTS 701 (1963); 8 CAL. L. REVISION COMM'N REPORTS 19 (1967)	Enacted. Cal. Stats. 1967, Ch. 1104
38. *Tort Liability of Public Entities and Public Employees,* 4 CAL. L. REVISION COMM'N REPORTS 801 (1963)	Enacted. Cal. Stats. 1963, Ch. 1681
39. *Claims, Actions and Judgments Against Public Entities and Public Employees,* 4 CAL. L. REVISION COMM'N REPORTS 1001 (1963)	Enacted. Cal. Stats. 1963, Ch. 1715
40. *Insurance Coverage for Public Entities and Public Employees,* 4 CAL. L. REVISION COMM'N REPORTS 1201 (1963)	Enacted. Cal. Stats. 1963, Ch. 1682
41. *Defense of Public Employees,* 4 CAL. L. REVISION COMM'N REPORTS 1301 (1963)	Enacted. Cal. Stats. 1963, Ch. 1683
42. *Liability of Public Entities for Ownership and Operation of Motor Vehicles,* 4 CAL. L. REVISION COMM'N REPORTS 1401 (1963); 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. Cal. Stats. 1965, Ch. 1527
43. *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer,* 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963)	Enacted. Cal. Stats. 1963, Ch. 1684
44. *Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes,* 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963)	Enacted. Cal. Stats. 1963, Chs. 1685, 1686, 2029
45. *Evidence Code,* 7 CAL. L. REVISION COMM'N REPORTS 1 (1965)	Enacted. Cal. Stats. 1965, Ch. 299

Recommendation	Action by Legislature
46. *Claims and Actions Against Public Entities and Public Employees,* 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. Cal. Stats. 1965, Ch. 653
47. *Evidence Code Revisions,* 8 CAL. L. REVISION COMM'N REPORTS 101 (1967)	Enacted in part. Cal. Stats. 1967, Ch. 650. Balance enacted. Cal. Stats. 1970, Ch. 69
48. *Evidence—Agricultural Code Revisions,* 8 CAL. L. REVISION COMM'N REPORTS 201 (1967)	Enacted. Cal. Stats. 1967, Ch. 262
49. *Evidence—Commercial Code Revisions,* 8 CAL. L. REVISION COMM'N REPORTS 301 (1967)	Enacted. Cal. Stats. 1967, Ch. 703
50. *Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property,* 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967)	Enacted. Cal. Stats. 1968, Chs. 457, 458
51. *Vehicle Code Section 17150 and Related Sections,* 8 CAL. L. REVISION COMM'N REPORTS 501 (1967)	Enacted. Cal. Stats. 1967, Ch. 702
52. *Additur,* 8 CAL. L. REVISION COMM'N REPORTS 601 (1967)	Enacted. Cal. Stats. 1967, Ch. 72
53. *Abandonment or Termination of a Lease,* 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); 9 CAL. L. REVISION COMM'N REPORTS 153 (1969)	Enacted. Cal. Stats. 1970, Ch. 89
54. *Good Faith Improver of Land Owned by Another,* 8 CAL. L. REVISION COMM'N REPORTS 801 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1373 (1967)	Enacted. Cal. Stats. 1968, Ch. 150
55. *Suit By or Against an Unincorporated Association,* 8 CAL. L. REVISION COMM'N REPORTS 901 (1967)	Enacted. Cal. Stats. 1967, Ch. 1324
56. *Escheat,* 8 CAL. L. REVISION COMM'N REPORTS 1001 (1967)	Enacted. Cal. Stats. 1968, Chs. 247, 356
57. *Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding,* 8 CAL. L. REVISION COMM'N REPORTS 1361 (1967)	Enacted. Cal. Stats. 1968, Ch. 133

Recommendation	Action by Legislature
58. *Service of Process on Unincorporated Associations,* 8 CAL. L. REVISION COMM'N REPORTS 1403 (1967)	Enacted. Cal. Stats. 1968, Ch. 132
59. *Sovereign Immunity—Statute of Limitations,* 9 CAL. L. REVISION COMM'N REPORTS 49 (1969); 9 CAL. L. REVISION COMM'N REPORTS 175 (1969)	Enacted. Cal. Stats. 1970, Ch. 104
60. *Additur and Remittitur,* 9 CAL. L. REVISION COMM'N REPORTS 63 (1969)	Enacted. Cal. Stats. 1969, Ch. 115
61. *Fictitious Business Names,* 9 CAL. L. REVISION COMM'N REPORTS 71 (1969)	Enacted. Cal. Stats. 1969, Ch. 114
62. *Quasi-Community Property,* 9 CAL. L. REVISION COMM'N REPORTS 113 (1969)	Enacted. Cal. Stats. 1970, Ch. 312
63. *Arbitration of Just Compensation,* 9 CAL. L. REVISION COMM'N REPORTS 123 (1969)	Enacted. Cal. Stats. 1970, Ch. 417
64. *Revisions of Evidence Code,* 9 CAL. L. REVISION COMM'N REPORTS 137 (1969)	Enacted in part. Cal. Stats. 1970, Ch. 69. See also Cal. Stats. 1970, Chs. 1396, 1397
65. *Mutuality of Remedies in Suits for Specific Performance,* 9 CAL. L. REVISION COMM'N REPORTS 201 (1969)	Enacted. Cal. Stats. 1969, Ch. 156
66. *Powers of Appointment,* 9 CAL. L. REVISION COMM'N REPORTS 301 (1969)	Enacted. Cal. Stats. 1969, Chs. 113, 155
67. *Evidence Code—Revisions of Privileges Article,* 9 CAL. L. REVISION COMM'N REPORTS 501 (1969)	Vetoed. But see Cal. Stats. 1970, Chs. 1396, 1397
68. *Fictitious Business Names,* 9 CAL. L. REVISION COMM'N REPORTS 601 (1969)	Enacted. Cal. Stats. 1970, Ch. 618
69. *Representations as to the Credit of Third Persons and the Statute of Frauds,* 9 CAL. L. REVISION COMM'N REPORTS 701 (1969)	Enacted. Cal. Stats. 1970, Ch. 720
70. *Revisions of Governmental Liability Act,* 9 CAL. L. REVISION COMM'N REPORTS 801 (1969)	Enacted in part. Cal. Stats. 1970, Chs. 662, 1099

Recommendation	Action by Legislature
71. *"Vesting" of Interests Under Rule Against Perpetuities,* 9 CAL. L. REVISION COMM'N REPORTS 901 (1969)	Enacted. Cal. Stats. 1970, Ch. 45
72. *Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions,* 10 CAL. L. REVISION COMM'N REPORTS 501 (1971)	Enacted. Cal. Stats. 1971, Chs. 244, 950. See also Cal. Stats. 1973, Ch. 828
73. *Wage Garnishment and Related Matters,* 10 CAL. L. REVISION COMM'N REPORTS 701 (1971); 11 CAL. L. REVISION COMM'N REPORTS 101 (1973); 12 CAL. L. REVISION COMM'N REPORTS 901 (1974); 13 CAL. L. REVISION COMM'N REPORTS 601 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1703 (1976)	Enacted in part. Cal. Stats. 1978, Ch. 1133
74. *Proof of Foreign Official Records,* 10 CAL. L. REVISION COMM'N REPORTS 1022 (1971)	Enacted. Cal. Stats. 1970, Ch. 41
75. *Inverse Condemnation—Insurance Coverage,* 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971)	Enacted. Cal. Stats. 1971, Ch. 140
76. *Discharge From Employment Because of Wage Garnishment,* 10 CAL. L. REVISION COMM'N REPORTS 1147 (1971)	Enacted. Cal. Stats. 1971, Ch. 1607
77. *Civil Arrest,* 11 CAL. L. REVISION COMM'N REPORTS 1 (1973)	Enacted. Cal. Stats. 1973, Ch. 20
78. *Claim and Delivery Statute,* 11 CAL. L. REVISION COMM'N REPORTS 301 (1973)	Enacted. Cal. Stats. 1973, Ch. 526
79. *Unclaimed Property,* 11 CAL. L. REVISION COMM'N REPORTS 401 (1973); 12 CAL. L. REVISION COMM'N REPORTS 609 (1974)	Proposed resolution enacted. Cal. Stats. 1973, Res. Ch. 76. Legislation enacted. Cal. Stats. 1975, Ch. 25.
80. *Enforcement of Sister State Money Judgments,* 11 CAL. L. REVISION COMM'N REPORTS 451 (1973)	Enacted. Cal. Stats. 1974, Ch. 211
81. *Prejudgment Attachment,* 11 CAL. L. REVISION COMM'N REPORTS 701 (1973)	Enacted. Cal. Stats. 1974, Ch. 1516. See also Cal. Stats. 1975, Ch. 200.
82. *Landlord-Tenant Relations,* 11 CAL. L. REVISION COMM'N REPORTS 951 (1973)	Enacted. Cal. Stats. 1974, Chs. 331, 332

Recommendation	Action by Legislature
83. *Pleading* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1024 (1973)	Enacted. Cal. Stats. 1972, Ch. 73
84. *Evidence—Judicial Notice* (technical change), 11 CAL. L. REVISION COMM'N REPORTS 1025 (1973)	Enacted. Cal. Stats. 1972, Ch. 764
85. *Evidence—"Criminal Conduct" Exception,* 11 CAL. L. REVISION COMM'N REPORTS 1147 (1973)	Not enacted 1974. See recommendation to 1975 session (item 90 *infra*) which was enacted.
86. *Erroneously Compelled Disclosure of Privileged Information,* 11 CAL. L. REVISION COMM'N REPORTS 1163 (1973)	Enacted. Cal. Stats. 1974, Ch. 227
87. *Liquidated Damages,* 11 CAL. L. REVISION COMM'N REPORTS 1201 (1973); 13 CAL. L. REVISION COMM'N REPORTS 2139 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1735 (1976)	Enacted. Cal. Stats. 1977, Ch. 198
88. *Payment of Judgments Against Local Public Entities,* 12 CAL. L. REVISION COMM'N REPORTS 575 (1974)	Enacted. Cal. Stats. 1975, Ch. 285
89. *View by Trier of Fact in a Civil Case,* 12 CAL. L. REVISION COMM'N REPORTS 587 (1974)	Enacted. Cal. Stats. 1975, Ch. 301
90. *Good Cause Exception to the Physician-Patient Privilege,* 12 CAL. L. REVISION COMM'N REPORTS 601 (1974)	Enacted. Cal. Stats. 1975, Ch. 318
91. *Improvement Acts,* 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974)	Enacted. Cal. Stats. 1974, Ch. 426
92. *The Eminent Domain Law,* 12 CAL L. REVISION COMM'N REPORTS 1601 (1974)	Enacted. Cal. Stats. 1975, Chs. 1239, 1240, 1275
93. *Eminent Domain—Conforming Changes in Special District Statutes,* 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974)	Enacted. Cal. Stats. 1975, Chs. 581, 582, 584, 585, 586, 587, 1176, 1276
94. *Oral Modification of Written Contracts,* 13 CAL. L. REVISION COMM'N REPORTS 301 (1976); 13 CAL. L. REVISION COMM'N REPORTS 2129 (1976)	Enacted. Cal. Stats. 1975, Ch. 7; Cal. Stats. 1976, Ch. 109.

Recommendation	Action by Legislature
95. *Partition of Real and Personal Property,* 13 CAL. L. REVISION COMM'N REPORTS 401 (1976)	Enacted. Cal. Stats. 1976, Ch. 73
96. *Revision of the Attachment Law,* 13 CAL. L. REVISION COMM'N REPORTS 801 (1976)	Enacted. Cal. Stats. 1976, Ch. 437
97. *Undertakings for Costs,* 13 CAL. L. REVISION COMM'N REPORTS 901 (1976)	Not enacted 1976. But see recommendation to 1979 session (item 118 *infra*).
98. *Admissibility of Copies of Business Records in Evidence,* 13 CAL. L. REVISION COMM'N REPORTS 2051 (1976)	Not enacted.
99. *Turnover Orders Under the Claim and Delivery Law,* 13 CAL. L. REVISION COMM'N REPORTS 2079 (1976)	Enacted. Cal. Stats. 1976, Ch. 145
100. *Relocation Assistance by Private Condemnors,* 13 CAL. L. REVISION COMM'N REPORTS 2085 (1976)	Enacted. Cal. Stats. 1976, Ch. 143
101. *Condemnation for Byroads and Utility Easements,* 13 CAL. L. REVISION COMM'N REPORTS 2091 (1976)	Enacted in part (utility easements). Cal. Stats. 1976, Ch. 994
102. *Transfer of Out-of-State Trusts to California,* 13 CAL. L. REVISION COMM'N REPORTS 2101 (1976)	Enacted. Cal. Stats. 1976, Ch. 144
103. *Admissibility of Duplicates in Evidence,* 13 CAL. L. REVISION COMM'N REPORTS 2115 (1976)	Not enacted. But see Cal. Stats. 1977, Ch. 708, enacting substance of recommendation in modified form.
104. *Service of Process on Unincorporated Associations,* 13 CAL. L. REVISION COMM'N REPORTS 1657 (1976)	Enacted. Cal. Stats. 1976, Ch. 888
105. *Sister State Money Judgments,* 13 CAL. L. REVISION COMM'N REPORTS 1669 (1976)	Enacted. Cal. Stats. 1977, Ch. 232
106. *Damages in Action for Breach of Lease,* 13 CAL. L. REVISION COMM'N REPORTS 1679 (1976)	Enacted. Cal. Stats. 1977, Ch. 49
107. *Nonprofit Corporation Law,* 13 CAL. L. REVISION COMM'N REPORTS, 2201 (1976)	Not enacted. Legislation on this subject, not recommended by the Commission, was enacted in 1978.

Recommendation	Action by Legislature
108. *Use of Keepers Pursuant to Writs of Execution,* 14 CAL. L. REVISION COMM'N REPORTS 49 (1978)	Enacted. Cal. Stats. 1977, Ch. 155
109. *Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors,* 14 CAL. L. REVISION COMM'N REPORTS 61 (1978)	Enacted. Cal. Stats. 1977, Ch. 499
110. *Review of Resolution of Necessity by Writ of Mandate,* 14 CAL. L. REVISION COMM'N REPORTS 83 (1978)	Enacted. Cal. Stat. 1978, Ch. 286
111. *Use of Court Commissioners Under the Attachment Law,* 14 CAL. L. REVISION COMM'N REPORTS 93 (1978)	Enacted. Cal. Stats. 1978, Ch. 151
112. *Evidence of Market Value of Property,* 14 CAL. L. REVISION COMM'N REPORTS 105 (1978)	Enacted in part. Cal. Stats. 1978, Ch. 294
113. *Psychotherapist-Patient Privilege,* 14 CAL. L. REVISION COMM'N REPORTS 127 (1978)	Vetoed 1978.
114. *Parol Evidence Rule,* 14 CAL. L. REVISION COMM'N REPORTS 143 (1978)	Enacted. Cal. Stats. 1978, Ch. 150
115. *Powers of Appointment,* (technical changes), 14 CAL. L. REVISION COMM'N REPORTS (1978)	Enacted. Cal. Stats. 1978, Ch. 266
116. *Attachment Law—Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action,"* (February 1978) (Published as Appendix II to this Report)	Enacted. Cal. Stats. 1978, Ch. 273
117. *Ad Valorem Property Taxes in Eminent Domain Proceedings,* (September 1978) (Published as Appendix VII to this Report)	Recommendation to be submitted to 1979 legislative session.
118. *Security for Costs,* (October 1978) (Published as Appendix VIII to this Report)	Recommendation to be submitted to 1979 legislative session.
119. *Guardianship-Conservatorship Law,* 14 CAL. L. REVISION COMM'N REPORTS 501 (1978)	Recommendation to be submitted to 1979 legislative session.

APPENDIX II

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Technical Revisions in the Attachment Law

Unlawful Detainer Proceedings
Bond for Levy on Joint Deposit Account or Safe Deposit Box
Definition of "Chose in Action"

February 1978

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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Ex Officio

February 10, 1978

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

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the subject of creditors' remedies, including prejudgment attachment. The Attachment Law was enacted upon Commission recommendation in 1974. 1974 Cal. Stats., Ch. 1516. The Commission has continued to review the experience under the Attachment Law.

This recommendation proposes revisions in the Attachment Law with respect to unlawful detainer proceedings, the bond required for levy on a joint deposit account or safe deposit box, and the definition of "chose in action."

Respectfully submitted,

HOWARD R. WILLIAMS
Chairman

RECOMMENDATION

relating to

TECHNICAL REVISIONS IN THE ATTACHMENT LAW

Introduction

Upon recommendation of the Law Revision Commission, the Attachment Law (Code of Civil Procedure Sections 481.010 to 492.090) was enacted in 1974[1] and was substantially amended in 1976.[2] As a result of a continuing review,[3] the Commission has concluded that a few additional revisions are needed. These revisions are discussed below.

Amount of Attachment in Unlawful Detainer Proceeding

The Attachment Law does not contain a specific provision concerning the amount for which an attachment may be issued in a proceeding for unlawful detainer of business premises[4] where there is an incidental claim for nonpayment of rent.[5] In an unlawful detainer proceeding,

[1] 1974 Cal. Stats., Ch. 1516. See *Recommendation Relating to Prejudgment Attachment,* 11 Cal. L. Revision Comm'n Reports 701, 721 (1973). See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate J. 13010 (August 21, 1974).

[2] 1976 Cal. Stats., Ch. 437. See *Recommendation Relating to Revision of the Attachment Law,* 13 Cal. L. Revision Comm'n Reports 801 (1976). See also Report of Senate Committee on Judiciary on Assembly Bill 2864, Senate J. 11113 (April 22, 1976). For another recently enacted Commission recommended statute, see 1977 Cal. Stats., Ch. 499. See also *Recommendation Relating to Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for Benefit of Creditors,* 14 Cal. L. Revision Comm'n Reports 61 (1978). For a recommendation submitted to 1978 legislative session, see *Recommendation Relating to Use of Court Commissioners Under the Attachment Law,* 14 Cal. L. Revision Comm'n Reports 93 (1978).

[3] The Commission reviews the judicial decisions under the Attachment Law and studies possible defects in the statute that are brought to its attention by judges, lawyers, and others.

[4] Attachment is not available where the defendant is an individual unless the claim arises out of the conduct by the individual of a trade, business, or profession. An attachment may not be issued on a claim against an individual which is based on a lease of property where the property leased was used by the individual primarily for personal, family, or household purposes. See Code Civ. Proc. § 483.010.

[5] Under former Code of Civil Procedure Section 537, subd. 4 (held unconstitutional in Damazo v. MacIntyre, 26 Cal. App.3d 18, 102 Cal. Rptr. 609 (1972), on the basis of Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)), a writ of attachment could be issued in an unlawful detainer proceeding by the clerk

unpaid rent and damages may be awarded up to the date of judgment,[6] but damages accruing after judgment are not recoverable.[7] The amount included in the judgment for unpaid rent or damages from the time of filing the complaint until the date of judgment may be substantial since, in a commercial case, there may be a six-month delay from the time of filing the complaint until the entry of judgment if the proceeding is contested.[8] Yet, it is unclear whether the attachment may include an amount for the unpaid rent or damages for the period between the time of filing the complaint and entry of judgment or whether the attachment must be restricted to the amount of the unpaid rent due at the time of filing the complaint.

The lessor in an unlawful detainer proceeding is in a different position from most other creditors. In the usual case, a creditor can cease to extend credit to the debtor and can obtain an attachment for the full amount of the unsecured outstanding debt. The lessor, however, cannot avoid continuing to extend credit for the lessee's continued occupancy of the premises; despite the default in the payment of the rent, the lessee may occupy the premises until such time as the lessee chooses to give up possession

based upon an affidavit. The amount for which the writ was issued was the amount of "rent actually due and payable . . . for the premises sought to be recovered" as shown in the verified complaint. This provision was superseded by Code of Civil Procedure Section 483.010, which authorizes attachment in an action "based upon a contract." The official Comment to Section 483.010 states in part: "it should be noted that the term 'contract' . . . includes a lease of either real or personal property." See also R. Johnson & M. Moskovitz, 7 California Real Estate Law & Practice § 210.51 (1977), and California Legislative Counsel Opinion #16229, Oct. 14, 1977 (on file in office of California Law Revision Commission) (attachment available in unlawful detainer proceeding).

[6] Flournoy v. Everett, 51 Cal. App. 406, 408, 196 P. 916, 917 (1921). See also Garfinkle v. Montgomery, 113 Cal. App.2d 149, 153, 248 P.2d 52, 55 (1952); M. Moskovitz, P. Honigsberg, & D. Finkelstein, California Eviction Defense Manual § 13.33, at 125 (1971).

[7] *E.g.*, Cavanaugh v. High, 182 Cal. App.2d 714, 722–23, 6 Cal. Rptr. 525, 530–31 (1960); Roberts v. Redlich, 111 Cal. App.2d 566, 569–70, 244 P.2d 933, 935 (1952). However, if the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action in which the lessor may recover all the damages to which the lessor is entitled upon compliance with Civil Code Section 1952.3.

[8] The time, of course, varies with the particular area of the state. However, the Commission is advised that, where commercial premises are involved, there is a delay of approximately six months in bringing contested unlawful detainer cases to trial in Los Angeles County.

or is forced out after the unlawful detainer trial. To provide a limited remedy to the lessor in this situation, the Commission recommends that the court be authorized, in its discretion, to include an additional amount in an attachment in an unlawful detainer proceeding to cover the use and occupancy of the premises by the lessee during the period from the time the complaint is filed until the estimated time of judgment or such earlier time as possession has been delivered to the lessor. This additional amount for the estimated period should be computed using the rental rate provided in the lease.[9]

A lease of commercial property ordinarily will require that the lessee provide a deposit to secure the performance of the lessee's obligations under the lease. To clarify the effect such a deposit has on the amount to be secured by an attachment in an unlawful detainer proceeding, the Commission recommends that the amount of the deposit be subtracted in determining the amount to be secured by the attachment if the deposit secures only the payment of the rent. However, the amount of the deposit should not be subtracted if the deposit also secures the performance of other obligations under the lease. This is because the entire amount of the deposit may be required, for example, to cover repairs and cleaning of the premises when they are restored to the lessor.

Undertaking for Levy on Joint Bank Account or Safe Deposit Box

Where a plaintiff seeks to attach a deposit account or safe deposit box not standing solely in the name of the defendant, Section 489.240 of the Code of Civil Procedure requires that the plaintiff furnish an undertaking in twice the amount of the claim. Basing the amount of the undertaking on the "amount of the claim" may result in an undertaking that bears no relationship to the possible harm against which the undertaking is intended to protect. For

[9] Computation of the amount on this basis would satisfy the purpose of the requirement of Code of Civil Procedure Section 483.010 that the amount of the claim be in a "fixed or readily ascertainable amount."

example, if a plaintiff with a $50,000 claim wishes to attach a $2,000 deposit account, Section 489.240 requires that an undertaking for $100,000 be furnished.

Chapter 42 of the 1977 Statutes amended Code of Civil Procedure Section 682a to correct this defect in case of a levy of execution on a deposit account or safe deposit box not standing solely in the name of the debtor. Under the 1977 amendment, the creditor is required to furnish a bond in the lesser of twice the amount of the judgment or twice the amount sought to be levied upon. The Legislature failed to make a comparable amendment to Section 489.240 to correct the same defect in case of an attachment. The Commission recommends that Section 489.240 be amended to make it consistent with the 1977 amendment to Section 682a.

Definition of "Chose in Action"

Section 481.050 of the Code of Civil Procedure, defining "chose in action," should be amended to delete the reference to an interest in or claim under an insurance policy. This deletion would be consistent with the deletion in 1974[10] of comparable language from the definition of "general intangibles" in Commercial Code Section 9106. More important, the deletion would eliminate language that may cause confusion and would conform the section to the case law.[11]

Proposed Legislation

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

An act to amend Sections 481.050 and 489.240 of, and to add Section 483.020 to, the Code of Civil Procedure, relating to attachment.

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[10] 1974 Cal. Stats., Ch. 997, § 11 (operative January 1, 1976).

[11] Elimination of this language will conform to the holding in Hoteles Camino Real, S.A. v. Superior Court, 70 Cal. App.3d 367, 138 Cal. Rptr. 809 (1977) (contingent obligation of an insurer to indemnify and defend not a basis for quasi in rem jurisdiction). See also Javorek v. Superior Court, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (consistent decision interpreting interim attachment statute). The deleted language in unnecessary to cover, for example, a right to payment under an insurance policy when the other requirements of Section 481.050 are met.

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

§ 481.050 (amended). "Chose in action" defined

SECTION 1. Section 481.050 of the Code of Civil Procedure is amended to read:

481.050. "Chose in action" means any right to payment which arises out of the conduct of any trade, business, or profession and which (a) is not conditioned upon further performance by the defendant or upon any event other than the passage of time, (b) is not an account receivable, (c) is not a deposit account, and (d) is not evidenced by a negotiable instrument, security, chattel paper, or judgment. The term includes ~~an interest in or a claim under an insurance policy and~~ a right to payment on a nonnegotiable instrument which is otherwise negotiable within Division 3 (commencing with Section 3101) of the Commercial Code but which is not payable to order or to bearer.

Comment. Section 481.050 is amended to delete the reference to an interest in or claim under an insurance policy. This deletion is consistent with the deletion of comparable language from the definition of "general intangibles" in Commercial Code Section 9106 by 1974 Cal. Stats., Ch. 997, § 11 (operative January 1, 1976).

The language deleted from Section 481.050 is unnecessary to cover, for example, a right to payment under an insurance policy where the other requirements of Section 481.050 are satisfied. The elimination of this language will, however, eliminate possible confusion and will conform to the holding in Hoteles Camino Real, S.A. v. Superior Court, 70 Cal. App.3d 367, 138 Cal. Rptr. 809 (1977) (contingent obligation of an insurer to indemnify and defend not a basis for quasi in rem jurisdiction). *Cf.* Javorek v. Superior Court, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (consistent decision interpreting interim attachment statute).

§ 483.020 (added). Attachment in unlawful detainer proceeding

SEC. 2. Section 483.020 is added to the Code of Civil Procedure, to read:

483.020. (a) Subject to subdivision (d), the amount to be secured by the attachment in an unlawful detainer proceeding is the sum of the following:

(1) The amount of the rent due and unpaid as of the date of filing the complaint in the unlawful detainer proceeding.

(2) Any additional amount included by the court under subdivision (c).

(3) Any additional amount included by the court under Section 482.110.

(b) In an unlawful detainer proceeding, the plaintiff's application for a right to attach order and a writ of attachment pursuant to this title may include (in addition to the rent due and unpaid as of the date of the filing of the complaint and any additional estimated amount authorized by Section 482.110) an amount equal to the rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(c) The amount to be secured by the attachment in the unlawful detainer proceeding may, in the discretion of the court, include an additional amount equal to the amount of rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(d) Notwithstanding subdivision (b) of Section 483.010, an attachment may be issued in an unlawful detainer proceeding where the plaintiff has received a payment or holds a deposit to secure the payment of rent or the performance of other obligations under the lease. If the payment or deposit secures only the payment of rent, the amount of the payment or deposit shall be subtracted in determining the amount to be secured by the attachment. If the payment or deposit secures the payment of rent and the performance of other obligations under the lease or secures only the performance of other obligations under the lease, the amount of the payment or deposit shall not be subtracted in determining the amount to be secured by the attachment.

Comment. Section 483.020 makes clear that, upon the plaintiff's application therefor, the "amount to be secured by the

attachment" in an unlawful detainer proceeding may include, in the court's discretion, an amount for the use and occupation of the premises by the defendant during the period from the time the complaint is filed until either the time of judgment or such earlier time as possession has been or is likely to be delivered to the plaintiff. One factor the court should consider in deciding whether to allow the additional amount is the likelihood that the unlawful detainer proceeding will be contested. There may be a considerable delay in bringing the unlawful detainer proceeding to trial if it is contested. In this case, there may be a greater need for attachment to include an additional amount to cover rent accruing after the complaint is filed. It should be noted that attachment is permitted only where the premises were leased for trade, business, or professional purposes. See Section 483.010.

The amount authorized under subdivision (c) of Section 483.020 is in addition to (1) the amount in which the attachment would otherwise issue (unpaid rent due and owing at the time of the filing of the complaint) and (2) the additional amount for costs and attorney's fees that the court may authorize under Section 482.110.

Subdivision (d) makes clear that the amount of a deposit (such as a deposit described in Civil Code Section 1950.7) held by the plaintiff solely to secure the payment of rent is to be subtracted in determining the amount to be secured by the attachment. However, the amount of the deposit is not subtracted in determining the amount to be secured by the attachment where, for example, the deposit is to secure both the payment of rent and the repair and cleaning of the premises upon termination of the tenancy. Under former law, it was held that a deposit in connection with a lease of real property was not "security" such as to preclude an attachment under former Section 537(4), superseded by Section 483.010(b). See Garfinkle v. Montgomery, 113 Cal. App.2d 149, 155–57, 248 P.2d 52, 56–57 (1952).

§ 489.240 (amended). Deposit account, or contents of safe deposit box, not wholly in name of defendant

SEC. 3. Section 489.240 of the Code of Civil Procedure is amended to read:

489.240. (a) In addition to any other provision of law, the provisions of this section shall be complied with where any of the following personal property is sought to be attached:

(1) A deposit account, or interest therein, not standing in the name of the defendant alone.

(2) Property in a safe–deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe–deposit business and rented by it to a person other than a defendant.

(b) The amount of an undertaking filed to obtain a writ of attachment of property described in subdivision (a) shall be an amount not less than twice the amount sought to be recovered by the plaintiff in the action in which the writ is sought *or, if a lesser amount is sought to be levied upon, not less than twice the lesser amount.* The undertaking shall secure the payment of any recovery for wrongful attachment by any person, other than the defendant whose interest is sought to be attached, rightfully entitled to such property (which person need not be named specifically in the undertaking but may be referred to generally in the same manner as in this sentence).

(c) Objections to the undertaking may be made by any person claiming to be the rightful owner of the property sought to be levied upon.

Comment. Subdivision (b) of Section 489.240 is amended to permit the plaintiff to furnish an undertaking in twice the amount sought to be levied upon rather than twice the amount of the claim. This provision is consistent with Section 682a, as amended by 1977 Cal. Stats., Ch. 42, § 1, applicable to levies of execution.

APPENDIX III

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 2230

[Extract from Senate Journal for June 8, 1978 (1977–78 Regular Session).]

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 2230

In order to indicate more fully its intent with respect to Assembly Bill 2230, the Senate Committee on Judiciary makes the following report:

Assembly Bill 2230 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Review of Resolution of Necessity by Writ of Mandate,* 14 Cal. L. Revision Comm'n Reports 83 (1978). The revised comment set out below reflects the intent of the Senate Committee on Judiciary in approving Assembly Bill 2230.

Code of Civil Procedure §1245.255 (amended)

Comment. Subdivision (a)(1) is added to Section 1245.255 to make clear that ordinary mandamus (Section 1085) is an appropriate remedy for the owner of property described in a resolution of necessity to challenge the validity of the resolution of necessity. See Wilzen v. Board of Supervisors, 101 Cal. 15, 21, 35 P. 353, 355 (1894); Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App.2d 271, 278–81, 63 Cal. Rptr. 889, 893–95 (1967). See also Section 1230.040 (rules of practice in eminent domain proceedings). Under subdivision (a)(1), the writ of mandate is available prior to the time the eminent domain proceeding is commenced. Thereafter, the validity of the resolution may be attacked in the eminent domain proceeding itself. Subdivision (a)(2). See Section 1250.370(a) (no valid resolution of necessity as ground for objection to right to take). In the case of a writ of mandate action pending at the time of commencement of the eminent domain proceeding, the writ action may be prosecuted to completion only if the interest of justice so requires. The court might, for example, determine that the writ of mandate action may be prosecuted to completion in the interest of justice where the matter had been heard in the writ of mandate action and the court had concluded the resolution was invalid and a judgment to this effect was being prepared when the eminent domain proceeding was commenced. Judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is limited to an examination of the proceedings to determine whether adoption of the resolution by the governing body of the public entity has been arbitrary, capricious, or entirely lacking in evidentiary support, and whether the governing body has failed to follow the procedure and give the notice required by law. See Pitts v. Perluss, 58 Cal.2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962); Brock v. Superior Court, 109 Cal. App.2d 594, 605, 241 P.2d 283, 290 (1952).

Subdivision (a) does not purport to prescribe the exclusive means by which the validity of a resolution of necessity may be challenged. The validity of the resolution may be subject to review under principles of law otherwise applicable, such as (in appropriate cases) declaratory relief and injunction. The validity of the resolution may be subject to attack, in the case of a conflict of interest, under the Political Reform Act of 1974 (Govt. Code §91003(b)). See also Section 1245.270 (resolution adopted as a result of bribery).

Unlike subdivision (a), subdivision (b) does not provide a ground for attack on the validity of the resolution. Subdivision (b) provides, apart from the validity of the resolution, a ground for attack on the evidentiary effect given a resolution by Section 1245.250.

It should be noted that Section 1245.255 may be subject to statutory exceptions. See, *e.g.*, Health & Saf. Code §§ 33368 and 33500 (conclusive effect of adoption of redevelopment plan).

APPENDIX IV

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 2282

[Extract from Senate Journal for June 8, 1978 (1977–78 Regular Session).]

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 2282

In order to indicate more fully its intent with respect to Assembly Bill 2282, the Senate Committee on Judiciary makes the following report.

Except for the revised comments set out below, the comments contained under the various sections of Assembly Bill 2282 as set out in *Recommendation Relating to Evidence of Market Value of Property* (October 1977), 14 Cal. L. Revision Comm'n Reports 105 (1978), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bill 2282.

The following revised comments also reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bill 2282.

Evidence Code § 810 (amended)

Comment. Section 810 defines the scope of this article. This article expressly applies only to the determination of the value of property in eminent domain and inverse condemnation proceedings. However, nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate. See *In re* Marriage of Folb, 53 Cal. App.3d 862, 868–71, 126 Cal. Rptr. 306, 310–12 (1975).

Evidence Code § 811 (amended)

Comment. Section 811 is amended to make clear the limited application of this article. This article applies only where market value of real property, an interest in real property (*e.g.*, a leasehold), or tangible personal property is to be determined, whether for computing damages and benefits or otherwise. This article does not apply to the valuation of intangible personal property that is not an interest in real property, such as goodwill of a business; valuation of such property is governed by the rules of evidence otherwise applicable. However, nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate. See Comment to Section 810.

Evidence Code § 812 (amended)

Comment. Section 812 is amended to take into account the limited application of this article. See Section 811 and Comment thereto.

APPENDIX V

BACKGROUND STATEMENT CONCERNING REASONS FOR AMENDING STATUTE RELATING TO POWERS OF APPOINTMENT

The California statute relating to powers of appointment (Civil Code §§ 1380.1–1392.1) was enacted in 1969 upon recommendation of the Law Revision Commission. See 1969 Cal. Stats., chs. 113, 155; *Recommendation and a Study Relating to Powers of Appointment,* 9 Cal. L. Revision Comm'n Reports 301 (1969). This topic was removed from the Commission's calendar of topics in 1974 because the Commission did not believe that any further legislation in this field would be needed. Since that time, however, the Commission became aware of two defects in the powers of appointment statute. The Commission prepared proposed legislation to correct these defects. The proposed legislation was enacted as Chapter 266 of the Statutes of 1978.

Civil Code § 1384.1. Exercise of power of appointment by minor

As enacted in 1969, Section 1384.1 adopted the rule that, unless the creating instrument otherwise provided, a minor could not exercise a power of appointment unless the minor was over 18 and exercised the power by will or the minor was deemed to be an adult under Civil Code Section 25. When Section 1384.1 was amended in 1972 to conform to the bill lowering the age of majority to 18, the section was inadvertently worded to provide that a minor could, rather than could not, exercise a power of appointment unless the creating instrument otherwise provided.

The 1978 amendment restores the original policy stated in Section 1384.1. This policy is more likely to reflect the intent of the donor—that the power can be exercised only after the donee has reached the age of majority. A minor may still be permitted to exercise the power if the creating instrument so provides.

Civil Code § 1388.1. Ability of donee of power of appointment to contract to appoint

Subdivision (b) of Section 1388.1 provides that the donee of a power of appointment not presently exercisable cannot contract to make an appointment. This provision codifies the common law rule and is consistent with the rule declared by statute in New York. See the Comment to Civil Code Section 1388.1; N.Y. Est., Powers & Trusts Law § 10–5.3 (McKinney 1967).

The New York statute was recently amended to restrict the prohibition against contracting to appoint to cases where the donor and the donee are different persons. See 1977 N.Y. Laws, ch. 341, § 1; New York Law Revision Commission, Recommendation of the Law Revision Commission to the 1977 Legislature Relating to the Ability of a Donee of a Testamentary Power of Appointment to Contract to Appoint and to the Donee's Release of the Power, Under the Estates, Powers and Trusts Law, N.Y. Leg. Doc. No. 65(C) (1977). Compare *In re* Estate of Brown, 33 N.Y.2d 211, 306 N.E.2d 781, 351 N.Y.S.2d 655 (1973).

The purpose of subdivision (b) of Section 1388.1 is to prevent the donor's intent from being defeated by the donee contracting to appoint under a power of appointment that is not presently exercisable. By giving a testamentary or postponed power to the donee, the donor expresses the desire that the donee's discretion be retained until the donee's death or such other time as is stipulated. However, where the donor and the donee are the same person, his or her intent is better protected by an exception permitting the option of dealing with the power during the donor–donee's lifetime. Subdivision (c)—added to Section 1388.1 by Chapter 266 of the California Statutes of 1978—adopts the policy of the 1977 amendment to the New York statute and makes clear that the donee of a power of appointment may contract to make an appointment while the power of appointment is not presently exercisable if the donor and donee are the same person unless the creating instrument expressly provides that the donor–donee may not make an appointment while the power of appointment is not presently exercisable.

Subdivision (c) reflects a policy consistent with Section 1390.4 which makes an unexercised general power of appointment created by the donor in favor of himself or herself, whether or not presently exercisable, subject to the claims of creditors of the donor or of his or her estate and to the expenses of the administration of the estate. A similar policy is reflected in subdivision (a) of Section 1392.1 which permits the donor to revoke the creation of a power of appointment when the power is created in connection with a trust which is revocable under Section 2280.

APPENDIX VI

COMMENTS TO ASSEMBLY BILL 393 (WAGE GARNISHMENT)

Assembly Bill 393 was enacted as 1978 Cal. Stats., ch. 1133, upon recommendation of the California Law Revision Commission. See *Recommendation Relating to Wage Garnishment,* 13 Cal. L. Revision Comm'n Reports 1703 (1976). A number of amendments were made to the bill after its introduction. See discussion of Assembly Bill 393 in "Legislative History of Recommendations Submitted to 1978 Legislative Session" *supra.*

The Comments to the sections of Assembly Bill 393 as enacted are set out below. Some of these Comments are taken from the Commission's *Recommendation Relating to Wage Garnishment,* 13 Cal. L. Revision Comm'n Reports 1703, 1715–1733 (1976). The remaining Comments are taken from an earlier recommendation on this subject. *Recommendation Relating to Wage Garnishment Procedure,* 13 Cal. L. Revision Comm'n Reports 601 (1976). For further discussion, see 13 Cal. L. Revision Comm'n Reports 1707 (1976). The Comments to the following sections, all in the Code of Civil Procedure, include technical revisions made necessary by amendments made to Assembly Bill 393 after the bill was introduced: 683, 723.011, 723.020, 723.022, 723.023, 723.026, 723.029, 723.030, 723.031, 723.050, 723.051, 723.052, 723.071, 723.074, 723.100, 723.103, and 723.105.

CODE OF CIVIL PROCEDURE

§ 682 (technical amendment)

Comment. Section 682 is amended to delete the reference to former Section 682.3.

§ 682.3 (repealed). Wage garnishment procedure

Comment. Section 682.3 is superseded by Chapter 2.5 (commencing with Section 723.010).

§ 683 (amended). Return of writ of execution

Comment. Subdivision (a) of Section 683 is amended to reflect the repeal of Section 682.3 and the enactment of Section 723.026. Subdivision (f) has been added to provide a reference to the rules governing the return when an earnings withholding order has been served.

§ 690.6 (repealed). Exemption of earnings

Comment. Section 690.6 is superseded by the Employees' Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010). Subdivision (a) is superseded by Sections 723.050 and 723.052. Subdivision (b) is superseded by Section 723.051. Subdivisions (c) and (d) are superseded by various other provisions. See, *e.g.,* Sections 723.030 (priority of earnings withholding order issued to enforce judgment for delinquent amounts for support), 723.031 (priority of wage assignment for support), 723.077 (priority of earnings withholding order for taxes), 723.107 (limitation on serving subsequent earnings withholding order on earnings of same employee by same judgment creditor).

§ 690.50 (technical amendment)

Comment. Section 690.50 is revised to delete references to Section 690.6 which is repealed. The last portion of subdivision (a) is deleted as unnecessary because it is superseded by provisions of the Employees' Earnings Protection Law. See Chapter 2.5 (commencing with Section 723.010). It should be noted that a separate procedure is provided in Chapter 2.5 (commencing with Section 723.010) for claiming exemptions under that chapter and that Section 690.50 is not applicable to those exemptions.

§ 710 (technical amendment)

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

§ 723.011. Definitions

Comment. Section 723.011 states definitions used in applying this chapter. This chapter deals only with the garnishment or withholding of earnings for services rendered in an employer–employee relationship. See Section 723.020. Subdivisions (b) and (c) are based on the common law requirements for such relationship. It should be noted that an employee may be given considerable discretion and still be an employee as long as his employer has the legal right to control both method and result. However, no attempt is made here to incorporate specific case law arising out of situations involving problems and issues unrelated to the purposes and procedures relevant in applying this chapter. "Employee" includes both private and public employees. See subdivisions (b), (c), and (f). See also Section 710(h).

"Earnings" embraces all remuneration "whether denominated as wages, salary, commission, bonus, or otherwise." The infinite variety of forms which such compensation can take precludes a more precise statutory definition.

Unlike the definition of "earnings" used in Title III of the federal Consumer Credit Protection Act of 1968, the term used here does not include "periodic payments pursuant to a pension or retirement program." Exemptions applicable to such payments are provided by various sections of the California statutes. These statutes apply unless a greater exemption is available under the federal Consumer Credit Protection Act of 1968.

§ 723.020. Exclusive procedure for withholding earnings

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

The Employees' Earnings Protection Law has no effect on matters that are preempted by the federal law, such as federal bankruptcy proceedings—including proceedings under Chapter XIII of the Bankruptcy Act—and federal tax collection procedures. *E.g.,* Int. Rev. Code of 1954, § 6334(c). Nor does this chapter apply to deductions which an employer is authorized by statute to make for such items as insurance premiums and payments to health, welfare, or pension plans. See, *e.g.,* Govt. Code §§ 1158, 12420; Labor Code §§ 224, 300. Finally, this chapter does not affect the procedures for the examination of a debtor of the judgment debtor provided in Chapter 2 (Sections 717–723) of this part. See Comment to Section 723.154.

§ 723.021. Levy made by earnings withholding order

Comment. Section 723.021 makes clear that a levy of execution on earnings is made as provided in this chapter rather than under Section 688.

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

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

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

Under subdivision (a), the withholding period generally commences 10 calendar days (not working or business days) after service of an earnings withholding order is completed. See Section 723.101 (when service completed). For example, if an order is served on Friday, the withholding period would commence on the second following Monday. See Code Civ. Proc. § 12. The 10–day delay affords the employer time to process the order within his organization, *i.e.,* deliver the order to the employer's bookkeeper, make bookkeeping adjustments, and so

on. The introductory clause to subdivision (b) recognizes certain exceptions to this general rule. An employer is not generally required to withhold pursuant to two orders at the same time; thus, a subsequent order will not be given effect. See Section 723.023 (priority of orders) and Comment thereto. Moreover, withholding may be delayed beyond the normal 10-day period where a prior assignment of wages is in effect. See Labor Code § 300(c) and Comment thereto. However, this delay does not affect the date the withholding period terminates under subdivision (a)(1).

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

Paragraph (1) provides a general expiration date 100 days after the date of service; thus, the employer will usually be required to withhold for 90 days.

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

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

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

rehired or returns to work during the withholding period, the employer must resume withholding pursuant to the order. Finally, the termination of certain types of orders—orders for the collection of state taxes and support orders—are governed by separate rules. See Sections 723.030 (support orders), 723.078 (tax orders).

Sometimes an order will be terminated without the employer's prior knowledge. Subdivision (c) makes clear that an employer will not be subject to liability for having withheld and paid over amounts pursuant to an order prior to service of a written notice of termination of the order. In such a case, the employee must look to the judgment creditor for the recovery of amounts previously paid to the judgment creditor. See Section 723.154 (employer entitled to rely on documents actually served). See also Section 723.105(i) (recovery from levying officer or judgment creditor of amounts received after order terminated).

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

§ 723.023. Priority of orders generally

Comment. Section 723.023 establishes the general rules governing priority of earnings withholding orders. Generally speaking, the first order served is given priority. Occasionally, two or more earnings withholding orders will be served on the same day. In this situation, the employer must comply with the earnings withholding order which was issued pursuant to the judgment first entered. The date of entry of judgment will be indicated on the face of the order. See Section 723.125. In rare instances, earnings withholding orders served the same day will also be based on judgments entered the same day. In this situation, the employer has complete discretion to choose the order with which he will comply. He must, of course, comply with one of these orders. For exceptions to these basic priority rules, see Sections 723.030 (support orders) and 723.077 (state taxes) and the Comments thereto. Unless the subsequent earnings withholding order is for state taxes or for support, an earnings withholding order is ineffective if the employer receives the order while he is required to comply with another earnings withholding order. In such a case, the employer does *not* hold such an order and give it effect when the prior order expires but returns it. See Section 723.104. However, the levying officer may later serve the same earnings withholding order if the writ of execution upon which the order is based has not yet been returned. See Section 723.103(c).

It should be noted that, in some circumstances, the operation of an earnings withholding order may be suspended, but the duty to withhold is not terminated nor does the 100-day period provided by Section 723.022(a)(1) cease to run. See, *e.g.,* Section 723.077 (tax order suspends operation of prior order); Labor Code § 300(c) (suspension where prior assignment in effect). See also Comment to Section 723.022. In such cases, as well as in cases where the subsequent earnings withholding order is not given effect, the employer is required to advise the levying officer who has served the order that is suspended or not given effect of the reason for the employer's action. See Sections 723.077 and 723.104.

An employer is generally entitled to rely upon what is served upon him. See Section 723.154 and Comment thereto.

§ 723.025. Payment to levying officer

Comment. Section 723.025 specifies when the amounts withheld pursuant to an earnings withholding order must be paid over to the levying officer. Regardless whether payment is required, the employer is required to send an employer's return to the levying officer. See Sections 723.104 and 723.126.

§ 723.026. Levying officer's duty to pay over amounts received and make return on writ

Comment. Subdivision (a) of Section 723.026 is similar to a requirement of subdivision (c) of former Section 682.3. Subdivision (b) permits the levying officer either to return the writ of execution at the time provided in paragraph (2) or after the earnings withholding order expires. See also Section 683(f). Ordinarily, the levying officer will delay making his return of the writ of execution until the earnings withholding order expires so he can avoid the need to make a supplemental return. However, the judgment creditor may desire to secure another writ so he can levy on property other than earnings after the time for levy of the writ of execution under which the earnings withholding order was issued has expired. In such a case, the levying officer can return the writ of execution and make a supplemental return on the earnings withholding order later, thus permitting the judgment creditor to obtain another writ of execution so the levy on the other property can be made. Subdivision (c) makes clear that subdivision (b) does not extend the time within which a levy may be made on the writ of execution. A levy on the earnings of the employee or on other property must be made within the time otherwise prescribed by law. See Section 723.103(c).

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

Comment. Section 723.027 requires the judgment creditor to give notice of satisfaction of the judgment to the levying officer if the earnings withholding order has not yet terminated. See Section 723.022 (withholding period). In some cases, the employer will be aware of the satisfaction by virtue of the employer's having withheld the amount necessary to satisfy the judgment. See Section 723.022(a)(2). In this case, Section 723.027 does not apply. However, the judgment may be satisfied by additional payments from the debtor or through other debt collection procedures instituted by the judgment creditor. If this is the case, Section 723.027 applies, and the judgment creditor has the duty to notify the levying officer promptly of the satisfaction so that the levying officer may serve a notice of termination on the employer. Service of the notice of termination is to be made on the person, and at the address, indicated in the employer's return. See Sections 723.101(c) and 723.126(b)(6). As to the general duty of a creditor to furnish a debtor a satisfaction of judgment, see Section 675. Failure to perform the duty imposed by this section may make the judgment creditor liable in an action for abuse of process. See *White Lighting Co. v. Wolfson,* 68 Cal.2d 336, 347–351, 438 P.2d 345, 351–354, 66 Cal. Rptr. 697, 703–706 (1968).

§ 723.028. Withholding order for costs and interest

Comment. Section 723.028 makes clear that a judgment creditor must apply for another earnings withholding order to recover costs and interest that accrue following the application for a prior order. To illustrate: A creditor obtains a judgment which his debtor does not pay. The creditor applies for and secures an earnings withholding order directed to the debtor's employer. The application and order require payment of only those amounts owing at the time of the application for this order. See Sections 723.121 (application for issuance of earnings withholding order) and 723.125 (content of earnings withholding order). After the application for this order, further costs may, and interest on the judgment will, accrue. If the creditor wishes to recover these amounts by wage garnishment, he must apply for another earnings withholding order, following the same procedure as before. This later application and order are subject

to the same general requirements as any other withholding order. Of course, the earnings withholding order for costs and interest may only be issued if a writ of execution is outstanding. See Section 723.102. It is not entitled to any priority over the orders of other creditors, and the creditor is required to comply with the waiting period prescribed by Section 723.107.

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

§ 723.029. Lien created by service of earnings withholding order

Comment. Section 723.029 provides a special rule for the commencement of a lien of execution on earnings. Compare subdivision (e) of Section 688 which provides that the levy under a writ of execution creates a lien on the property levied upon for a period of one year from the date of the issuance of the execution. Service of an earnings withholding order is a form of levy of execution. See Section 723.021. However, the lien on each installment runs for a year from the date the earnings became payable.

The purpose of Section 723.029 is to protect the employer against stale claims and to give the levying creditor priority over competing claims by third parties where the priority questions are not already regulated by other provisions of this chapter. See Section 723.023 and the Comment thereto. For example, if installments are not promptly paid, competing claims may arise under conflict-of-laws rules (see *Sanders v. Armour Fertilizer Works,* 292 U.S. 190 (1934)) or in supervening proceedings under the Bankruptcy Act (§ 67(a)).

Although the lien is limited to one year, it will not expire if, before the end of the one-year period, the levying creditor brings suit against the employer for the payment of the sums the creditor claims should have been paid to him. See *Boyle v. Hawkins,* 71 Cal.2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969).

§ 723.030. Withholding order for support

Comment. Section 723.030 provides special rules for an earnings withholding order to enforce a judgment for delinquent support payments for a child or spouse or former spouse of the judgment debtor. An earnings withholding order for support is given a different effect than other withholding orders: It is effective until the employer has withheld the full amount specified in the order or he is served with a notice of termination, in which case the date of termination will be specified in the notice. See subdivision (b) (1). Thus, the withholding order for support does not terminate 100 days after service (it may, of course, be modified). The withholding order for support is subject to special exemption rules (see Section 723.052). Even when in effect, it does not necessarily preclude withholding on either a prior or subsequent earnings withholding order. If not earlier terminated, the withholding order for support automatically terminates one year after the employment of the employee terminates. Thus, for example, if the employee returns to work for the same employer within one year from the date his employment terminated, the employer must withhold pursuant to the withholding order for support. On the other hand, if the employee does not return to work until more than one year from the date his employment terminated, the order expires at the end of the year, and nothing is withheld pursuant to the order when the employee returns to work.

The earnings withholding order for support is given priority over any other earnings withholding order. *But see* Section 723.031 (wage assignment for support given priority). However, a prior earnings withholding order remains in effect, and a judgment creditor may still obtain an earnings withholding order even where there is already in effect a prior earnings withholding order for support. Thus, where there are two earnings withholding orders in effect—one for support and one for another obligation—the amount withheld for support is deducted from the employee's earnings first. The amount, if any, that may be withheld pursuant to the other earnings withholding order is determined by subtracting the amount withheld pursuant to the withholding order for support from the amount that otherwise could be withheld pursuant to the other earnings withholding order. See Sections 723.077, 723.050, and 723.051 and the Comments thereto.

§ 723.031. Effect of wage assignment for support

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

Subdivision (a) makes clear that nothing in this chapter affects the wage assignment for support, and subdivision (b) makes clear that the wage assignment has priority (as provided in Section 4701) over any earnings withholding order, including a withholding order for support under Section 723.030. Under subdivision (b), the employer is required to notify the levying officer who earlier served an earnings withholding order if that order is completely superseded by the wage assignment. It should be noted that "levying officer" means the state agency where a withholding order for taxes is superseded. See Section 723.073.

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

any individual are required to be withheld for payment of any debt") and [1969–1973 Transfer Binder] Lab. L. Rep. (CCH) para. 30,813.

Under subdivision (e), the amount that could be withheld pursuant to a withholding order for taxes would be computed in the same manner as for an ordinary earnings withholding order pursuant to Section 723.050 unless the withholding order for taxes is obtained under Section 723.076.

§ 723.050. Standard exemption

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

Where a wage assignment for support under Section 4701 of the Civil Code is in effect, the amount withheld from the debtor's earnings pursuant to such wage assignment is deducted from the amount that otherwise would be withheld pursuant to Section 723.050 on an earnings withholding order on an ordinary money judgment. See Section 723.031 and Comment thereto. The amount that may be withheld pursuant to an administratively issued earnings withholding order for taxes when a wage assignment under Section 4701 of the Civil Code is in effect is computed in the same manner. See Section 723.031 and the Comment thereto.

§ 723.051. Additional amounts necessary for support exempt

Comment. Section 723.051 continues the hardship exemption formerly provided by subdivision (b) of former Section 690.6. The limitation of the hardship exemption under former Section 690.6 to earnings received "within 30 days next preceding the date of a withholding by the employer under Section 682.3" has been eliminated. Both the judgment debtor with a family and

one without a family may claim the exemption under Section 723.051. For a special provision applicable where the earnings withholding order is on a writ issued for the collection of delinquent support payments, see Section 723.052.

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

Comment. Subdivision (a) of Section 723.052 prescribes the exemption applicable to a wage garnishment for the collection of delinquent child or spousal support payments except in cases where the court has made an equitable division pursuant to subdivision (b). The judgment debtor's earnings that are subject to the 50 percent exemption under subdivision (a) are "disposable earnings" as defined by the federal Consumer Credit Protection Act, 15 U.S.C. § 1672 (1970). See Section 723.050. Unlike federal law, however, subdivision (a) protects the same amount of earnings regardless of whether the judgment debtor is supporting a present and a former spouse or is more than 12 weeks delinquent. Federal law permits garnishment of 50 percent of the employee's earnings if the employee is supporting a spouse or dependent other than the person who caused the garnishment and 60 percent if the employee is not supporting such additional persons; these percentages are increased to 55 percent and 65 percent, respectively, if the support payments are more than 12 weeks delinquent. See 15 U.S.C.A. § 1673(b)(2) (Supp. 1978).

Subdivision (a) also makes clear that, in applying the 50 percent exemption, the amount withheld from the earnings of the judgment debtor pursuant to a wage assignment for support under Section 4701 of the Civil Code is included in computing the 50 percent of the judgment debtor's earnings that may be withheld. For example, if 30 percent of the judgment debtor's earnings are withheld pursuant to a wage assignment for support, an additional 20 percent may be withheld pursuant to the earnings withholding order on the writ issued for the collection of delinquent amounts payable for child or spousal support.

Subdivision (b) makes the 50 percent standard provided by subdivision (a) subject to the power of the court to make an order that more or less of the judgment debtor's earnings be withheld where the earnings withholding order is issued to collect delinquent child or spousal support payments. It should be noted that the court may not order the withholding of an amount in excess of that permitted by federal law. This maximum amount varies depending upon whether the judgment

debtor is supporting more than one person or is more than 12 weeks delinquent. The authority of the court to make an equitable division of the judgment debtor's earnings between, for example, the debtor and a former spouse, or between a former spouse and a present family, is based on decisions under the former statute. See, *e.g.,* Rankins v. Rankins, 52 Cal. App.2d 231, 126 P.2d 125 (1942).

Under this section, an employer who receives an earnings withholding order for support will know that 50 percent of disposable earnings is to be withheld unless the employer is served with a court order requiring a greater or lesser amount to be withheld.

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

§ 723.070. Definitions

Comment. Section 723.070 provides definitions for terms used in this article.

"State" means the state or any agency thereof. Where the term "state" is used in this article, it refers to the particular state agency that administers the particular tax law under which recovery of the delinquent tax is sought. See Section 723.011(d).

The definition of "state tax liability" makes this article apply to those tax liabilities for which a warrant may be issued pursuant to Section 1785 of the Unemployment Insurance Code (unemployment compensation contribution) or Section 6776 (sales and use taxes), 7881 (vehicle fuel license tax), 9001 (use fuel tax), 16071 (gift tax), 18906 (personal income tax), 26191 (bank and corporation taxes), 30341 (cigarette tax), or 32365 (alcoholic beverage tax) of the Revenue and Taxation Code or for which a notice of levy may be given pursuant to Section 1755 of the Unemployment Insurance Code (unemployment compensation contributions) or for which a notice or order to withhold may be given pursuant to Section 6702 (sales and use tax), 7851 (vehicle fuel license tax), 8952 (use fuel tax), 11451 (private car tax), 16101 (gift tax), 18817 (personal income tax), 26132 (bank and corporation taxes), 30311 (cigarette tax), or 32381 (alcoholic beverage tax) of the Revenue and Taxation Code.

§ 723.071. Exclusive procedure for withholding earnings for state tax liability

Comment. Section 723.071 makes clear that the levy procedure for withholding *earnings* of an employee for the collection of state tax liability provided in the Employees' Earnings Protection Law is exclusive. The authorization, for example, to direct orders to third persons who owe the taxpayer money found in Section 18817 (personal income tax) and Section 26132 (bank and corporation taxes) of the Revenue and Taxation Code is limited by Section 723.071. This article deals, however, only with levy on earnings to collect certain state taxes. The collection of federal taxes is accomplished pursuant to federal law and cannot be limited by state law. See Int. Rev. Code of 1954, § 6334. As to other taxes not within the scope of this article, the tax obligation must be reduced to judgment, and the taxing authority may then obtain an earnings withholding order like any other creditor; such order is treated the same as any other earnings withholding order, and this article does not apply.

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

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

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

§ 723.073. Provisions governing tax withholding orders

Comment. Section 723.073 makes clear that the provisions of this chapter governing earnings withholding orders are applicable to withholding orders for taxes except to the extent that this article contains special provisions applicable to such orders.

§ 723.074. Agency issued withholding order for taxes

Comment. Section 723.074 specifies the procedure to be followed when the state taxing agency itself issues the withholding order for taxes. In such case, no application to a court for the order is required. Under an order issued pursuant to Section 723.074, the employer may be required to withhold the same amount as if the earnings withholding order were issued at the behest of a judgment creditor. This amount is determined according to Section 723.050. The amount determined according to Section 723.050 must be withheld by the employer unless the order itself specifies a lesser amount or the amount to be withheld is reduced pursuant to subdivision (c) of Section 723.075. As to the effect of a wage assignment for support under Section 4701 of the Civil Code, see subdivision (e) of Section 723.031 and the Comment thereto.

§ 723.075. Notice to taxpayer; reduction in amount withheld

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

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

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

§ 723.076. Court issued withholding order for taxes

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

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

§ 723.077. Priority of orders

Comment. Section 723.077 deals with the priority a tax withholding order is to be given with respect to other earnings withholding orders. A withholding order for taxes takes priority over any prior earnings withholding order except one for support or another withholding order for taxes. As indicated in the Comment to Section 723.030, a withholding order for support always takes priority over any other earnings withholding order. Thus, where a withholding order for support is in effect and a subsequent tax order is received, the employer will continue to withhold pursuant to the withholding order for support, and the amount withheld pursuant to the tax order will be reduced by the amount withheld pursuant to the withholding order for support. Similarly, where a tax order is in effect and a withholding order for support is served, the withholding order for support again takes priority. See the Comments to Sections 723.030 and 723.050. However, where the prior earnings withholding order is for the collection of a debt other than for taxes or delinquent support, the tax order displaces the prior earnings withholding order, and the employer must withhold only pursuant to the tax order until the tax debt is completely paid. If the earnings withholding order for taxes is satisfied during the withholding period of the prior earnings withholding

order (Section 723.022), the employer must then again withhold pursuant to the prior earnings withholding order. Where there is a prior tax order in effect, the second tax order is ineffective; the employer may not withhold pursuant to the second order and must promptly notify the agency which issued or obtained the second order of the reason for his action. See Section 723.104(b).

As to the effect of a wage assignment for support under Section 4701 of the Civil Code, see Section 723.031(e). As indicated in the Comment to Section 723.031, a wage assignment for support under Civil Code Section 4701 takes priority over any earnings withholding order. Thus, where a wage assignment for support is in effect and a subsequent tax order is received, the employer will continue to withhold pursuant to the wage assignment, and the amount withheld pursuant to the tax order will be reduced by the amount withheld pursuant to the wage assignment for support. Similarly, where a tax order is in effect and a wage assignment for support is served, the wage assignment takes priority. See the Comments to Sections 723.031 and 723.050.

§ 723.078. Withholding period; notice terminating order

Comment. Subdivision (a) of Section 723.078 requires the employer to withhold commencing at the same time as with any other order. *Cf.* Section 723.022. Subdivision (b) provides for a jeopardy withholding order that requires immediate withholding. Such an order should be used only in rare and unusual cases. Subdivision (c) requires the employer to withhold earnings pursuant to a withholding order for taxes until the amount specified in the order has been paid in full and provides for a notice if the tax liability is satisfied before the full amount specified in the order has been withheld. The notice required by Section 723.078 is in lieu of the notice provided by Section 723.027. If not earlier terminated by the court, the order automatically terminates one year after the employment of the employee by the employer terminates. See the discussion of a comparable provision in the Comment to Section 723.030.

§ 723.080. Service

Comment. Section 723.080 provides special provisions for service of notices, documents, and orders under this article. This special service provision is in lieu of the one prescribed by Section 723.101.

§ 723.081. Forms

Comment. Section 723.081 requires that forms used in connection with this article be prescribed by the state taxing agency administering the particular tax law except that the Judicial Council prescribes the forms used in connection with court issued orders under Section 723.076.

§ 723.082. Review of tax liability

Comment. Section 723.082 makes clear that the court, in a proceeding to determine whether a withholding order for taxes should be issued or be modified or terminated because of hardship, may not review the taxpayer's tax liability.

§ 723.083. Refund of employer's service charge

Note. This section has no operative effect since it relates to a provision that was deleted before the bill was enacted.

§ 723.084. Warrant or notice deemed withholding order for taxes

Comment. Section 723.084 deals with the situation where it is not clear whether an employer–employee relationship exists. The warrant, notice of levy, or notice or order to withhold may be issued on the assumption the taxpayer is an independent contractor. However, so that the taxpayer cannot avoid the withholding by claiming that he is an employee and that his earnings may be withheld only pursuant to an earnings withholding order, Section 723.084 provides that the warrant, notice, or order may require that it be treated as an earnings withholding order if the taxpayer is an employee. The contents of the forms (except for a court issued withholding order for taxes) are prescribed by the state. See Section 723.081. The form for the court issued withholding order for taxes is prescribed by the Judicial Council. See Section 723.120.

§ 723.100. Judicial Council authorized to prescribe practice and procedure

Comment. Article 5 outlines generally the procedure for issuance and review of an earnings withholding order; however, Section 723.100 authorizes the Judicial Council to provide by rule for the practice and procedure in proceedings under this chapter. The rules may prescribe the circumstances under which

forms in languages other than English may or must be used. The state tax agency prescribes the rules of procedure for administrative hearings under Article 4 (withholding orders for taxes). The Judicial Council also prescribes the forms to be used under this chapter. See Section 723.120. *But see* Section 723.081 (forms used in connection with withholding orders for taxes—other than the form of a court issued order—are prescribed by state).

§ 723.101. Service

Comment. Section 723.101 specifies the manner of service under this chapter. Although personal delivery is authorized, it is anticipated that the convenience and economy of service by mail will result in the general use of this method. Subdivision (b) requires personal delivery by the levying officer where mail service is apparently ineffective because a return receipt has not been received by the levying officer within 15 days after the order is mailed. Where service is made by mail, the employer must indicate on his employer's return the date service was completed. See Section 723.126(b)(1). As to service of withholding orders for taxes, see Section 723.080. Subdivision (c) makes clear that, after the levying officer has received the employer's return, service of any notice or document under this chapter is to be made on the person, and at the address, indicated in the employer's return. See Sections 723.101(c) and 723.126(b)(6). See also, for example, the Comment to Section 723.027.

§ 723.102. Application for issuance of earnings withholding order

Comment. Subdivision (a) of Section 723.102 requires a judgment creditor to apply for an earnings withholding order to the levying officer in the county where the order is to be served. The form prescribed by the Judicial Council must be used for the application. See Section 723.120. See also Section 723.121 (contents of application). As a prerequisite to applying for the earnings withholding order, the judgment creditor must have obtained the issuance of a writ of execution to the county where the order is to be served. See also Section 723.101 (place where service may be made). An earnings withholding order shall be promptly issued on the ex parte application of a judgment creditor. The debtor may claim an exemption as provided in Section 723.105, have such order modified or terminated, and

even recover from the creditor amounts withheld and paid over pursuant to such order; but this does not affect the initial issuance of the order. The earnings withholding order will be effective only if served before the time for the return of the writ under subdivision (a) of Section 683 has expired. See Section 723.103(c).

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

§ 723.103. Service of order and information on employer

Comment. Section 723.103 prescribes what must be served upon the employer by the levying officer and when such service must be accomplished to be effective. Service of the earnings withholding order must be completed before the writ must be returned. See Section 683 (writ may be made returnable not less than 10 nor more than 60 days after its receipt by the levying officer). See also Section 723.026(c).

Section 723.103 requires that the employer be supplied with a copy of the earnings withholding order and with a notice advising the employee of the effect of the earnings withholding order and his rights with respect to the order. The employer is required to deliver these papers to the employee within 10 days of service. See Section 723.104. The person to be served and the manner of service of the earnings withholding order and related documents is specified in Section 723.101.

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

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

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

The last two sentences of subdivision (a) make clear that an employer is not liable for civil damages for failure to give the employee the notice concerning the employee's rights. Section 723.104 does not preclude the Labor Commissioner from taking

action under the Labor Code if the employer consistently fails to give employees the notice required under subdivision (a). Moreover, although the employer is not civilly liable, the employer may be subject to punishment for contempt. This would be appropriate where the employer fails to give the employee notice out of malice or willful neglect but would not be appropriate where the employer merely inadvertently fails to give the notice.

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

§ 723.105. Judgment debtor's claim of exemption

Comment. Section 723.105 outlines generally the procedure for the hearing of a judgment debtor's claim for the exemption under Section 723.051. Section 690.50 is not applicable.

A judgment debtor is not limited as to the time within which a claim of exemption must be made. However, unless there has been a material change in the debtor's income or needs, an exemption may be claimed only once during the period the order is in effect. See subdivision (a). A similar limitation applies to a judgment creditor; if a withholding order is terminated by the court, the judgment creditor may not apply for the issuance of an earnings withholding order directed to the same employer for the same debtor for 100 days following the date of service of a prior terminated order or 60 days after the date of termination, whichever is later, unless the court orders otherwise or there is a material change in circumstances. See subdivision (h).

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

creditor, together with a notice of the claim of exemption which advises the creditor of the effect of the claim. See subdivision (c).

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

The 10–day period provided by subdivision (e) for the judgment creditor to file the documents there specified commences to run from the date of "mailing" of the notice of claim of exemption. This specific provision is intended to take precedence over the general provisions of Section 1013 (extra time to act after mail "service"). *Cf. Labarthe v. McRae,* 35 Cal. App.2d 734, 97 P.2d 251 (1939) (provision for running of time for notice of intention to move for new trial from receipt of notice of entry of judgment controls over Section 1013). And the 10–day period for service of the notice of hearing is not subject to Section 1013. See *Welden v. Davis Auto Exchange,* 153 Cal. App.2d 515, 521–522, 315 P.2d 33, 37 (1957).

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

If the notice of opposition to the claim of exemption and the notice of motion for an order determining the claim of exemption are timely filed, the hearing is held within 20 days from the filing of the notice of motion unless continued by the court for good cause. The judgment creditor must also serve a copy of the notice of opposition and a notice of hearing on the judgment debtor and file proof of service. See also Section 723.123 (judgment debtor states present mailing address in claim of exemption). If the claim of exemption requested that the attorney for the judgment debtor also be served copies of such notices, the judgment creditor must also serve copies of the notices on such attorney and file proof of service.

After hearing, the court may order that the earnings withholding order be modified or even terminated. The date

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

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

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

§ 723.106. Findings not required

Comment. Section 723.106 is comparable to a provision found in subdivision (i) of Section 690.50 (claims for exemption).

§ 723.107. Limitation on obtaining additional earnings withholding orders

Comment. Section 723.107 precludes a creditor who has obtained an earnings withholding order which has gone into effect from causing another order to be served during the 10–day

period following the expiration of his prior order. The purpose of this limitation is to give other judgment creditors a 10–day period during which their earnings withholding orders can be served while the original creditor is precluded from competing with them. The original creditor may apply for the second earnings withholding order either before or after his prior order expires. But service of the second order on the same employer while the original order is in effect will be ineffective under Section 723.023, and service during the 10–day period following expiration of the original order is prohibited by Section 723.107. Even though the 10–day moratorium period is violated, the employer may act pursuant to what has been served upon him. See Section 723.154. Of course, after the expiration of the 10–day period, the original creditor is treated like any other creditor.

It should be noted that each agency of the state is considered a separate entity for the purposes of this chapter. See Section 723.011(d). Hence, even though one agency has been making collection, a second agency may serve an earnings withholding order within the 10–day period provided in this section.

§ 723.120. Judicial Council to prescribe forms

Comment. Section 723.120 requires the Judicial Council to prescribe the forms necessary for the purposes of this chapter. Various sections prescribe information to be contained in the forms; but the Judicial Council has complete authority to adopt and revise the forms as necessary and may require additional information in the forms or may omit information from the forms that it determines is unnecessary. See also Section 723.081 (forms in connection with withholding order for taxes).

§ 723.121. Application for earnings withholding order

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

§ 723.122. Notice to employee

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

a statement that informs the employee where to seek legal advice.

§ 723.123. Form of claim of exemption

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

§ 723.124. Judgment debtor's financial statement

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

§ 723.125. Earnings withholding order

Comment. Section 723.125 specifies the information to be included in the earnings withholding order. The form of the order is prescribed by the Judicial Council. See Section 723.120. Special forms are prescribed for earnings withholding orders for taxes. See Section 723.081.

§ 723.126. Employer's return

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

§ 723.127. Employer's instructions

Comment. Section 723.127 requires the preparation of employer's instructions that provide the employer with the information he needs to comply with the law. The levying officer provides the employer with a copy of the employer's instructions with the earnings withholding order. See Section 723.103.

§ 723.128. Judgment creditor's notice of opposition

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

§ 723.129. Availability of forms

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

§ 723.151. Liaison with federal administrator

Comment. Section 723.151 authorizes the Judicial Council to do whatever is required by the federal administrator to obtain and maintain a state exemption from the earnings garnishment provisions of the Consumer Credit Protection Act. A similarly broad grant of power as that contained in the first paragraph of Section 723.151 is found in Government Code Section 25210 (county participation in Economic Opportunity Act of 1964). Subdivisions (a), (b), and (c) are based on the language of 29 Code of Federal Regulations Section 870.55(a), requiring the state administrator to act as liaison with the federal administrator.

§ 723.152. Fraudulent withholding by employer

Comment. Section 723.152 is based on Labor Code Section 227 (failure to make agreed payments to health, welfare, or similar fund).

§ 723.153. Employer not to defer or accelerate payment of earnings

Comment. Section 723.153 makes clear that an employer may neither defer nor accelerate payment of earnings to an employee in an attempt to avoid compliance with an earnings withholding order and specifies the measure of damages in case of a violation.

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

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

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

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

GOVERNMENT CODE

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

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

LABOR CODE

§ 300 (amended). Wage assignments

Comment. Section 300 is amended to make the section consistent with the Employees' Earnings Protection Law (Code Civ. Proc. § 723.010 *et seq.*).

Subdivision (a). Subdivision (a) makes clear that the shortened phrase "assignment of wages" continues prior law as to the kind of instrument dealt with in this section and clarifies the relationship between Section 300 and Civil Code Section 4701 (wage assignment for support).

Subdivision (b). Paragraphs (1) through (6) of subdivision (b) continue generally without substantive change provisions formerly contained in Section 300. A sentence has been added to paragraph (2) to provide a limited exception from the requirement of spousal consent. Paragraph (7) continues without substantive change a provision formerly contained in Section 300 except that the former reference to the attachment or levy on execution against wages or salary is replaced by a reference to an earnings withholding order to conform to the procedure provided by the Employees' Earnings Protection Law, and the former reference to priority of wage assignments has been superseded by paragraph (7) and subdivision (c).

Subdivision (c). Subdivision (c) clarifies the relationship between a valid wage assignment and a subsequently served earnings withholding order. Where a wage assignment is in effect and an earnings withholding order is served, the employer shall not withhold pursuant to the order until after the end of the pay period during which the order was served. Thus, the wage assignment is, in effect, given an exclusive preference for that pay period and the debtor is given an opportunity to put his affairs in order. Such action may include revoking the wage assignment as to unearned wages pursuant to subdivision (f). Even where the debtor revokes the wage assignment prior to the end of the pay period (but after receipt of an earnings withholding order), the operation of the order is suspended until after the current pay period. Hence, the debtor is afforded an opportunity to retain his unearned wages for the current pay period only. After such moratorium, the earnings withholding order has a priority over the assignment if the latter remains in effect. The unlimited preference formerly given to an assignment of unearned wages or salary is not continued because this preference would permit a judgment debtor to give preference to one creditor and to defeat the claims of other creditors who seek to collect on their judgments under the Employees' Earnings Protection Law.

Subdivision (d). See the Comment to subdivision (f).

Subdivision (e). Subdivision (e) continues the substance of a provision formerly found in Section 300 and extends the scope of the former provision to cover the statement provided for in paragraph (2) of subdivision (b).

Subdivision (f). The first sentence of subdivision (f), which makes an assignment of unearned wages or salary revocable at any time by the maker thereof, replaces a portion of the former provision of Section 300 which restricted the amount of unearned wages or salary that could be assigned. The former 50-percent limitation on the amount of wages or salary that can be assigned

has been continued in subdivision (d). The former 25-percent "hardship" limitation has not been continued because subdivision (f) permits the person making the assignment of wages or salary to be earned to revoke the assignment at any time. Thus, where an assignment becomes too onerous, especially after service of an earnings withholding order, the assignment may be revoked. The delayed preference given the earnings withholding order under subdivision (c) will generally require persons having judgments, including support orders, to use the procedure provided in the Employees' Earnings Protection Law—rather than Section 300—to enforce their judgments; but it avoids conflict between wage assignments and orders issued pursuant to the Employees' Earnings Protection Law.

Subdivisions (g), (h), and (i). Subdivisions (g), (h), and (i) continue without substantive change provisions formerly contained in Section 300. It should be noted that the inapplicability of Section 300 to the deductions referred to in subdivision (h) means not only that compliance with the formalities and limitations provided in Section 300 is not required but also that Section 300 provides no special preference for such deductions.

WELFARE AND INSTITUTIONS CODE

§ 11489 (technical amendment)

Comment. Section 11489 has been amended to conform to changes made by Chapter 2.5 (commencing with Section 723.010) of the Code of Civil Procedure and Civil Code Section 4701. See Code Civ. Proc. § 723.031 and the Comment thereto.

APPENDIX VII

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Ad Valorem Property Taxes in Eminent Domain Proceedings

September 1978

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

CALIFORNIA LAW REVISION COMMISSION
STANFORD LAW SCHOOL
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September 7, 1978

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

The Eminent Domain Law was enacted in 1975 on recommendation of the California Law Revision Commission. Pursuant to Resolution Chapter 130 of the Statutes of 1965, the Commission has maintained a continuing review of condemnation law and procedure to determine whether any technical or substantive changes are necessary.

As a result of this continuing review, the Commission submits this recommendation to clarify the law relating to apportionment, payment, and cancellation of ad valorem property taxes on property taken by eminent domain. The recommended legislation is technical in nature and reorganizes and simplifies existing provisions to clarify them and make them more usable. The recommended legislation also makes minor substantive and procedural improvements.

Respectfully submitted,
HOWARD R. WILLIAMS
Chairperson

RECOMMENDATION

relating to

AD VALOREM PROPERTY TAXES IN EMINENT DOMAIN PROCEEDINGS

The provisions governing the apportionment, payment, and cancellation of ad valorem property taxes on property subject to eminent domain proceedings are difficult to understand and apply. They are located in two codes and are haphazardly organized.[1] They are intermingled with provisions governing taxes in acquisitions of property other than by eminent domain.[2] They are unduly lengthy and deal with a number of unrelated subjects.[3]

The Commission recommends that provisions relating solely to taxes on property acquired by eminent domain be revised and relocated in the Eminent Domain Law. The more general provisions of the Revenue and Taxation Code relating to taxes in acquisitions by public entities should be revised and reorganized for clarity.

The rules pertaining to the apportionment of liability for taxes should also be clarified. In order to help ensure that past taxes will be paid when property becomes exempt from taxation because of acquisition by a public entity,[4] the Commission recommends that the public entity be surety for taxes not collected from the award or paid from escrow.[5] Where there is a partial taking in eminent domain, the

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[1] See, *e.g.*, Code Civ. Proc. §§ 1265.220, 1268.410–1268.430; Rev. & Tax. Code §§ 4986, 4986.1, 4986.9, 5096.3.

[2] See, *e.g.*, Rev. & Tax. Code §§ 4986, 4986.1 (prescribing both general principles relating to acquisition of exempt property and special rules applicable only in eminent domain proceedings).

[3] Revenue and Taxation Code Section 4986.9, for example, deals not only with certification of tax information by the tax collector in eminent domain proceedings but also with payment of taxes out of the award, naming parties, and transfer of the tax lien whether in eminent domain or negotiated purchase.

[4] See Cal. Const., Art. XIII, § 3(a), (b), (d); Rev. & Tax. Code § 202(a)(3)–(4) (tax exempt property).

[5] Revenue and Taxation Code Section 4986.9(b) requires the court in eminent domain proceedings to order taxes paid from the award. Revenue and Taxation Code Section 4986(b) provides for payment of taxes from escrow when property is acquired by negotiated purchase. The recommended provision would make taxes not so paid collectible from the public entity. However, the former owner would remain ultimately liable for past taxes, and the public acquiring entity would be entitled to reimbursement from the former owner for any past taxes collected from the public entity.

award should serve as security for taxes due on the remainder.[6] The statute should provide a moratorium on collection of future taxes on property that will become exempt from taxation; this will prevent the collection effort for taxes that will ultimately be refunded. Several minor substantive and technical improvements should also be made.[7]

These changes will help end the confusion that surrounds ad valorem tax questions in eminent domain proceedings and simplify their resolution.[8]

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

An act to amend Section 1268.410 of, to repeal and add Section 1268.420 to, and to add Sections 1250.250, 1260.250, 1268.440, and 1268.450 to, the Code of Civil Procedure, and to amend Sections 134, 2921.5, 2922, 4986, 4986.2, and 5096.7 of, to add Article 5 (commencing with Section 5081) to Chapter 4 of Part 9 of Division 1 of, and to repeal Sections 4986.1, 4986.7, 4986.9, and 5096.3, of the Revenue and Taxation Code, relating to ad valorem property taxes on property subject to eminent domain proceedings or acquired by public entities.

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

Code of Civil Procedure § 1250.250 (added). Holder of tax lien need not be named defendant

SECTION 1. Section 1250.250 is added to the Code of Civil Procedure, to read:

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[6] This provision avoids the need to separately assess the part taken and the remainder until it becomes clear that the property will ultimately be taken, and also facilitates the collection of taxes past due on the entire parcel.

[7] The specific changes recommended by the Commission are noted in the Comments that follow the sections in the recommended legislation.

[8] This recommendation does not address problems of determining, apportioning, or paying ad valorem property taxes in inverse condemnation actions; these are separate matters that the Commission has not considered. Nor does this recommendation deal with fixed assessment liens on property subject to eminent domain proceedings; the Commission is engaged in a separate study of this problem.

1250.250. If the only interest of the county or other taxing agency in the property described in the complaint is a lien for ad valorem taxes, the county or other taxing agency need not be named as a defendant.

Comment. Section 1250.250 continues the substance of the first portion of former Revenue and Taxation Code Section 4986.9(c). In the case of exempt property, the lien for ad valorem taxes is extinguished and transfers and attaches to the proceeds constituting the award pursuant to Section 5083 of the Revenue and Taxation Code.

Code of Civil Procedure § 1260.250 (added). Determination and payment of property taxes

SEC. 2. Section 1260.250 is added to the Code of Civil Procedure, to read:

1260.250. (a) The court shall by order give the tax collector the legal description of the property sought to be taken and direct the tax collector to certify to the court the information required by subdivision (c), and the tax collector shall promptly certify the required information to the court.

(b) The court order shall be made on or before the earliest of the following dates:

(1) The date the court makes an order for possession.

(2) The date set for trial.

(3) The date of entry of judgment.

(c) The court order shall require certification of the following information:

(1) The current assessed value of the property together with its assessed identification number.

(2) All unpaid taxes on the property, and any penalties and costs that have accrued thereon while on the secured roll, levied for prior tax years that constitute a lien on the property.

(3) All unpaid taxes on the property, and any penalties and costs that have accrued thereon while on the secured roll, levied for the current tax year that constitute a lien on the property prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code or the date of trial, whichever is earlier. If the amount of the current taxes is not

ascertainable at the time of proration, the amount shall be estimated and computed based on the assessed value for the current assessment year and the tax rate levied on the property for the immediately prior tax year.

(4) The actual or estimated amount of taxes on the property that are or will become a lien on the property in the next succeeding tax year prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code or the date of trial, whichever is earlier. Any estimated amount of taxes shall be computed based on the assessed value of the property for the current assessment year and the tax rate levied on the property for the current tax year.

(5) The amount of the taxes, penalties, and costs allocable to one day of the current tax year, and where applicable, the amount allocable to one day of the next succeeding tax year, hereinafter referred to as the "daily prorate."

(6) The total of paragraphs (2), (3), and (4).

(d) If the property sought to be taken does not have a separate valuation on the assessment roll, the information required by this section shall be for the larger parcel of which the property is a part.

(e) The court, as part of the judgment, shall separately state the amount certified pursuant to this section and order that the amount be paid to the tax collector from the award. If the amount so certified is prorated to the date of trial, the order shall include, in addition to the amount so certified, an amount equal to the applicable daily prorate multiplied by the number of days commencing on the date of trial and ending on and including the day before the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code.

(f) Notwithstanding any other provision of this section, if the board of supervisors provides the procedure set forth in Section 5087 of the Revenue and Taxation Code, the court shall make no award of taxes in the judgment.

Comment. Subdivisions (a)–(c), and (e) of Section 1260.250 continue the substance of subdivisions (a) and (b) of former Revenue and Taxation Code Section 4986.9. Subdivision (b) (3) is added in recognition of the fact that judgment may be entered without a trial. Subdivision (d) is added so that, in a partial

taking, the award is security for taxes due on the whole parcel. See subdivision (e). Subdivision (f) continues the second sentence of subdivision (b) of former Section 4986.1.

Taxes on exempt property not paid from the award pursuant to subdivision (e) may be transferred to the unsecured roll for collection. See Rev. & Tax. Code §§ 5084(b), 5086(a), 5087. For the rules governing reimbursement for taxes subject to cancellation, and liability for taxes after the date of apportionment, see Article 5 (commencing with Section 1268.410) of Chapter 11.

Code of Civil Procedure § 1268.410 (technical amendment)

SEC. 3. Section 1268.410 of the Code of Civil Procedure is amended to read:

1268.410. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties, and costs upon property acquired by eminent domain ~~that would be subject to cancellation under Chapter 1 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a public entity and if such taxes, penalties, and costs had not been paid, whether or not the plaintiff is a public entity~~ *prorated from and including the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code*.

Comment. Section 1268.410 is amended for clarity. The proration under this section applies whether or not the property becomes exempt from taxation, but affects only the relationship between plaintiff and defendant. Collection and cancellation of taxes is not governed by Section 1268.410 but by the relevant provisions of the Revenue and Taxation Code. See, *e.g.*, Rev. & Tax. Code § 5090. See also Section 1268.420 (tax collection moratorium).

Code of Civil Procedure § 1268.420 (repealed)

SEC. 4. Section 1268.420 of the Code of Civil Procedure is repealed.

~~1268.420. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation~~

~~pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.~~

Comment. The substance of former Section 1268.420 is continued in Section 1268.450.

Code of Civil Procedure § 1268.420 (added). Collection of taxes

SEC. 5. Section 1268.420 is added to the Code of Civil Procedure, to read:

1268.420. (a) Except as provided in subdivision (b):

(1) If the acquisition of property by eminent domain will make the property exempt property as defined in Section 5081 of the Revenue and Taxation Code, any ad valorem taxes, penalties, or costs on the property for which the plaintiff is liable pursuant to Section 1268.410 are not collectible.

(2) If the acquisition of property by eminent domain will not make the property exempt property as defined in Section 5081 of the Revenue and Taxation Code, the plaintiff shall be deemed to be the assessee for the purposes of collection of any ad valorem taxes, penalties, and costs on the property for which the plaintiff is liable pursuant to Section 1268.410.

(b) To the extent there is a dismissal or partial dismissal of the eminent domain proceeding, the amount of any unpaid ad valorem taxes, penalties, and costs on the property for which the plaintiff would be liable pursuant to Section 1268.410 until the entry of judgment of dismissal shall be awarded to the defendant. The amount awarded shall be paid to the tax collector from the award or, if unpaid for any reason, are collectible from the defendant.

Comment. Subdivision (a)(1) of Section 1268.420 places a moratorium on collection of taxes on property that it appears will become exempt from taxation by virtue of acquisition by a public entity. *Cf.* Rev. & Tax. Code § 5091 (notice of proposed acquisition of property that will become exempt). If the eminent domain proceeding is ultimately abandoned or otherwise

dismissed, the moratorium ends and collection may thereafter be made from the award or from the defendant. See subdivision (b).

Subdivision (a) (2) makes clear that taxes on property that will not become exempt by virtue of acquisition by a public entity are collectible from the plaintiff as of the date of apportionment. See Section 1268.410. The taxes are collectible notwithstanding the fact that the final order of condemnation vesting title in the plaintiff has not yet been made or recorded. For cancellation and refund of taxes collected on property that becomes exempt by virtue of a claimed exemption, see Revenue and Taxation Code Section 272. In the case of abandonment or other dismissal, unpaid taxes for which the plaintiff is liable must be awarded to the defendant, and are collectible either from the award or from the defendant. See subdivision (b).

In the case of a partial taking, a separate valuation may be necessary in order to make taxes, penalties, and costs collectible, whether on the part taken or on the remainder. *Cf.* Section 1268.450 (application for separate valuation of property).

Code of Civil Procedure § 1268.440 (added). Refund of taxes

SEC. 6. Section 1268.440 is added to the Code of Civil Procedure, to read:

1268.440. (a) If taxes have been paid on property that is exempt property as defined in Section 5081 of the Revenue and Taxation Code, the amount of the taxes that, if unpaid, would have been subject to cancellation under Article 5 (commencing with Section 5081) of Chapter 4 of Part 9 of Division 1 of the Revenue and Taxation Code shall be deemed to be erroneously collected and shall be refunded in the manner provided in Article 1 (commencing with Section 5096) of Chapter 5 of Part 9 of Division 1 of the Revenue and Taxation Code to the person who paid the taxes.

(b) The public entity shall be deemed to be the person who paid the taxes if the public entity reimbursed the defendant for the taxes under a cost bill filed in the eminent domain proceeding pursuant to Section 1268.430. A claim for refund of taxes filed by a public entity pursuant to this section shall contain a copy of the cost bill under which taxes were reimbursed or a declaration under penalty of perjury by the public entity that the taxes were reimbursed under a cost bill.

(c) Taxes paid on either the secured or unsecured roll may be refunded pursuant to this section.

Comment. Section 1268.440 continues the substance of former Section 5096.3 of the Revenue and Taxation Code. Refund of taxes on exempt property other than that defined in Revenue and Taxation Code Section 5081 is governed by Revenue and Taxation Code Section 272. The terms "secured roll" and "unsecured roll" are defined in Revenue and Taxation Code Section 109.

Code of Civil Procedure § 1268.450 (added). Separate valuation

SEC. 7. Section 1268.450 is added to the Code of Civil Procedure, to read:

1268.450. If property acquired by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on the property are subject to cancellation under Article 5 (commencing with Section 5081) of Chapter 4 of Part 9 of Division 1 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of the property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in that article to the contrary.

Comment. Section 1268.450 continues the substance of former Section 1268.420. It is revised to reflect the enactment of Article 5 (commencing with Section 5081) of Chapter 4 of Part 9 of Division 1 of the Revenue and Taxation Code relating to cancellation of taxes on exempt property.

Revenue & Taxation Code § 134 (technical amendment)

SEC. 8. Section 134 of the Revenue and Taxation Code is amended to read:

134. "Unsecured property" is property:

(a) The taxes on which are not a lien on real property sufficient, in the opinion of the assessor, to secure payment of the taxes.

(b) The taxes on which were secured by real ~~estate~~ *property* on the lien date and which ~~real estate~~ *property* was later acquired by the United States ~~of America~~, the

~~State~~ *state*, or by any county, city, school district or other public ~~agency~~ *entity* and the taxes *required to be* transferred to the unsecured roll pursuant to ~~Section 4986 of this code~~ *Article 5 (commencing with Section 5081) of Chapter 4 of Part 9*.

Comment. Section 134 is amended to reflect the enactment of Article 5 (commencing with Section 5081) of Chapter 4 of Part 9, relating to cancellation of taxes on exempt property.

Revenue & Taxation Code § 2921.5 (technical amendment)

SEC. 9. Section 2921.5 of the Revenue and Taxation Code is amended to read:

2921.5. ~~Taxes~~ *(a) Except as provided in subdivision (b), taxes* on unsecured property as defined in *subdivision (b) of* Section 134, ~~subparagraph (b) of this code~~ shall be transferred from the "secured roll" to the "unsecured roll" of the corresponding year by the county auditor on order of the board of supervisors with the written consent of the ~~district attorney~~ *county legal adviser* pursuant to ~~Section 4986 of this code~~ *Article 5 (commencing with Section 5081) of Chapter 4 of Part 9* at the same time the taxes are canceled on the ~~real estate~~ *property*, and shall be collected in the same manner as other delinquent taxes on the "unsecured ~~roll"; provided, that no~~ *roll."*

(b) No delinquent penalty shall attach to ~~such~~ taxes ~~so transferred~~ *transferred pursuant to subdivision (a)*, except to those taxes which carried delinquent penalty on the secured roll at the time the ~~real estate~~ *property* involved was acquired by a public ~~agency~~ *entity*.

Comment. Section 2921.5 is amended to reflect the enactment of Article 5 (commencing with Section 5081) of Chapter 4 of Part 9, relating to cancellation of taxes on exempt property, and to conform to the language of Section 4986.

Revenue & Taxation Code § 2922 (technical amendment)

SEC. 10. Section 2922 of the Revenue and Taxation Code is amended to read:

2922. (a) Taxes on the unsecured roll as of July 31st if unpaid are delinquent August 31st at 5 p.m., and thereafter a delinquent penalty of 6 percent attaches to them. Taxes

added to the unsecured roll after July 31st, if unpaid are delinquent at 5 p.m. on the last day of the month succeeding the month in which the assessment was added to the unsecured roll and thereafter a delinquent penalty of 6 percent attaches to them, except that taxes transferred to the unsecured roll pursuant to ~~Section 4986 of this code~~ *Article 5 (commencing with Section 5081) of Chapter 4 of Part 9* to which penalties had attached while on the secured roll and also were transferred shall be subject only to the additional penalties prescribed by subdivision (b). If August 31st or the last day of any month falls on Saturday, Sunday or a legal holiday, and if payment is received by 5 p.m. of the next business day, the 6 percent penalty shall not attach.

(b) If taxes on the unsecured roll are unpaid by 5 p.m. of the last day of the second succeeding month after the 6 percent penalty attaches pursuant to subdivision (a), an additional penalty of 1 percent attaches to them on the first day of each month thereafter to the time of payment or to the time a court judgment is entered for the amount of the unpaid taxes and penalties, whichever occurs first. If the last day of any month falls on Saturday, Sunday or a legal holiday, the additional penalty of 1 percent shall attach after 5 p.m. on the next business day.

Comment. Section 2922 is amended to reflect the enactment of Article 5 (commencing with Section 5081) of Chapter 4 of Part 9, relating to cancellation of taxes on exempt property.

Revenue & Taxation Code § 4986 (amended)

SEC. 11. Section 4986 of the Revenue and Taxation Code is amended to read:

4986. (a) All or any portion of any tax, penalty, or costs, heretofore or hereafter levied, ~~may~~ *shall*, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the county legal adviser if it was levied or charged:

(1) More than once.

(2) Erroneously or illegally.

(3) On the canceled portion of an assessment that has been decreased pursuant to a correction authorized by Article 1 (commencing with Section 4876) of Chapter 2 ~~of this part~~.

(4) On property which did not exist on the lien date.

(5) On property annexed after the lien date by the public entity owning it.

(6) On property acquired ~~prior to September 18, 1959,~~ by the United States ~~of America~~, the state, or by any county, city, school district or other ~~political subdivision and which, because of such public ownership, became not subject to sale for delinquent taxes~~ *public entity, to the extent provided in Article 5 (commencing with Section 5081)*.

(7) On that portion of an assessment in excess of the value of the property as determined by the assessor pursuant to Section 469.

~~(b) On property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States, or by the state or by any county, city, school district or other public entity, and because of such public ownership becomes not subject to sale for delinquent taxes, no cancellation shall be made in respect of all or any portion of any such unpaid tax, or penalties or costs, but such tax, together with such penalties and costs as may have accrued thereon while on the secured roll, shall be paid through escrow at the close of escrow or, if unpaid for any reason, they shall be collected like any other taxes on the unsecured roll. If unpaid at the time set for the sale of property on the secured roll to the state, they shall be transferred to the unsecured roll pursuant to Section 2921.5, and collection thereof shall be made and had as provided therein, except that the statute of limitations on any suit brought to collect such taxes and penalties shall commence to run from the date of transfer of such taxes, penalties and costs to the unsecured roll, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time such transfer is made. The foregoing toll of the statute of limitatons shall apply retroactively to all such unpaid taxes and penalties so transferred, the delinquent dates of which are prior to the effective date of the amendment of this section at the 1959 Regular Session.~~

~~If any property described in this subdivision is acquired by a negotiated purchase and sale, gift, devise, or eminent domain proceeding after the lien date but prior to the~~

~~commencement of the fiscal year for which current taxes are a lien on the property, the amount of such current taxes shall be canceled and neither the person from whom the property was acquired nor the public entity shall be liable for the payment of such taxes. If, however, the property is so acquired after the commencement of the fiscal year for which the current taxes are a lien on the property, that portion only of such current taxes, together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the property shall be paid through escrow at the close of escrow, or if unpaid for any reason, they, shall be transferred to the unsecured roll pursuant to Section 2921.5 and shall be collectible from the person from whom the property was acquired. The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of the acquisition of the property, shall be canceled and shall not be collectible either from the person from whom the property was acquired nor from the public entity.~~

~~In no event shall any transfer of unpaid taxes, penalties or costs be made with respect to property which has been tax deeded to the state for delinquency.~~

~~For purposes of this subdivision, if proceedings for acquisition of the property by eminent domain have not been commenced, the date of acquisition shall be the date that the conveyance is recorded in the name of the public entity or the date of actual possession by the public entity, whichever is earlier. If proceedings to acquire the property by eminent domain have been commenced and an order of immediate possession obtained prior to acquisition of the property by deed, the date of acquisition shall be the date upon or after which the plaintiff may take possession as authorized by such order of immediate possession.~~

~~The subject of the amount of the taxes which may be due on the property shall not be considered relevant on any issue in the condemnation action, and the mention of said subject, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel,~~

~~or otherwise, shall constitute grounds for a mistrial in any such action.~~

(b) No cancellation under paragraph (2) of subdivision (a) ~~of this section~~ shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a ~~municipal corporation~~ *city* without the written consent of the city attorney or other officer designated by the city council unless the city council, by resolution filed with the board of supervisors, has authorized the cancellation by county officers. The resolution shall remain effective until rescinded by the city council. ~~For the purpose of this section and Section 4986.9, the date of possession shall be the date after which the plaintiff may take possession as authorized by order of the court or as authorized by a declaration of taking.~~

Comment. Section 4986 is amended to delete the provisions relating to cancellation of taxes on property acquired by public entities. These provisions are superseded by Article 5 (commencing with Section 5081). The language of subdivision (a) of Section 4986 is made mandatory, rather than permissive, to reflect existing law. *See* 2 Ops. Cal. Att'y Gen. 526 (1943), 6 Ops. Cal. Att'y Gen. 72 (1945). The portion of Section 4986 that related to mention of the amount of taxes which may be due on the property is not continued; it is inconsistent with Evidence Code Section 822(c).

Revenue & Taxation Code § 4986.1 (repealed)

SEC. 12. Section 4986.1 of the Revenue and Taxation Code is repealed.

~~4986.1. (a) The board of supervisors of any county may prescribe that where the amount of unpaid taxes, penalties and costs to be transferred to the unsecured roll pursuant to Section 4986 is less than ten dollars ($10), such taxes, penalties and costs shall be canceled rather than transferred to the unsecured roll.~~

~~(b) The board of supervisors of any county may provide that all delinquent taxes, penalties and costs and a pro rata share of current taxes, penalties and costs as may have accrued thereon while on the secured roll which are computed in accordance with subdivision (2) (b) of Section 4986 shall be transferred to the unsecured roll and collected~~

~~pursuant to Section 2921.5. In the event the board of supervisors of any county prescribes the procedure herein set forth, the court shall make no award of taxes in the eminent domain proceeding. The date for proration of current taxes and penalties shall be the date specified in subdivision (2)(b) of Section 4986.~~

Comment. Subdivision (a) of former Section 4986.1 is continued in Section 5089. The first and third sentences of subdivision (b) are continued in Section 5087. The second sentence is continued in Code of Civil Procedure Section 1260.250(f).

Revenue & Taxation Code § 4986.2 (technical amendment)

SEC. 13. Section 4986.2 of the Revenue and Taxation Code is amended to read:

4986.2. All or any portion of uncollected city taxes, penalties or costs ~~may~~ *shall* be canceled on any of the grounds specified in Section 4986. If the city taxes are collected by the county, the procedure outlined in Section 4986 for the cancellation of taxes, penalties or costs shall be followed, except that the consent of the city attorney, in lieu of the consent of the ~~district attorney~~ *county legal adviser*, is necessary before cancellation. If the taxes are collected by the city, the taxes, penalties, or costs shall be ~~cancelled~~ *canceled* by the officer having custody of the records thereof on order of the governing body of the city, with the written consent of the city attorney.

Comment. Section 4986.2 is amended to conform to the language of Section 4986. The language of this section is made mandatory, rather than permissive, to reflect existing law. *See* 2 Ops. Cal. Att'y Gen. 526 (1943); 6 Ops. Cal. Att'y Gen. 72 (1945).

Revenue & Taxation Code § 4986.7 (repealed)

SEC. 14. Section 4986.7 of the Revenue and Taxation Code is repealed.

~~4986.7. Whenever a public agency proposes to acquire private property or properties for public use, and where such public use will make the property or properties exempt from taxation, the public agency shall notify the county tax collector and any other public agencies whose taxes are not collected by the county tax collector but who~~

~~at that time exercise the right of assessment and taxation of the approximate extent of the proposed public project and the estimated time of completion of all acquisitions necessary therefor. Said notice shall be provided within a reasonable period of time following the initial budgeting of funds for the proposed acquisition or acquisitions.~~

~~The provisions of this section create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.~~

Comment. The substance of former Section 4986.7 is continued in Section 5091.

Revenue & Taxation Code § 4986.9 (repealed)

SEC. 15. Section 4986.9 of the Revenue and Taxation Code is repealed.

~~4986.9. (a) In an action in eminent domain, the court, either on the date it issues an order for possession or on or before the date set for trial relative to a particular parcel, whichever is earlier, shall direct the tax collector to certify to the court the following information:~~

~~(1) The current assessed value of the parcel together with its assessed identification number.~~

~~(2) All unpaid taxes, penalties and costs levied for prior tax years and constituting a lien upon such parcel.~~

~~(3) All unpaid taxes, penalties and costs levied for the current tax year which constitute a lien on such parcel prorated to, but not including, the date of possession as such date of possession is determined pursuant to Section 4986. If the amount of the current taxes is not ascertainable at the time of proration, the same shall be estimated and computed based upon the current assessed value and the tax rate levied on the property for the immediate prior year.~~

~~(4) If no order for possession has issued relative to such parcel, all unpaid taxes, penalties and costs levied for the current tax year which constitute a lien on such parcel prorated to, but not including, the date of trial, plus the amount of such taxes, penalties and costs allocable to one day of the tax year, hereinafter referred to as the "daily prorate." If the amount of the current taxes is not ascertainable at the time of proration, the same shall be~~

~~estimated and computed based upon the current assessed value and the tax rate levied on the property for the immediate prior year.~~

~~(5) The actual or estimated amount of taxes which are or will become a lien on such parcel in the next succeeding tax year prorated to, but not including, the date of possession or the date of trial whichever is earlier plus, where applicable, a daily prorate of such taxes. Any estimated amount of taxes shall be premised upon the assessed value of the parcel for the current assessment year and the tax rate levied on the property for the current fiscal year.~~

~~(6) The total of paragraphs (2), (3), and (5) of this subdivision or the total of paragraphs (2), (4), and (5) of this subdivision, plus the applicable daily prorate.~~

~~A legal description of the parcel shall accompany the order.~~

~~(b) On or before the date set for trial, the tax collector shall, on a form approved by the board, certify such information to the court, and the court, as part of its judgment in eminent domain, shall order that the amounts so certified be paid to the tax collector from the award. In the event no order for possession has issued relative to such parcel, the court's order shall require an amount to be paid which shall be a sum certain to, but not including, the date of trial, plus an amount equal to the appropriate daily prorate multiplied by the number of days commencing on the date of trial and ending on and including the day before the date the final order of condemnation is recorded.~~

~~(c) Where the only interest of the county or any other taxing agency in the property being condemned is a lien for ad valorem taxes, the county or such other agency need not be named as a party in the eminent domain proceeding, but such lien shall be extinguished as a matter of law upon the acquisition of such property by the condemning agency.~~

~~(d) In any instance where real property is acquired either by negotiated purchase or in an action in eminent domain by the United States or any public entity in this state and because of such acquisition the lien for ad valorem taxes against such property is extinguished, such lien shall immediately transfer and attach to the proceeds constituting the purchase price or award.~~

Comment. Subdivisions (a) and (b) of former Section 4986.9 are continued in Code of Civil Procedure Section 1260.250. Subdivision (c) is continued in Code of Civil Procedure Section 1250.250 and Revenue and Taxation Code Section 5083. Subdivision (d) is continued in Revenue and Taxation Code Section 5083.

Revenue & Taxation Code §§ 5081–5091 (added)

SEC. 16. Article 5 (commencing with Section 5081) is added to Chapter 4 of Part 9 of Division 1 of the Revenue and Taxation Code, to read:

Article 5. Cancellation of Taxes on Exempt Property

§ 5081. "Exempt property" defined

5081. As used in this article, "exempt property" means:

(a) Property acquired by the United States, that becomes exempt from taxation under the laws of the United States.

(b) Property acquired by the state or by a county, city, school district, or other public entity, that becomes exempt from taxation under the laws of the state.

Comment. Section 5081 continues the first portion of former subdivision (b) of Section 4986 except that the phrase "not subject to sale for delinquent taxes" is replaced in subdivision (b) by the phrase "exempt from taxation under the laws of the state." See, *e.g.*, Cal. Const., Art. XIII, § 3(a), (b), (d); Rev. & Tax. Code § 202(a)(4) (tax exemption). Cancellation of taxes on exempt property other than that described in this section is governed by Section 272 and Article 1 (commencing with Section 4985). See Sections 201–234 (taxable and exempt property). See also Section 4987 (compliance with procedure for claiming exemption).

§ 5082. Date of apportionment

5082. For purposes of this article, the "date of apportionment" is the earliest of the following times:

(a) The date the conveyance to the public entity or the final order of condemnation is recorded.

(b) The date of actual possession by the public entity.

(c) The date upon or after which the public entity may take possession as authorized by an order for possession or by a declaration of taking.

Comment. Section 5082 supersedes the fourth paragraph of former subdivision (b) of Section 4986 that defined the date of acquisition. Section 5082 makes clear that the date of apportionment is the earliest of the times listed, regardless of whether an eminent domain proceeding has been commenced or an order for possession prior to judgment has been obtained.

§ 5083. Transfer of lien

5083. If exempt property is acquired either by negotiated purchase or eminent domain any lien on the property for ad valorem taxes is extinguished as a matter of law upon the acquisition of the property, and the lien immediately transfers and attaches to the proceeds constituting the purchase price or award.

Comment. Section 5083 continues the substance of the last portion of subdivision (c) and subdivision (d) of former Section 4986.9, and extends the provision for extinction of liens to property acquired by negotiated purchase. Taxes may be collected from the award in eminent domain or paid through escrow, or transferred to the unsecured roll for collection. See Sections 5084, 5086, 5087. The term "exempt property" is defined in Section 5081.

§ 5084. Delinquent taxes, penalties, and costs

5084. (a) No cancellation shall be made of all or any portion of any unpaid taxes or any penalties or costs levied for prior tax years that constitute a lien at the time of acquisition of exempt property.

(b) Such unpaid taxes, penalties, and costs shall be paid through escrow at the close of escrow or from the award in eminent domain, or if unpaid for any reason, shall be transferred to the unsecured roll pursuant to Section 5090 and are collectible from either the person from whom the property was acquired or the public entity that acquired the property.

Comment. Section 5084 continues the substance of the first sentence of former subdivision (b) of Section 4986, with the addition in subdivision (b) of provisions for collection of unpaid amounts from the public entity. This will help ensure that the public entity notifies the tax collector so taxes are paid from the funds available at the time of acquisition of the property. The term "exempt property" is defined in Section 5081. For collection and cancellation of current taxes on exempt property, see Sections 5085 and 5086.

§ 5085. Taxes prior to commencement of fiscal year

5085. If exempt property is acquired by negotiated purchase, gift, devise, or eminent domain after the lien date but prior to the commencement of the fiscal year for which taxes are a lien on the property, the amount of the taxes for that fiscal year shall be canceled and are not collectible from either the person from whom the property was acquired or the public entity that acquired the property.

Comment. Section 5085 continues the substance of the first sentence of the second paragraph of former subdivision (b) of Section 4986. The term "exempt property" is defined in Section 5081.

§ 5086. Taxes, penalties, and costs after commencement of fiscal year

5086. If exempt property is acquired by negotiated purchase, gift, devise, or eminent domain after commencement of the fiscal year for which the current taxes are a lien on the property:

(a) The portion of the current taxes and any penalties and costs that are allocable to the part of the fiscal year that ends on the day before the date of apportionment shall be paid through escrow at the close of escrow or from the award in eminent domain, or if unpaid for any reason, shall be transferred to the unsecured roll pursuant to Section 5090 and are collectible from either the person from whom the property was acquired or the public entity that acquired the property.

(b) The portion of the current taxes and any penalties and costs that are allocable to the part of the fiscal year that begins on the date of apportionment shall be canceled and are not collectible either from the person from whom the property was acquired or from the public entity that acquired the property.

Comment. Section 5086 continues the substance of the second and third sentences of the second paragraph of former subdivision (b) of Section 4986. The provision in subdivision (a) for collection of unpaid amounts from the public entity is new; it will help ensure that public entity notifies the tax collector so taxes are paid from the funds available at the time of acquisition of the property. The term "exempt property" is defined in Section 5081. The "date of apportionment" is defined in Section 5082.

§ 5087. Optional transfer to unsecured roll

5087. The board of supervisors of a county may provide that all unpaid taxes, penalties, and costs and the allocable portion of current taxes, penalties, and costs computed in accordance with this article shall not be paid through escrow at the close of escrow or from the award in eminent domain, but shall be transferred to the unsecured roll pursuant to Section 5090 and are collectible from the person from whom the property was acquired.

Comment. Section 5087 continues the substance of the first and third sentences of subdivision (b) of former Section 4986.1.

§ 5088. Tax deeded property

5088. Notwithstanding any other provision of this article, unpaid taxes, penalties, or costs shall not be transferred to the unsecured roll with respect to property that has been tax deeded to the state for delinquency.

Comment. Section 5088 continues the substance of the third paragraph of former subdivision (b) of Section 4986.

§ 5089. Cancellation of nominal amounts

5089. The board of supervisors of a county may prescribe that, where the amount of unpaid taxes, penalties, and costs to be transferred to the unsecured roll pursuant to this article is less than ten dollars ($10), the unpaid taxes, penalties, and costs shall be canceled rather than transferred to the unsecured roll.

Comment. Section 5089 continues the substance of former Section 4986.1(a).

§ 5090. Collection on unsecured roll

5090. (a) If taxes, penalties, and costs that are not subject to cancellation pursuant to this article are unpaid at the time set for the sale of property on the secured roll to the state, they shall be transferred to the unsecured roll pursuant to Section 2921.5, and collected as provided therein.

(b) The statute of limitations on any suit brought to collect taxes, penalties, and costs transferred to the

unsecured roll commences to run on the date of transfer, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time the transfer is made.

(c) The amount of taxes, penalties, and costs collectible on the unsecured roll from a public entity pursuant to this article shall not exceed the amount paid for the property or awarded in the proceeding.

(d) The person from whom the property was acquired is liable to the public entity that acquired the property for any taxes, penalties, and costs collected on the unsecured roll from the public entity.

Comment. Subdivisions (a) and (b) of Section 5090 continue the substance of the second sentence of former Section 4986(b). Subdivisions (c) and (d) are new; subdivision (c) implements the provisions of Sections 5084 and 5086 permitting collection on the unsecured roll from the acquiring entity, while subdivision (d) makes clear that the property owner is liable to the public entity for the amount of taxes, penalties, and costs so collected.

§ 5091. Notice of proposed acquisition of property

5091. (a) If a public entity proposes to acquire property for a public use that will make the property exempt from taxation, the public entity shall give notice to the county tax collector and to any public entities whose taxes are not collected by the county tax collector but who at the time exercise the right of assessment and taxation.

(b) The notice shall be given within a reasonable time following the initial budgeting of funds for the proposed acquisition, and shall state all of the following:

(1) The approximate extent of the proposed project.

(2) The estimated time of completion of all acquisitions necessary for the proposed project.

(c) This section creates no rights or liabilities and does not affect the validity of any property acquisitions by negotiated purchase or eminent domain.

Comment. Section 5091 continues the substance of former Section 4986.7.

Revenue & Taxation Code § 5096.3 (repealed)

SEC. 17. Section 5096.3 of the Revenue and Taxation Code is repealed.

~~5096.3. If taxes have been paid on property which is acquired by eminent domain after the lien date by the state or by any county, city, school district or other public agency of this state, the amount of such taxes which would have been subject to cancellation under Section 4986 if unpaid shall be deemed to be erroneously collected and shall be refunded to such public agency. For the purposes of this article, except Section 5096.7, such public agency shall be deemed to be the person who paid the taxes if such public agency reimbursed the condemnee for such taxes through payment under a cost bill filed in the eminent domain action. A claim for refund of taxes filed by a public agency pursuant to this section shall contain a copy of the cost bill under which taxes were reimbursed or a declaration under penalty of perjury by the public agency that such taxes were reimbursed under a cost bill.~~

~~Refunds under this section shall be applicable to taxes paid on either the secured or unsecured rolls.~~

Comment. The substance of former Section 5096.3 is continued in Section 1268.440 of the Code of Civil Procedure.

Revenue & Taxation Code § 5096.7 (technical amendment)

SEC. 18. Section 5096.7 of the Revenue and Taxation Code is amended to read:

5096.7. If taxes have been paid on property acquired by negotiated purchase by any public entity designated in ~~subdivision (b) of Section 4986~~ *Section 5081* after the commencement of the fiscal year for which the taxes are a lien on the property, the portion of such taxes which are allocable to that part of the fiscal year which begins on the date of ~~the acquisition of the property~~ *apportionment determined pursuant to Section 5082* and made uncollectible if unpaid by virtue of Section ~~4986~~ *5086*, shall be deemed erroneously collected and shall be refunded to ~~such~~ *the* person who has paid the tax, where ~~such~~ *the* person was not otherwise reimbursed for ~~such~~ *that* portion of the taxes by the public entity which acquired the property.

Refunds under this section shall be applicable to taxes paid on either the secured or unsecured rolls.

Comment. Section 5096.7 is amended to reflect the enactment of Article 5 (commencing with Section 5081) of Chapter 4 relating to cancellation of taxes on exempt property.

APPENDIX VIII

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Security For Costs

October 1978

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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Ex Officio

October 13, 1978

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

Pursuant to Section 10331 of the Government Code, the California Law Revision Commission submits this recommendation to repeal unconstitutional provisions of existing law that require the plaintiff in specified types of actions to furnish an undertaking as security for the defendant's recoverable costs.

In 1975, the Commission proposed revision of all unconstitutional cost bond statutes to satisfy constitutional requirements. See *Recommendation Relating to Undertakings for Costs,* 13 Cal. L. Revision Comm'n Reports 901 (1976). That recommendation was confined to remedying the constitutional defects in the statutes; the Commission pointed out in its recommendation that it had not undertaken to reexamine the soundness of the policies underlying the statutes and expressed no view concerning the kinds of cases in which a cost bond should be required.

Assembly Bill 2847 was introduced at the 1976 session to effectuate the Commission's 1975 recommendation but was held in the Assembly Judiciary Committee. Doubt being expressed whether the cost bond statutes serve a desirable public purpose, members of the Committee were unwilling to approve a bill that would revitalize all the unconstitutional statutes. Since then, the Commission has given this matter further consideration and has examined the policy considerations underlying the unconstitutional cost bond statutes.

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Eight cost bond statutes are constitutionally defective. This recommendation would repeal five statutes in their entirety and would make technical amendments in two statutes to conform with constitutional standards. The nonresident plaintiff cost bond statute would be substantially amended to provide constitutional procedures.

Respectfully submitted,
HOWARD R. WILLIAMS
Chairperson

RECOMMENDATION

relating to

SECURITY FOR COSTS

Background

Thirteen California statutes require the plaintiff in specified types of actions to furnish an undertaking as security for the defendant's recoverable costs.[1] The principal purpose of 12 of the cost bond statutes is to deter frivolous litigation,[2] although they also serve to secure a possible judgment for costs in the defendant's favor. The statute requiring a nonresident plaintiff to file a cost bond is intended to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction.[3]

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[1] See Code Civ. Proc. §§ 391–391.5 (action by vexatious litigant), 830–836 (action for libel or slander), 1029.5 (malpractice action against architect or similar licensee), 1029.6 (malpractice action against licensed health professional), 1030 (action by nonresident plaintiff); Corp. Code §§ 800 (shareholders' derivative action under General Corporation law), 5710 (members' derivative action under Nonprofit Corporation Law) [A.B. 2180, 1978 session], 7710 (members' derivative action under Nonprofit Mutual Benefit Corporation Law) [A.B. 2180, 1978 session]; Educ. Code § 92650 (action against Regents of the University of California); Fin. Code § 7616 (derivative action by shareholder of savings and loan association); Govt. Code §§ 947 (action against public entity), 951 (action against public employee); Mil. & Vet. Code § 393 (action against member of militia).

[2] The purpose of the undertaking requirement in the vexatious litigant statute (Code Civ. Proc. §§ 391–391.5) is to prevent "abuse" by "litigants who constantly file groundless actions." *Review of 1963 Code Legislation,* 38 Cal. St. B.J. 601, 663 (1963). In the defamation context (Code Civ. Proc. §§ 830–836), it is to discourage "the too common practice of instituting libel and slander suits inspired by mere spite or ill-will and without good faith." Shell Oil Co. v. Superior Court, 2 Cal. App.2d 348, 355, 37 P.2d 1078, 1081 (1934), *modified,* 5 Cal. App.2d 480, 42 P.2d 1049 (1935). The undertaking in the case of malpractice actions against architects, physicians, and others (Code Civ. Proc. §§ 1029.5, 1029.6) is to deter "frivolous" claims. Review of Selected 1969 Code Legislation 65 (Cal. Cont. Ed. Bar 1969); Review of Selected 1967 Code Legislation 57 (Cal. Cont. Ed. Bar 1967); Comment, *Exemplary Damages in Medical Malpractice Actions: California's Requirement for Posting of a Cost Bond by Plaintiff,* 4 Pac. L.J. 903 (1973). The requirement in shareholder derivative suits (Corp. Code § 834) is to discourage "frivolous" suits. *See* Beaudreau v. Superior Court, 14 Cal.3d 448, 462, 535 P.2d 713, 722, 121 Cal. Rptr. 585, 594 (1975). The undertaking requirement of the California Tort Claims Act (Govt. Code §§ 947, 951) was to deter "unmeritorious and frivolous litigation." *Id.* at 452, 535 P.2d at 715, 121 Cal. Rptr. at 587. See generally McDermott & Williams, *Security for Costs,* in 1 California Civil Procedure Before Trial §§ 14.1, 14.25, 14.57 (Cal. Cont. Ed. Bar 1977); Comment, *Due Process and Security for Expense Statutes: An Analysis of California Statutes in Light of Recent Trends,* 7 Pac. L.J. 176 (1976).

[3] Myers v. Carter, 178 Cal. App.2d 622, 625, 3 Cal. Rptr. 205, 207 (1960) (undertaking requirement is in recognition of "the probable difficulty or impracticability of

Provisions Held Unconstitutional

The provision requiring a cost bond upon the ex parte application of the defendant where punitive damages are sought in a malpractice action against a licensed health professional[4] was held violative of due process requirements in *Nork v. Superior Court*[5] as a deprivation of property without a hearing.

The portions of the California Tort Claims Act which allow the defendant public entity or public employee to require the plaintiff to furnish a cost bond by merely filing a demand[6] were held unconstitutional in *Beaudreau v. Superior Court*[7] for failure to provide for a hearing at which the merit of the plaintiff's action and the reasonableness of the amount demanded could be determined.[8]

On the authority of the *Beaudreau* case, *Allen v. Jordanos' Inc.*[9] held unconstitutional the requirement that a plaintiff in an action for libel or slander provide a cost bond before summons is issued.[10]

The court in *Gonzalez v. Fox*[11] applied the standards enunciated in *Beaudreau* to invalidate the statute requiring a nonresident plaintiff to furnish a cost bond.[12]

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enforcing judicial mandates against persons not dwelling within the jurisdiction of the courts").

[4] Code Civ. Proc. § 1029.6(e).

[5] 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).

[6] Govt. Code §§ 947, 951.

[7] 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

[8] The *Beaudreau* case is another of the many cases since Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), developing the constitutional requirement of a due process hearing before a party may be deprived, even temporarily, of its property. See, *e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Brooks v. Small Claims Court, 8 Cal.3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Cline v. Credit Bureau of Santa Clara Valley, 1 Cal.3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970). The plaintiff's "property" in this context is the nonrefundable corporate premium, the plaintiff's cash collateral, or—if no undertaking is furnished—the cause of action which is dismissed. Beaudreau v. Superior Court, 14 Cal.3d 448, 455–57, 535 P.2d 713, 717–18, 121 Cal. Rptr. 585, 589–90 (1975).

[9] 52 Cal. App.3d 160, 125 Cal. Rptr. 31 (1975).

[10] Code Civ. Proc. §§ 830–835.

[11] 68 Cal. App.3d Supp. 16, 137 Cal. Rptr. 312 (1977).

[12] Code Civ. Proc. § 1030.

Other Unconstitutional Provisions

At a minimum, to satisfy the constitutional requirements set forth in *Beaudreau,* a statute requiring security for costs must provide for a hearing on noticed motion to "inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in the light of the defendant's probable expenses".[13] If the plaintiff is clearly entitled to prevail and there is thus no reasonable possibility that the defendant will become entitled to recover costs,[14] security may not constitutionally be required from the plaintiff.[15]

The Commission has examined the cost bond statutes which have not yet been tested in light of the applicable constitutional requirements and has concluded that, in addition to those provisions explicitly held unconstitutional, the statutes requiring cost bonds in actions against the Regents of the University of California[16] and in certain actions against active members of the state militia[17] also fail to satisfy the constitutional requirements set forth in *Beaudreau* because they do not provide for a hearing. The statute requiring cost bonds in malpractice actions against architects and similar licensees[18] provides for a hearing to determine whether "there is no reasonable possibility that the plaintiff has a cause of action" and whether the plaintiff "would not suffer undue economic hardship" if required to file an undertaking, but is of doubtful constitutionality in that it establishes a flat $500 bond amount whereas it was held in *Beaudreau* that the reasonableness of the amount of the undertaking should be determined at a hearing.[19]

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[13] Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). The question of whether some of the damage bond statutes may be unconstitutional is closely analogous to the question in the cost bond context. *Cf.* Conover v. Hall, 11 Cal.3d 842, 851–52, 523 P.3d 682, 688, 114 Cal. Rptr. 642, 648 (1974). However, the more numerous damage bond provisions present a subject of considerably broader scope. The Commission has not made a study of the damage bond statutes. This recommendation is therefore confined to the cost bond problem.

[14] It should be noted, however, that the plaintiff may prevail and still be liable for some of the defendant's costs, such as where the defendant makes an offer to compromise under Code of Civil Procedure Section 998 and the plaintiff fails to recover a more favorable judgment.

[15] *See* Bell v. Burson, 402 U.S. 535, 540 (1971); Beaudreau v. Superior Court, 14 Cal.3d 448, 458–61, 535 P.2d 713, 719–20, 121 Cal. Rptr. 585, 591–93 (1975); Rios v. Cozens, 7 Cal.3d 792, 796–97, 499 P.2d 979, 982–83, 103 Cal. Rptr. 299, 302 (1972).

[16] Educ. Code § 92650.

[17] Mil. & Vet. Code § 393.

[18] Code Civ. Proc. § 1029.5.

[19] 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

Disposition of Unconstitutional Provisions

This recommendation is concerned with the disposition of the cost bond provisions that are unconstitutional.[20] These provisions should either be repealed or be amended to comport with the requirements of due process.

In determining whether the unconstitutional cost bond statutes should be repealed or revised, the Commission has considered whether the statutory purpose is being promoted and has weighed the need for cost bond provisions against the administrative and financial burdens of a procedure that would satisfy the mandates of *Beaudreau.*

Cost bonds assuredly deter some frivolous litigation. However, in several statutes the amount of the bond does not appear to be a significant bar to unmeritorious suits.[21] And if an unmeritorious action is brought by an indigent plaintiff, the cost bond requirement may be waived.[22] Statutes which permit the defendent to require any plaintiff to furnish a cost bond without regard to the merit

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[20] The following provisions appear to satisfy the constitutional requirements of *Beaudreau* Code Civ. Proc. §§ 391–391.5 (action by vexatious litigant), 1029.5 (malpractice action against architect or similar licensee) (except as discussed in the text accompanying note 19 *supra*), 1029.6(a)–(d), (f), (g) (malpractice action against licensed health professional); Corp. Code §§ 800 (shareholders' derivative action under General Corporation Law), 5710 (members' derivative action under Nonprofit Corporation Law) [A.B. 2180, 1978 session], 7710 (members' derivative action under Nonprofit Mutual Benefit Corporation Law) [A.B. 2180, 1978 session]; Fin. Code § 7616 (derivative action by shareholder of savings and loan association).

The Commission previously prepared legislation to correct the constitutional defects in the cost bond statutes and to provide a uniform hearing procedure. See *Recommendation Relating to Undertakings for Cost,* 13 Cal. L. Revisions Comm'n Reports 901 (1976). At that time, the Commission expressly reserved judgment on the soundness of the policies underlying cost bond statutes and expressed no view concerning the kinds of cases in which an undertaking should be required. *Id.* at 903. Legislation to implement this first recommendation was introduced as Assembly Bill 2847 in the 1976 legislative session but was not approved. At legislative hearings on the bill, committee members expressed concern about the underlying policy behind cost bond provisions.

[21] See Code Civ. Proc. §§ 830 (flat $500 in libel and slander actions), 1029.5 ($500 per defendant, not to exceed $3,000, in malpractice actions against architects), 1029.6 (not to exceed $500 per defendant, or $1,000 total, in malpractice actions against health professionals).

[22] *See* Beaudreau v. Superior Court, 14 Cal.3d 448, 454 n.8, 535 P.2d 713, 716, 121 Cal. Rptr. 585, 588 (1975); Conover v. Hall, 11 Cal.3d 842, 850–53, 523 P.2d 682, 687–89, 114 Cal. Rptr. 642, 647–49 (1974). See also Boddie v. Connecticut, 401 U.S. 371 (1971) (waiver of filing fee constitutionally required for indigent plaintiff seeking divorce in "good faith"); Fuller v. State, 1 Cal. App.3d 664, 82 Cal. Rptr. 78 (1969), *cert. denied,* 400 U.S. 836 (1970) (trial court not required to waive undertaking for indigent plaintiff absent showing of inability to obtain sureties).

of the plaintiff's claim unfairly (and unconstitutionally) restrict access to the courts. While there may be special need in some of these situations to deter frivolous litigation, it is not clear that the existing provisions are properly designed to accomplish this purpose. The need for cost bond statutes also appears much less acute when it is remembered that there are several other relatively inexpensive devices for summarily disposing of unmeritorious actions, such as motions for summary judgment,[23] motions for judgment on the pleadings,[24] general demurrers,[25] and objections to all evidence.[26]

The administrative and financial burdens that would result from revising the unconstitutional cost bond statutes to comply with *Beaudreau* would be substantial. Under *Beaudreau* a fairly detailed evidentiary hearing would have to take place to determine the merit of the plaintiff's cause of action and the probable amount of the defendant's allowable costs and attorney's fees, and in some cases the indigency of the plaintiff. Such a hearing would comsume time and money of both the parties and the courts. Further delay and expense would occur in proceedings to determine the sufficiency of the sureties or in contesting the findings of the court regarding the validity of the claim and the amount of costs and attorney's fees to be secured. In some situations, the motion for a cost bond could be used as a dilatory tactic by delaying it until late in the proceedings.[27] As a consequence of extending the procedures mandated by *Beaudreau* to all cost bond provisions, frivolous litigation may be proliferated in some cases, both by plaintiffs and defendants contesting determinations in the cost bond proceedings. Furthermore, many plaintiffs with meritorious claims would be subjected to the expense of cost bond proceedings.

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[23] See Code Civ. Proc. § 437c; 4 B. Witkin, California Procedure *Proceedings Without Trial* §§ 173–174, at 2825–28 (2d ed. 1971).

[24] See 4 B. Witkin, California Procedure *Proceedings Without Trial* §§ 161–162, at 2816–18 (2d ed. 1971); 1 California Civil Procedure Before Trial §§ 13.1–13.15 (Cal. Cont. Ed. Bar 1977).

[25] See Code Civ. Proc. § 589; 3 B. Witkin, California Procedure *Pleading* §§ 796–853, at 2408–56 *passim* (2d ed. 1971).

[26] See 4 B. Witkin, California Procedure *Proceedings Without Trial* §§ 171–172, at 2823–25 (2d ed. 1971).

[27] The courts may look with disapproval upon a demand for security that is made right before trial, absent a showing of excuse for delay. See Straus v. Straus, 4 Cal. App.2d 461, 41 P.2d 218 (1935).

Recommendations

Repeal of Unconstitutional Cost Bond Statutes

The Commission recommends that, with three exceptions, the unconstitutional cost bond statutes be repealed because, in these cases, the need for cost bonds to deter frivolous litigation is not sufficient to justify imposing the procedural burden that would necessarily result from revising these statutes to comply with *Beaudreau.* Accordingly, statutes providing for cost bonds in the following types of actions should be repealed: actions for libel or slander, actions against the Regents of the University of California, actions against public entities, actions against public employees, and actions against members of the state militia. The three exceptions, discussed below, are cost bonds in malpractice actions against architects and licensed health professionals and cost bonds in actions by nonresident plaintiffs.

Malpractice Actions Against Architects and Licensed Health Professionals

The Commission does not recommend the repeal of statutes providing for cost bonds in malpractice actions against architects and licensed health professionals.[28] These are recently enacted statutes which, it has been argued, are needed to deter frivolous litigation that is especially acute in these areas because of increasing insurance premiums, reduced coverage, and higher deductible amounts.[29]

The cost bond statute in malpractice actions against architects should be amended to make the $500 bond amount a maximum rather than a flat amount. The $500 flat amount provided in Code of Civil Procedure Section 1029.5 is of doubtful constitutionality because the amount of the undertaking must be reasonable in the light of the defendant's probable expenses.[30]

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[28] Code Civ. Proc. §§ 1029.5 (malpractice action against architect or similar licensee), 1029.6 (malpractice action against licensed health professional).

[29] See Review of Selected 1967 Code Legislation 57 (Cal. Cont. Ed. Bar 1967); see also Review of Selected 1969 Code Legislation 65–67 (Cal. Cont. Ed. Bar 1969); Comment, *Exemplary Damages in Mediçal Malpractice Actions: California's Requirement for Posting of a Cost Bond by Plaintiff,* 4 Pac. L.J. 903 (1973).

[30] *See* Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

The cost bond statute in malpractice actions against licensed health professionals should be amended to delete the unconstitutional ex parte procedure for requiring cost bonds in cases where the plaintiff sues for exemplary damages.[31]

Actions by Nonresident Plaintiffs

The need to secure costs and attorney's fees in actions by nonresident plaintiffs is significant if there is a reasonable possibility that the defendant will prevail. However, as already discussed, the existing statute[32] is seriously deficient in that it does not meet the requirements of *Beaudreau.* The cost bond statute in actions by nonresident plaintiffs should be revised to comply with constitutional requirements and to more effectively achieve its purpose of securing expenses that otherwise might be unrecoverable. The following revisions should be made:

(1) The undertaking should secure the defendant's allowable costs and, where otherwise authorized, attorney's fees. The existing statute provides for an undertaking to secure the defendant's "costs and charges," but the logic supporting the requirement for security for costs applies equally to security for attorney's fees which are otherwise recoverable.

(2) The defendant should be required to show the probable allowable costs and, if recovery is authorized, attorney's fees, at a hearing held on noticed motion. Under existing law, the defendant merely serves the plaintiff with a notice that security is required and the plaintiff must file an undertaking in the amount of at least $300; this amount may be increased upon a showing that the original undertaking is insufficient security.[33]

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[31] Code of Civil Procedure Section 1029.6(e) was held unconstitutional in Nork v. Superior Court, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).

[32] Code Civ. Proc. § 1030.

[33] All of the defendant's probable costs and attorney's fees (if recoverable) should be secured if the court finds that the plaintiff's claim lacks merit. The plaintiff is protected against exorbitant cost bond requirements by the opportunity to appear at a hearing, the necessity of the defendant's establishing probable costs and attorney's fees, and by the provision for a decrease in the amount of the undertaking if it later appears to be excessive.

(3) The court should be authorized to require the undertaking in any case where there is a reasonable possibility that the defendant will prevail, since the purpose of the undertaking is to secure the defendant's costs. Under existing law, an undertaking may be required merely on the basis of nonresidency.

(4) The action should be dismissed if the plaintiff does not file the undertaking within 30 days after notice of the court's order, or within such longer period as the court allows.[34]

(5) The sureties should be subject to the approval of the court and the defendant should be permitted to object to the sureties. Existing law does not provide for approval of or objection to sureties; they may be challenged only by way of a motion for a new or additional undertaking.[35]

(6) The court should be authorized to increase or decrease the amount of the undertaking after a hearing on noticed motion.

(7) There should be a mandatory stay of the action if the defendant's motion for an undertaking is filed within 30 days after service of summons, and a discretionary stay if the motion is filed later. The existing statute does not limit the time within which the defendant may require the undertaking.[36] The recommended limitation is necessary to inhibit the use of the cost bond procedure as a dilatory tactic.

(8) The determination of the court on the motion for an undertaking should have no effect on the determination of the merits of the action.[37]

Proposed Legislation

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

An act to amend Sections 1029.5, 1029.6, and 1030 of, to add Section 1037 to, and to repeal Chapter 7 (commencing

[34] Under existing law, the statutory time limit may be extended upon a showing of good cause. See Code Civ. Proc. § 1054.

[35] *See* Estate of Baker, 176 Cal. 430, 434, 168 P. 881, 882 (1917).

[36] *But see* note 27 *supra.*

[37] Similar provisions appear in Code Civ. Proc. §§ 391.2, 1029.5(a), 1029.6(a); Corp. Code § 800(d).

with Section 830) of Title 10 of Part 2 of, the Code of Civil Procedure, to repeal Section 92650 of the Education Code, to repeal Sections 947 and 951 of the Government Code, and to amend Section 393 of the Military and Veterans Code, relating to security for costs and attorney's fees.

Libel and Slander Actions

Code of Civil Procedure §§ 830–836 (repealed)

SECTION 1. Chapter 7 (commencing with Section 830) of Title 10 of Part 2 of the Code of Civil Procedure is repealed.

~~830. Before issuing the summons in an action for libel or slander, the clerk shall require a written undertaking on the part of the plaintiff in the sum of five hundred dollars ($500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. An action brought without filing the required undertaking shall be dismissed.~~

Comment. Section 830 has been repealed because it was held unconstitutional in Allen v. Jordanos' Inc., 52 Cal. App.3d 160, 164, 125 Cal. Rptr. 31, 33 (1975). See also Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

~~831. Each surety shall annex to the undertaking an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.~~

Comment. See the Comment to Section 830.

~~832. Within 10 days after the service of the summons, any defendant may give to the plaintiff or his attorney notice that he excepts to the sureties and requires their justification before a judge of the court at a specified time and place. The time shall be not less than five or more than~~

~~10 days after the service of the notice, except by consent of parties. The qualifications of the sureties shall be as required in their affidavits.~~

Comment. See the Comment to Section 830.

~~833. For the purpose of justification each surety shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath touching his sufficiency in such manner as the judge deems proper. The examination shall be reduced to writing if either party desires it.~~

Comment. See the Comment to Section 830.

~~834. If the judge finds the undertaking sufficient, he shall annex the examination to the undertaking and endorse his approval upon it. If the sureties fail to appear or the judge finds either surety insufficient, he shall order a new undertaking to be given. The judge may at any time order a new or additional undertaking upon proof that the sureties have become insufficient. If a new or additional undertaking is ordered, all proceedings in the case shall be stayed until the new undertaking is executed and filed, with the approval of the judge.~~

Comment. See the Comment to Section 830.

~~835. If the undertaking as required is not filed in five days after the order therefor, the judge or court shall order the action dismissed.~~

Comment. See the Comment to Section 830.

~~836. If the plaintiff recovers judgment, he shall be allowed as costs one hundred dollars ($100) to cover counsel fees in addition to the other costs. If the action is dismissed or the defendant recovers judgment, he shall be allowed one hundred dollars ($100) to cover counsel fees in addition to other costs, and judgment shall be entered accordingly.~~

Comment. Former Section 836 is reenacted without substantive change as Section 1037.

Malpractice Actions Against Architects and Others

Code of Civil Procedure § 1029.5 (amended)

SEC. 2. Section 1029.5 of the Code of Civil Procedure is amended to read:

1029.5. (a) Whenever a complaint for damages is filed against any architect, landscape architect, engineer, building designer, or land surveyor, duly licensed as such under the laws of this state, in an action for error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports or surveys which are the basis for work performed or agreed to be performed on real property, any such defendant may, within 30 days after service of summons, move the court for an order, upon notice and hearing, requiring the plaintiff to furnish a written undertaking, with at least two sufficient sureties, in ~~the~~ *a* sum ~~of~~ *not to exceed* five hundred dollars ($500) as security for the costs of defense as provided in subdivision (d), which may be awarded against such plaintiff. Such motion shall be supported by affidavit showing that the claim against such defendant is frivolous.

At the hearing upon such motion, the court shall order the plaintiff to file such security if the defendant shows to the satisfaction of the court that (i) the plaintiff would not suffer undue economic hardship in filing such written undertaking, and (ii) there is no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file such written undertaking. No appeal shall be taken from any order made pursuant to this subdivision to file or not to file such security.

A determination by the court that security either shall or shall not be furnished or shall be furnished as to one or more defendants and not as to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof. If the court, upon any such motion, makes a determination that a written undertaking be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court.

(b) This section does not apply to a complaint for bodily injury or for wrongful death, nor to an action commenced in a small claims court.

(c) Whenever more than one such defendant is named, the undertaking shall be increased to the extent of *not to exceed* five hundred dollars ($500) for each additional defendant in whose favor such undertaking is ordered not to exceed the total of three thousand dollars ($3,000).

(d) In any action requiring a written undertaking as provided in this section, upon the dismissal of the action or the award of judgment to the defendant, the court shall require the plaintiff to pay the defendant's costs of defense authorized by law. Any sureties shall be liable for such costs in an amount not to exceed the sum of five hundred dollars ($500) for each defendant with respect to whom such sureties have executed a written undertaking. If the plaintiff prevails in the action against any defendant with respect to whom such security has been filed, such defendant shall pay the cost to plaintiff of obtaining such written undertaking.

Comment. Subdivisions (a) and (c) of Section 1029.5 are amended to change the flat $500 amount to a maximum amount to conform to the constitutional standard enunciated in Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). This amendment makes Section 1029.5 consistent in this respect with Section 1029.6.

Malpractice Actions Against Doctors and Others

Code of Civil Procedure § 1029.6 (amended)

SEC. 3. Section 1029.6 of the Code of Civil Procedure is amended to read:

1029.6. (a) Whenever a complaint for damages for personal injuries is filed against a physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or veterinarian, duly licensed as such under the laws of this state, or a licensed hospital as the employer of any such person, in an action for error, omission, or negligence in the

performance of professional services, or performance of professional services without consent, any such defendant may, within six months after service of summons, move the court for an order, upon notice to plaintiff and all defendants having appeared in the action, and hearing, requiring the plaintiff to furnish a written undertaking, with at least two sufficient sureties, in a sum not to exceed five hundred dollars ($500), or to deposit such sum or equivalent security approved by the court with the clerk of the court, as security for the costs of defense as provided in subdivision (d), which may be awarded against such plaintiff. Such motion shall be supported by affidavit showing that the claim against such defendant is frivolous. Any defendant having appeared in the action and within 30 days after receipt of notice may join with the moving party requesting an order under this section as to such additional defendant. The failure of any defendant to join with the moving party shall preclude each such defendant from subsequently requesting an order under this section.

At the hearing upon such motion, the court shall order the plaintiff to furnish such security if the defendant shows to the satisfaction of the court that: (i) the plaintiff would not suffer undue economic hardship in filing such written undertaking or making such deposit and (ii) there is no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file such written undertaking or make such deposit.

A determination by the court that security either shall or shall not be furnished or shall be furnished as to one or more defendants and not as to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof. If the court, upon any such motion, makes a determination that a written undertaking or deposit be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court.

(b) This section does not apply to a complaint in an action commenced in a small claims court.

(c) Whenever more than one such defendant is named, the undertaking or deposit shall be increased to the extent of not to exceed five hundred dollars ($500) for each additional defendant in whose favor such undertaking or deposit is ordered, not to exceed the total of one thousand dollars ($1,000).

(d) In any action requiring a written undertaking or deposit as provided in this section, upon the dismissal of the action or the award of judgment to the defendant, the court shall require the plaintiff to pay the defendant's court costs. Any sureties shall be liable for such costs in an amount not to exceed the sum of five hundred dollars ($500) or the amount of the undertaking, whichever is lesser, for each defendant with respect to whom such sureties have executed a written undertaking or the plaintiff has made a deposit. If the plaintiff prevails in the action against any defendant with respect to whom such security has been filed, such defendant shall pay the costs to plaintiff incurred in obtaining such written undertaking or deposit and defending the motion for dismissal authorized by this section.

~~(e) Whenever a complaint described in subdivision (a) requests an award of exemplary damages, any defendant against whom the damages are sought may move the court for an ex parte order requiring the plaintiff to file a corporate surety bond, approved by the court, or make a cash deposit in an amount fixed by the court. Upon the filing of the motion, the court shall require the plaintiff to file the bond or make the cash deposit. In no event shall the bond or cash deposit be less than two thousand five hundred dollars ($2,500). The bond or cash deposit shall be conditioned upon payment by the plaintiff of all costs and reasonable attorney's fees incurred by the defendant in defending against the request for the award of exemplary damages, as determined by the court, if the plaintiff fails to recover any exemplary damages. The order requiring the bond or cash deposit shall require the bond to be filed or cash deposit to be made with the clerk of the court not later than 30 days after the order is served. If the bond is not filed or the cash deposit is not made within such period, upon the motion of the defendant, the court shall strike the portion~~

~~of the complaint which requests the award of exemplary damages.~~

~~(f)~~ *(e)* Any defendant filing a motion under this section or joining with a moving party under this section is precluded from subsequently filing a motion for summary judgment.

~~(g)~~ *(f)* Any defendant filing a motion for summary judgment is precluded from subsequently filing a motion, or joining with a moving party, under this section.

Comment. Former subdivision (e) has been deleted because it was held unconstitutional in Nork v. Superior Court, 33 Cal. App.3d 997, 1000–01, 109 Cal. Rptr. 428, 430–31 (1973). See also Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). Former subdivisions (f) and (g) have been renumbered as subdivisions (e) and (f), respectively.

Actions by Nonresident Plaintiffs

SEC. 4. Section 1030 of the Code of Civil Procedure is amended to read:

1030. *(a)* When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, ~~security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceedings must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the judge if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars ($300). A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed. Any stay of proceedings granted under the provisions of this section shall extend to a period 10 days after service upon the defendant of written notice of the filing of the required undertaking.~~

~~After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as~~

~~required has been filed, the court or judge, may order the action or special proceeding to be dismissed.~~ *the defendant may at any time move the court for an order requiring the plaintiff to furnish a written undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding.*

(b) The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.

(c) If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

(d) The amount of the undertaking initially determined may be increased or decreased by the court, after further hearing upon noticed motion, if the court determines that the undertaking has or may become inadequate or excessive because of a change in the amount of the probable allowable costs and attorney's fees which the defendant will have incurred by the conclusion of the action or special proceeding.

(e) The plaintiff shall file or increase the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file or increase the undertaking within the time allowed, the plaintiff's action or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

(f) Except as otherwise provided by statute, the undertaking shall have at least two sufficient sureties to be approved by the court. If the undertaking is given by individual sureties, the defendant may except to a surety by

noticed motion requiring the appearance of the surety before the court at a time specified in the notice for examination under oath concerning the sufficiency of the surety. If the surety fails to appear, or if the court finds the surety insufficient, the court shall order that a new undertaking be given.

(g) If the defendant's motion for an order requiring an undertaking is filed not later than 30 days after service of summons on the defendant, no pleading need be filed by the defendant and all further proceedings are stayed until 10 days after the motion is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been given written notice of the filing. If the defendant's motion for an order requiring an undertaking is filed later than 30 days after service of summons on the defendant, if the defendant excepts to a surety, or if the court orders the amount of the undertaking increased, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been given written notice of the filing.

(h) The determinations of the court under this section have no effect on the determination of any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding.

(i) An order granting or denying a motion for an undertaking under this section is not appealable.

Comment. Section 1030 is amended to conform to the constitutional standards enunciated in Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), and Gonzales v. Fox, 68 Cal. App.3d Supp. 16, 137 Cal. Rptr. 312 (1977).

Subdivision (a) of Section 1030 permits the defendant to require the plaintiff to file an undertaking to secure both costs and allowable attorney's fees whereas Section 1030 formerly referred to "costs and charges." This section does not provide any authority for an award of attorney's fees not otherwise made recoverable by contract or statute. The provision for requiring an undertaking for the probable amount of costs and attorney's fees without limitation supersedes the former provision for an initial

undertaking not exceeding $300 with the opportunity to obtain a new or increased undertaking without limitation. See McDermott & Williams, *Security for Costs,* in 1 California Civil Procedure Before Trial § 14.23, at 477 (Cal. Cont. Ed. Bar 1977).

Since the purpose of this section is to afford security for an award of costs which the defendant might otherwise have difficulty enforcing against a nonresident plaintiff, subdivision (b) permits an undertaking to be required whenever there is a "reasonable possibility" that the defendant will prevail in the action. *Cf.* Bell v. Burson, 402 U.S. 535, 540 (1971) (State of Georgia may not constitutionally require security for damages from uninsured motorist if there is "no reasonable possibility" of a judgment against motorist).

Subdivisions (b) and (c) provide for a hearing on noticed motion whereas this section formerly provided for a hearing only when the defendant sought a new or additional undertaking. Although the language of subdivision (c) is mandatory, the court has the common law authority to dispense with the undertaking if the plaintiff is indigent. *E.g.,* Conover v. Hall, 11 Cal.3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974). Under Section 1054a, the plaintiff may deposit money or bearer bonds or bearer notes of the United States or California in lieu of an undertaking.

Subdivision (d) continues the substance of a portion of what was formerly the third sentence of Section 1030, and also permits the amount of the undertaking to be decreased.

Subdivision (e) provides for dismissal if the undertaking is not filed within 30 days, as did the former last paragraph of Section 1030, but the 30-day period runs from service of the order on the plaintiff rather than from service of a notice that security is required. Failure to file within the prescribed time is not jurisdictional, and the court may accept a late filing. Boyer v. County of Contra Costa, 235 Cal. App.2d 111, 115–18, 45 Cal. Rptr. 58, 61–63 (1965). If the court authorizes the undertaking to be decreased as provided by subdivision (d), compliance by the plaintiff is optional.

The first sentence of subdivision (f) continues a portion of what was formerly the second sentence of Section 1030. The provision for excepting to the sufficiency of sureties is new. Formerly, sureties could be challenged only by way of a motion for a new or additional undertaking. *See* Estate of Baker, 176 Cal. 430, 168 P. 881 (1917). See also Sections 1056 (single corporate surety sufficient), 1057 (qualifications of individual surety), 1057a–1057b (qualifications and justification of corporate surety).

Subdivision (g) is a new provision which supersedes the former provision for an indefinite stay and for a stay of 10 days after service on the defendant of notice of the filing of the undertaking.

Subdivision (h) is new and is derived from comparable provisions in cost bond statutes requiring hearings. See, *e.g.,* Code Civ. Proc. §§ 391.2, 1029.5(a), 1029.6(a); Corp. Code § 800(d).

Subdivision (i) codifies existing law. *See* Horton v. City of Beverly Hills, 261 Cal. App.2d 306, 67 Cal. Rptr. 759 (1968). An order granting or denying a motion for an undertaking may sometimes be reviewed by extraordinary writ. *See* Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). A judgment of dismissal following the plaintiff's failure to furnish required security is appealable as a final judgment. Efron v. Kalmanovitz, 185 Cal. App.2d 149, 156–57, 8 Cal. Rptr. 107, 112 (1960).

Attorney's Fees in Libel and Slander Actions

Code of Civil Procedure § 1037 (added)

SEC. 5. Section 1037 is added to the Code of Civil Procedure, to read:

1037. If the plaintiff recovers judgment in an action for libel or slander, the plaintiff shall be allowed as costs one hundred dollars ($100) to cover counsel fees in addition to the other costs. If the action is dismissed or the defendant recovers judgment, the defendant shall be allowed one hundred dollars ($100) to cover counsel fees in addition to other costs, and judgment shall be entered accordingly.

Comment. Section 1037 continues former Section 836 without substantive change.

Actions Against Regents of University of California

Education Code § 92650 (repealed)

SEC. 6. Section 92650 of the Education Code is repealed.

~~92650. (a) At any time after the filing of the complaint in any action against the Regents of the University of California, the regents may file and serve a demand for a written undertaking on the part of each plaintiff as security~~

~~for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100) for the plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars ($200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.~~

~~(b) If judgment is rendered for the regents in any action against it, allowable costs incurred by the regents in the action shall be awarded against the plaintiffs.~~

~~(c) This section does not apply to an action commenced in a small claims court.~~

Comment. Section 92650 has been repealed. This section did not meet the constitutional standards enunciated in Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), which held unconstitutional Government Code Sections 947 and 951, the cost bond provisions of the California Tort Claims Act.

Actions Against Public Entities

Government Code § 947 (repealed)

SEC. 7. Section 947 of the Government Code is repealed.

~~947. (a) At any time after the filing of the complaint in any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100) for each plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars ($200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.~~

~~(b) This section does not apply to an action commenced in a small claims court.~~

Comment. Section 947 has been repealed. This section was held unconstitutional in Beaudreau v. Superior Court, 14 Cal.3d 448, 460–65, 535 P.2d 713, 720–24, 121 Cal. Rptr. 585, 592–96 (1975).

Actions Against Public Employees

Government Code § 951 (repealed)

SEC. 8. Section 951 of the Government Code is repealed.

~~951. (a) At any time after the filing of the complaint in any action a public employee or former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, his action shall be dismissed.~~

~~(b) This section does not apply to an action commenced in a small claims court.~~

Comment. Section 951 has been repealed. This section was held unconstitutional in Beaudreau v. Superior Court, 14 Cal.3d 448, 460–65, 535 P.2d 713, 724, 121 Cal. Rptr. 585, 596 (1975).

Actions Against Members of Militia

Military & Veterans Code § 393 (amended)

SEC. 9. Section 393 of the Military and Veterans Code is amended to read:

393. *(a)* ~~When~~ *In* an action or proceeding of any nature ~~is~~ commenced in any court against an active member of the militia in active service in pursuance of an order of the President of the United States as a result of a state emergency for an act done by such member in ~~his~~ *an* official capacity in the discharge of duty, or an alleged omission ~~by him~~ to do an act which it was ~~his~~ *the member's* duty to perform, or against any person acting under the authority

or order of an officer ~~;~~ or by virtue of a warrant issued by ~~him~~ *an officer* pursuant to ~~law, the defendant may require the person instituting or prosecuting the action or proceeding to file security in an amount of not less than one hundred dollars ($100), to be fixed by the court, for the payment of costs that may be awarded to the defendant therein.~~ *law:*

(1) The defendant in all cases may make a general denial and give special matter in evidence.

(2) A defendant in whose favor a final judgment is rendered in any such action or proceeding shall recover treble costs.

(b) The Attorney General shall defend such active member or person where the action or proceeding is civil. The senior judge advocate on the state staff or one of the judge advocates shall defend such active member or person where the action or proceeding is criminal, and the Adjutant General shall designate the senior judge advocate on the state staff, or one of the judge advocates, to defend such active member or person.

(c) In the event such active member or person is not indemnified by the federal government, Section 825 of the Government Code shall apply to such active member or person.

Comment. The provision permitting the defendant to require the plaintiff to provide security for costs has been deleted from Section 393 because it was in conflict with the constitutional standards enunciated in Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), which held unconstitutional Government Code Sections 947 and 951, the cost bond provisions of the California Tort Claims Act.

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- Number 4—Discovery in Eminent Domain Proceedings [The first three pamphlets (unnumbered) in Volume 3 also deal with the subject of condemnation law and procedure.]

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- Number 1—Tort Liability of Public Entities and Public Employees
- Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees
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- Article VI (Extrinsic Policies Affecting Admissibility)
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Annual Report (December 1967) includes following recommendations:
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- Abandonment or Termination of a Lease
- The Good Faith Improver of Land Owned by Another
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Tentative Recommendation and A Study Relating to Condemnation Law and Procedure: Number 1—Possession Prior to Final Judgment and Related Problems

VOLUME 9 (1969)

Annual Report (December 1968) includes following recommendations:
- Recommendation Relating to Sovereign Immunity: Number 9—Statute of Limitations in Actions Against Public Entities and Public Employees
- Recommendation Relating to Additur and Remittitur

Recommendation Relating to Fictitious Business Names

Annual Report (December 1969) includes following recommendations:
- Recommendation Relating to Quasi-Community Property
- Recommendation Relating to Arbitration of Just Compensation
- Recommendation Relating to the Evidence Code: Number 5—Revisions of the Evidence Code
- Recommendation Relating to Real Property Leases
- Proposed Legislation Relating to Statute of Limitations in Actions Against Public Entities and Public Employees

Recommendation and Study Relating to:
- Mutuality of Remedies in Suits for Specific Performance
- Powers of Appointment
- Fictitious Business Names
- Representations as to the Credit of Third Persons and the Statute of Frauds
- The "Vesting" of Interests Under the Rule Against Perpetuities

Recommendation Relating to:
- Real Property Leases
- The Evidence Code: Number 4—Revision of the Privileges Article
- Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act

VOLUME 10 (1971)

Annual Report (December 1970) includes the following recommendation:
- Recommendation Relating to Inverse Condemnation: Insurance Coverage

Annual Report (December 1971) includes the following recommendation:
- Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Discharge From Employment

California Inverse Condemnation Law [out of print]

Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law [out of print]

VOLUME 11 (1973)

Annual Report (December 1972)

Annual Report (December 1973) includes the following recommendations:
- Evidence Code Section 999—The "Criminal Conduct" Exception to the Physician-Patient Privilege
- Erroneously Ordered Disclosure of Privileged Information

Recommendation and Study Relating to:
- Civil Arrest

Inheritance Rights of Nonresident Aliens
Liquidated Damages

Recommendation Relating to:
Wage Garnishment and Related Matters
The Claim and Delivery Statute
Unclaimed Property
Enforcement of Sister State Money Judgments
Prejudgment Attachment
Landlord-Tenant Relations

Tentative Recommendation Relating to:
Prejudgment Attachment

VOLUME 12 (1974)

Annual Report (December 1974) includes following recommendations:
Payment of Judgments Against Local Public Entities
View by Trier of Fact in a Civil Case
The Good Cause Exception to the Physician-Patient Privilege
Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments

Recommendation Proposing the Eminent Domain Law

Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts

Recommendation Relating to Wage Garnishment Exemptions

Tentative Recommendations Relating to Condemnation Law and Procedure:
The Eminent Domain Law
Condemnation Authority of State Agencies
Conforming Changes in Special District Statutes

VOLUME 13 (1976)

Annual Report (December 1975) includes following recommendations:
Admissibility of Copies of Business Records in Evidence
Turnover Orders Under the Claim and Delivery Law
Relocation Assistance by Private Condemnors
Condemnation for Byroads and Utility Easements
Transfer of Out-of-State Trusts to California
Admissibility of Duplicates in Evidence
Oral Modification of Contracts
Liquidated Damages

Annual Report (December 1976) includes following recommendations:
Service of Process on Unincorporated Associations
Sister State Money Judgments
Damages in Action for Breach of Lease
Wage Garnishment

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

VOLUME 14 (1978)

[Volume expected to be available in December 1979]

Annual Report (December 1977) includes following recommendations:
Use of Keepers Pursuant to Writs of Execution (March 1977)
Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for Benefit of Creditors (April 1977)
Review of Resolution of Necessity by Writ of Mandate (September 1977)
Use of Court Commissioners Under the Attachment Law (October 1977)
Evidence of Market Value of Property (October 1977)
Psychotherapist-Patient Privilege (October 1977)
Parol Evidence Rule (November 1977)
Annual Report (December 1978) includes following recommendations:
Technical Revisions in the Attachment Law: Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action" (February 1978)
Ad Valorem Property Taxes in Eminent Domain Proceedings (September 1978)
Security for Costs (October 1978)
Recommendation Relating to Guardianship-Conservatorship Law (November 1978)

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