

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Annual Report



December 1982

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

THE CALIFORNIA LAW REVISION COMMISSION

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 16 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1983.

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SUMMARY OF WORK OF COMMISSION

The California Law Revision Commission's major recommendation to the 1983 session proposes the enactment of a new statute governing wills, intestate succession and related matters. Other recommendations to the 1983 session deal with such matters as emancipated minors, missing persons, notice in limited conservatorship proceedings, nonprobate transfers, disclaimer of testamentary and other interests, property subject to division upon marriage dissolution, creditors' remedies, bonds and undertakings, dismissal of civil actions for lack of prosecution, rejection of late claims against public entities, and liability of marital property for debts and obligations.

In 1982, 10 of 11 bills recommended by the Commission were enacted. A comprehensive statute relating to enforcement of judgments was enacted. The enactment of this statute (and the conforming legislation contained in a separate bill) is the culmination of a seven-year Commission project. Other bills enacted in 1982 dealt with:

- increase in the interest rate on judgments.
- handwritten and oral wills.
- prejudgment attachment.
- authorization of financial institutions to offer accounts payable on death to the beneficiary designated by the depositor.
- bonds and undertakings.
- marketable title of real property.
- escheat.

A Joint Resolution relating to federal pensions and benefits as community property also was adopted.

Commission recommendations enacted by the 1982 session affected 1,649 sections of the California statutes: 722 new sections were enacted, 496 sections were amended, and 431 sections were repealed.

During 1983, the Commission plans to devote its attention to securing the enactment of legislation recommended to the 1983 Legislature and to work on three projects:

- probate law.
- community property law.
- statutes of limitations on felonies.

Other topics will be considered to the extent time and resources permit.

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
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Chairperson

BEATRICE P. LAWSON

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ASSEMBLYMAN ALISTER McALISTER

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JOHN B. EMERSON

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BION M. GREGORY

DAVID ROSENBERG

December 1, 1982

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 1982.

I am pleased to report that at the 1982 legislative session 10 of 11 bills introduced to implement the Commission's recommendations were enacted. In addition, two Commission recommended resolutions were adopted.

I would like to give special recognition to Assemblyman Alister McAlister. He serves as the Assembly member of the Commission. He was the author of 11 of the Commission recommended measures enacted in 1982. The favorable legislative reaction during the last 10 years to the Commission recommended measures has been attributable to a significant extent to the integrity, hard work, and wise counsel of Assemblyman McAlister. The Commission is indeed fortunate to have this outstanding legislator as its Assembly member.

I would also like to give special recognition to Senator Omer L. Rains. He introduced one important Commission recommended bill enacted in 1982 and did much to secure the passage of Commission recommended measures in the Senate.

He has served as the Senate member of the Commission since 1979, but his service as a Commission member will end when his term as Senator ends in December 1982. The Commission will miss his valuable assistance.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

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ANNUAL REPORT FOR THE YEAR 1982

INTRODUCTION

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

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

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

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

The Commission consists of:

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

—A Member of the Assembly appointed by the Speaker.

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

—The Legislative Counsel who is an ex officio member.

The Commission may study only topics that the Legislature by concurrent resolution authorizes it to study. The Commission now has a calendar of 31 topics.³

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

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

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

Commission recommendations have resulted in the enactment of legislation affecting 7,563 sections of the California statutes: 3,225 sections have been added, 1,769 sections amended, and 2,569 sections repealed. Of the 146 Commission recommendations submitted to the Legislature, 133 (91%) have been enacted into law either in whole or in substantial part.⁴

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

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

1983 LEGISLATIVE PROGRAM

The Commission plans to recommend legislation on the following subjects to the 1983 Legislature:

- (1) Wills and intestate succession.¹
- (2) Missing persons.²
- (3) Nonprobate transfers.³
- (4) Emancipated minors.⁴
- (5) Notice in limited conservatorship proceedings.⁵
- (6) Disclaimer of testamentary and other interests.⁶
- (7) Division of property on dissolution of marriage.⁷
- (8) Creditors' remedies.⁸
- (9) Dismissal of civil actions for lack of prosecution.⁹
- (10) Conforming changes to the Bond and Undertaking Laws.¹⁰
- (11) Rejection of late claims against public entities.¹¹
- (12) Liability of marital property for debts.¹²
- (13) Vacation of streets and highways.¹³

¹ See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

² See *Recommendation Relating to Missing Persons* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

³ See *Recommendation Relating to Nonprobate Transfers* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

⁴ See *Recommendation Relating to Emancipated Minors* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

⁵ See *Recommendation Relating to Notice in Limited Conservatorship Proceedings* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

⁶ See *Recommendation Relating to Disclaimer of Testamentary and Other Interests* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

⁷ See *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage* (September 1982), published as Appendix VII to this Report.

⁸ See *Recommendation Relating to Creditors' Remedies* (September 1982), published as Appendix VIII to this Report.

⁹ See *Recommendation Relating to Dismissal for Lack of Prosecution* (September 1982), published as Appendix IX to this Report.

¹⁰ See *Recommendation Relating to Conforming Changes to the Bond and Undertaking Law* (September 1982), published as Appendix X to this Report.

¹¹ See *Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity* (November 1982), published as Appendix XI to this Report.

¹² See *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984). Work on this recommendation will be completed early in 1983.

¹³ The Commission did not prepare a recommendation relating to the legislation to be submitted in 1983. The 1983 recommended legislation merely clarifies legislation earlier enacted upon Commission recommendation.

Other recommendations will be submitted if work on them is completed in time to permit their submission to the 1983 session of the Legislature.

MAJOR STUDIES IN PROGRESS

Probate Code

The 1980 session of the Legislature directed the Commission to make a study of the Probate Code. In response to this directive, the Commission has commenced a study of portions of the Uniform Probate Code and the existing California law relating to those portions.

In 1982, upon Commission recommendation, legislation was enacted permitting a will to be upheld as valid if the signature and material provisions of the will are in the handwriting of the testator. See 1982 Cal. Stats. ch. 187. See also *Recommendation Relating to Holographic and Nuncupative Wills*, 16 Cal. L. Revision Comm'n Reports 301 (1982). This legislation also repealed provisions permitting oral wills.

The Commission recommended to the 1981-82 legislative session legislation relating to nonprobate transfers. See *Recommendation Relating to Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605 (1980). This recommendation was enacted in part; provisions were enacted authorizing financial institutions to offer accounts payable on death to the beneficiary designated by the depositor. See 1982 Cal. Stats. ch. 269.

The Commission proposes for enactment in 1983 a new, comprehensive statute relating to wills and intestate succession. See *Tentative Recommendations Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982). Recommendations concerning other aspects of probate law and related areas—such as missing persons, emancipated minors, disclaimers, nonprobate transfers, and limited conservatorship proceedings—will also be submitted to the 1983 legislative session. See *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

The Commission has retained the following expert consultants to assist the Commission in its study of probate law: Professor Paul E. Basye, Hastings College of the Law, Professor Gail B. Bird, Hastings College of the Law, Professor James L. Blawie, University of Santa Clara School of Law, Professor Jesse Dukeminier, U.C.L.A. Law School, Professor Susan F. French,

U.C. Davis Law School, and Professor Russell D. Niles, Hastings College of the Law. The Commission is working in close cooperation with the Estate Planning, Trust and Probate Law Section of the State Bar.

Community Property

Another major topic under active study by the Commission is the law relating to community property. Work on this study has been divided into two phases.

The first phase covers the liability of various kinds of community property and separate property to third-party creditors for debts and tort obligations of either or both spouses. Professor William A. Reppy, Jr., Duke Law School, is the Commission's principal consultant on this phase of the topic. The background study he prepared for the Commission has been published. See Reppy, *Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143 (1980). The Commission's recommendation on this phase of the study will be submitted to the 1983 legislative session. See *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984).

The second phase covers the problems in connection with equal management and control of community property, the division of community property upon dissolution of marriage, and related problems. Professor Carol S. Bruch, U.C. Davis Law School, has prepared background studies on this phase of the topic. See Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L. J. 769 (1982), and *Management Powers and Duties Under California's Community Property Laws*, to be published in Volume 34 of Hastings Law Journal. Her background studies are now being reviewed by the Commission.

The Commission is working closely with the Property Division Committee of the State Bar Family Law Section. Professor Bruce Wolk, U.C. Davis Law School, serves as a special consultant on the tax aspects of the community property study.

The Commission submitted a recommendation relating to one aspect of this topic to the 1982 Legislature. See *Recommendation Relating to Federal Military and Other Federal Pensions as Community Property*, 16 Cal. L. Revision Comm'n Reports 47 (1982). The joint resolution recommended by the Commission was adopted as Resolution Chapter 44 of the Statutes of 1982. For

federal legislation, see Uniform Former Spouses' Protection Act, Cong., 2d Sess., 128 Cong. Rec. H5953 (daily ed. August 16, 1982), H.R. Rept. No. 749, 97th Cong., 2d Sess. 13 (1982).

The Commission has also prepared a *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage* (September 1982), published as Appendix VII to this Report. The Commission plans to submit this recommendation to the 1983 legislative session.

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

A comprehensive statute was enacted in 1982 relating to enforcement of judgments. 1982 Cal. Stats. ch. 1364. The Attachment Law was substantially revised and conforming changes were made in other statutes. 1982 Cal. Stats. chs. 1198 (attachment), 497 (conforming changes). See also *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980);

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).

Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701 (1982); *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001 (1982).

The Commission plans to submit additional recommendations relating to creditors' remedies to the 1983 legislative session. See *Recommendations Relating to Creditors' Remedies* (September 1982), published as Appendix VIII to this Report; *Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984).

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

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

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.⁴

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

As the first phase of this project, the Commission recommended to the Legislature the enactment of legislation to expedite clearing title to land burdened by obsolete interests, such as ancient deeds of trust. See *Recommendation Relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982). The legislation was enacted as Chapter 1268 of the Statutes of 1982. The Commission plans to submit additional recommendations dealing with other property interests in the future.

Possibilities of reverter and powers of termination. Whether the law relating to possibilities of reverter and powers of termination should be revised.⁵

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

⁴ Authorized by 1976 Cal. Stats. res. ch. 30. See also 1975 Cal. Stats. res. ch. 82.

⁵ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 528 (1974).

Civil Code Section 1464. Whether Civil Code Section 1464 (relating to covenants running with the land) should be revised or repealed.⁶

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

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

Involuntary dismissal for lack of prosecution. Whether the law relating to involuntary dismissal for lack of prosecution should be revised.⁸

The Commission plans to submit a recommendation on this subject to the 1983 legislative session. See *Recommendation Relating to Dismissal for Lack of Prosecution* (September 1982), published as Appendix IX to this Report.

Statute of limitations. Whether the law relating to statutes of limitations applicable to felonies should be revised.⁹

The Commission has retained Professor Gerald F. Uelman, Loyola Law School, Los Angeles, as a consultant on this topic. Professor Uelman is preparing a background study.

Child custody, adoption, guardianship, and related matters. Whether the law relating to custody of children, adoption, guardianship, freedom from parental custody and control, and related matters should be revised.¹⁰

The Commission plans to submit recommendations on several aspects of this topic to the 1983 Legislature. See *Recommendations Relating to Probate Law and Procedure* (Emancipated Minors; Missing Persons; Notice in Limited Conservatorship Proceedings), 16 Cal. L. Revision Comm'n Reports 101 (1982).

Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.¹¹

⁶ Authorized by 1978 Cal. Stats. res. ch. 65.

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

⁸ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 23 (1978).

⁹ Authorized by 1981 Cal. Stats. ch. 909, § 3.

¹⁰ 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).

¹¹ Authorized by 1979 Cal. Stats. res. ch. 19. See also 14 Cal. L. Revision Comm'n Reports 217 (1978).

The Commission plans to submit recommendations on various aspects of this topic to the 1983 Legislature. See *Recommendations Relating to Probate Law and Procedure* (Emancipated Minors; Missing Persons; Notice in Limited Conservatorship Proceedings), 16 Cal. L. Revision Comm'n Reports 101 (1982).

Escheat; unclaimed property. Whether the law relating to the escheat of property and the disposition of unclaimed or abandoned property should be revised.¹²

The Commission's recommendation to the 1983 legislative session relating to wills and intestate succession includes recommended provisions relating to escheat. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

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.¹³

Class actions. Whether the law relating to class actions should be revised.¹⁴

Offers of compromise. Whether the law relating to offers of compromise should be revised.¹⁵

Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.¹⁶

Procedure for removal of invalid liens. Whether a summary procedure should be provided by which property owners can remove doubtful or invalid liens from their property, including a provision for payment of attorney fees to the prevailing party.¹⁷

¹² Authorized by 1967 Cal. Stats. res. ch. 81. See also 1956 Cal. Stats. res. ch. 42.

¹³ Authorized by 1971 Cal. Stats. res. ch. 75.

¹⁴ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 524 (1974).

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

¹⁶ Authorized by 1975 Cal. Stats. res. ch. 15. See also 12 Cal. L. Revision Comm'n Reports 526 (1974).

¹⁷ Authorized by 1980 Cal. Stats. res. ch. 37.

Special assessments for public improvements. Whether the acts governing special assessments for public improvements should be simplified and unified.¹⁸

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.

Eminent domain. Whether the law relating to eminent domain should be revised.¹⁹

Quiet title actions. Whether the law relating to quiet title actions should be revised.²⁰

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.²¹

Evidence. Whether the Evidence Code should be revised.²²

The Commission plans to undertake a study of the differences between the Federal Rules of Evidence and the California Evidence Code when time permits. Professor Jack Friedenthal of the Stanford Law School is the Commission's consultant on this study. The experience under the Evidence Code will be reviewed in the course of the study to determine whether any revisions are needed.

Arbitration. Whether the law relating to arbitration should be revised.²³

Partition. Whether the law relating to partition should be revised.²⁴

¹⁸ Authorized by 1980 Cal. Stats. res. ch. 37.

¹⁹ 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).

²⁰ Authorized by 1978 Cal. Stats. res. ch. 65. See also 14 Cal. L. Revision Comm'n Reports 22 (1978).

²¹ Authorized by 1978 Cal. Stats. res. ch. 65.

²² Authorized by 1965 Cal. Stats. res. ch. 130.

²³ Authorized by 1968 Cal. Stats. res. ch. 110. See also 8 Cal. L. Revision Comm'n Reports 1325 (1967).

²⁴ 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).

Modification of contracts. Whether the law relating to modification of contracts should be revised.²⁵

Governmental liability. Whether the law relating to sovereign or governmental immunity in California should be revised.²⁶

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.²⁷

Lease law. Whether the law relating to the rights and duties attendant upon termination or abandonment of a lease should be revised.²⁸

Liquidated damages. Whether the law relating to liquidated damages in contracts generally, and particularly in leases, should be revised.²⁹

Parol evidence rule. Whether the parol evidence rule should be revised.³⁰

Powers of appointment. Whether the law relating to powers of appointment should be revised.³¹

Pleadings in civil actions. Whether the law relating to pleadings in civil actions and proceedings should be revised.³²

Topics for Future Consideration

The Commission recommends that a number of topics already authorized for study be expanded to include the study of all aspects of family law. This expanded authority is needed so that the Commission has clear authority to deal effectively with problems discovered in the course of studying previously

²⁵ 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).

²⁶ Authorized by 1977 Cal. Stats. res. ch. 17. See also 1957 Cal. Stats. res. ch. 202.

²⁷ Authorized by 1971 Cal. Stats. res. ch. 74. See also 1970 Cal. Stats. res. ch. 46; 1965 Cal. Stats. res. ch. 130.

²⁸ Authorized by 1965 Cal. Stats. res. ch. 130. See also 1957 Cal. Stats. res. ch. 202.

²⁹ Authorized by 1973 Cal. Stats. res. ch. 39. See also 1969 Cal. Stats. res. ch. 224.

³⁰ Authorized by 1971 Cal. Stats. res. ch. 75. See also 10 Cal. L. Revision Comm'n Reports 1031 (1971).

³¹ Authorized by 1979 Cal. Stats. res. ch. 19. See also 1965 Cal. Stats. res. ch. 130; 14 Cal. L. Revision Comm'n Reports 218 (1978).

³² Authorized by 1980 Cal. Stats. res. ch. 37.

authorized topics—Probate Code, community property, rights and disabilities of minors and incompetent persons, and child custody, adoption, and guardianship.

FUNCTION AND PROCEDURE OF COMMISSION

The principal duties of the Law Revision Commission¹ are to:

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

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

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

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. The Commission may study only topics which the Legislature, by concurrent resolution, authorizes it to study.⁴

The Commission's work on a recommendation is commenced after a background study has been prepared. In some cases, the study is prepared by a member of the Commission's staff, but some of the studies are undertaken by specialists in the fields of law involved who are retained as research consultants to the Commission. This procedure not only provides the Commission with invaluable expert assistance but is economical as well because the attorneys and law professors who serve as research consultants have already acquired the considerable background necessary to understand the specific problems under consideration. Expert consultants are also retained to advise the Commission at meetings.

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

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

³ See Gov't Code § 10330. The Commission is also directed to recommend the express repeal of all statutes repealed by implication or held unconstitutional by the California Supreme Court or the Supreme Court of the United States. Gov't Code § 10331.

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

The background study is given careful consideration by the Commission and, after making its preliminary decisions on the subject, the Commission ordinarily distributes a tentative recommendation to the State Bar and to numerous other interested persons. Comments on the tentative recommendation are considered by the Commission in determining what recommendation, if any, the Commission will make to the Legislature. When the Commission has reached a conclusion on the matter, its recommendation to the Legislature, including a draft of any legislation necessary to effectuate its recommendation, is published in a pamphlet.⁵ In some cases, the background study is published in the pamphlet containing the recommendation.⁶

The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports⁷ to reflect amendments⁸ made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and 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

⁵ Occasionally one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission.

⁶ Background studies may be published in law reviews. For background studies published in law reviews in 1981 and 1982, see Reppy, *Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143 (1982); Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L. J. 769 (1982). For a list of background studies published in law reviews prior to 1981, 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).

⁷ Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App.3d 877, 884, 109 Cal. Rptr. 421, 426 (1973). For an example of such a report, see Appendix III to this Report.

⁸ Many of the amendments made after the recommended legislation has been introduced are made upon recommendation of the Commission to deal with matters brought to the Commission's attention after its recommendation was printed. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

in construing the statutory provisions.⁹ However, while the Commission endeavors in the Comment to explain any changes in the law made by the section, the Commission does not claim that every inconsistent case is noted in the Comment, nor can it anticipate judicial conclusions as to the significance of existing case authorities.¹⁰ Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.¹¹

The pamphlets are distributed to the Governor, Members of the Legislature, heads of state departments, and a substantial number of judges, district attorneys, lawyers, law professors, and law libraries throughout the state.¹² Thus, a large and representative number of interested persons are given an opportunity to study and comment upon the Commission's work before it is considered for enactment by the Legislature.¹³ The annual reports and the recommendations and studies of the Commission are republished in a set of hardcover volumes that is both a permanent record of the Commission's work and, it is believed, a valuable contribution to the legal literature of the state. These volumes are available at most county law libraries and at some other libraries. Some hardcover volumes are out-of-print, but others are available for purchase.¹⁴

⁹ *E.g.*, *Van Arsdale v. Hollinger*, 68 Cal.2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968). The Comments are published by both the Bancroft-Whitney Company and the West Publishing Company in their editions of the annotated codes.

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

¹¹ The Commission does not concur in the *Kaplan* approach to statutory construction. See *Kaplan v. Superior Court*, 6 Cal.3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973). See also 1974 Cal. Stats. ch. 227.

¹² See Gov't Code § 10333.

¹³ For a step by step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMouly, *Fact Finding for Legislation: A Case Study*, 50 A.B.A.J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965).

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

PERSONNEL OF COMMISSION

As of December 1, 1982, the membership of the Law Revision Commission is:

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

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

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

In April 1982, Governor Brown appointed Roslyn P. Chasan, Palos Verdes Estates (replacing Judith Ashmann who had resigned), James H. Davis, Los Angeles (replacing Thomas Loo whose term had expired), John B. Emerson, Los Angeles (replacing George Chinn who had resigned), and Debra S. Frank, Los Angeles (replacing Jean Love whose term had expired).

In December 1981, Jean C. Love was elected Chairperson and Beatrice P. Lawson was elected Vice Chairperson of the Commission for a one-year term commencing December 31, 1981.

In May 1982, Robert J. Berton was elected Chairperson of the Commission for a term expiring on December 30, 1982, the unexpired portion of the term of former Chairperson Jean Love.

In November, 1982, David Rosenberg was elected Chairperson and Debra S. Frank was elected Vice Chairperson of the Commission. Their one-year terms commence December 31, 1982.

As of December 1, 1982, the staff of the Commission is:

Legal

John H. DeMouly
Executive Secretary
Nathaniel Sterling
Assistant Executive Secretary

Robert J. Murphy III
Staff Counsel
Stan G. Ulrich
Staff Counsel

Administrative-Secretarial

Juan C. Rogers

Administrative Assistant

Victoria V. Matias

Word Processing Technician

Leta M. Skaug

Word Processing Technician

During 1982, the following Stanford Law School and University of Santa Clara Law School students were employed on a part-time, intermittent basis: Adele P. Athenour, Lynn Alison Combs, Robert G. P. Cruz, Robert W. Helm, Diane S. Makar, Betty L. Meshack, and Richard Seim.

LEGISLATIVE HISTORY OF RECOMMENDATIONS SUBMITTED TO 1982 LEGISLATIVE SESSION

The Commission recommended 11 bills for enactment at the 1982 session. Ten of the bills were enacted. The Commission also recommended a concurrent resolution and a joint resolution to the 1982 session. The Legislature adopted both of the resolutions.

Creditors' Remedies

Four bills relating to creditors' remedies were recommended by the Commission for enactment at the 1982 session.

Enforcement of judgments. Assembly Bills 707 and 798 were introduced by Assemblyman Alister McAlister to effectuate the Commission's recommendation on this subject. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980).

Assembly Bill 707, which proposed enactment of the Enforcement of Judgments Law, was enacted as Chapter 1364 of the Statutes of 1982. Assembly Bill 798, making changes in various codes to conform to the new Enforcement of Judgments Law, was enacted as Chapter 497 of the Statutes of 1982. A number of substantive, technical, and clarifying amendments were made before the bills were enacted. These amendments are not described here because the Commission, in cooperation with California Continuing Education of the Bar, has published the new Enforcement of Judgments Law as enacted. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001 (1982).

The Assembly Judiciary Committee and the Senate Judiciary Committee adopted special reports revising the official Comments to Assembly Bills 707 and 798. See *Report of Assembly*

Committee on Judiciary on Assembly Bills 707 and 798, noted in Assembly J. (January 18, 1982) at 9356, reprinted as Appendix II to this Report; *Report of Senate Committee on Judiciary on Assembly Bills 707, 798, and 2332*, Senate J. (June 24, 1982) at 11372, reprinted as Appendix III to this Report.

Interest rate on judgments. Senate Bill 203 was introduced by Senator Omer L. Rains to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Interest Rate on Judgments*, 15 Cal. L. Revision Comm'n Reports 7 (1980). The bill, enacted as Chapter 150 of the Statutes of 1982, effectuates the Commission's recommendation that the interest rate on judgments be increased to ten percent. Provisions providing for prejudgment interest in personal injury actions (not recommended by the Commission) were also enacted by this bill.

Prejudgment attachment. Assembly Bill 2332, which became Chapter 1198 of the Statutes of 1982, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bills 707, 798, and 2332*, Senate J. (June 24, 1982) at 11399, reprinted as Appendix III to this Report. A number of substantive, technical, and clarifying amendments were made before Assembly Bill 2332 was enacted. These amendments are not described here because the revised attachment law is included in a book published in cooperation with California Continuing Education of the Bar. See *1982 Creditors' Remedies Legislation*, 16 Cal. L. Revision Comm'n Reports 1001 (1982).

Bonds and Undertakings

Assembly Bills 2750 and 2751 were introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bills 2750 and 2751*, Senate J. (June 24, 1982) at 11370, reprinted as Appendix IV to this Report.

Assembly Bill 2751, which proposed the consolidation of general procedural rules applicable to all statutory bonds and undertakings in one statute, was enacted after technical

amendments were made and became Chapter 998 of the Statutes of 1982.

Assembly Bill 2750, making changes in various codes to conform to the new bond and undertaking law, was enacted after technical and clarifying amendments were made and became Chapter 517 of the Statutes of 1982.

Estate Planning and Probate

Nonprobate transfers. Assembly Bill 325 was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605 (1980). The bill was not enacted. However, Assembly Bill 2643, which became Chapter 269 of the Statutes of 1982, was introduced by Assemblyman McAlister to enact the substance of a portion of the Commission's recommendation authorizing financial institutions to offer "pay-on-death" accounts to their depositors. The Commission plans to submit a recommendation on nonprobate transfers to the 1983 session. See *Recommendation Relating to Nonprobate Transfers* (September 1982), published in *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

Holographic and nuncupative wills. Assembly Bill 2331, which became Chapter 187 of the Statutes of 1982, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Holographic and Nuncupative Wills*, 16 Cal. L. Revision Comm'n Reports 301 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bill 2331*, Senate J. (April 1, 1982) at 8357, reprinted as Appendix V to this Report. The bill was enacted after a number of amendments were made.

Marketable Title of Real Property

Assembly Bill 2416, which became Chapter 1268 of the Statutes of 1982, was introduced by Assemblyman McAlister to effectuate the Commission's recommendation on this subject. See *Recommendation Relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982). See also *Report of Senate Committee on Judiciary on Assembly Bill 2416*, Senate J. (June 17, 1982) at 11018, reprinted as Appendix VI to this Report. The bill was enacted after a number of amendments were made.

Escheat

Assembly Bill 2341, which became Chapter 182 of the Statutes of 1982, was introduced by Assemblyman McAlister at the request of the Commission to make a technical amendment to Probate Code Section 231 to make clear that employee trust benefits are to be paid over to the state under the Unclaimed Property Law unless the employee benefit plan contains a provision for forfeiture. Such benefits do not, however, escheat under the Probate Code escheat provisions unless and until the employee benefit plan terminates. Benefits paid to the state under the Unclaimed Property Law will be held by the state to be paid to the person entitled thereto should the person make a claim to the state for such benefits.

Federal Pensions and Benefits Subject to State Marital Property Law

Assembly Joint Resolution 63, which became Resolution Chapter 44 of the Statutes of 1982, was introduced by Assemblyman McAlister to effectuate the recommendation of the Commission on this subject. See *Recommendation Relating to Federal Military and Other Federal Pensions as Community Property*, 16 Cal. L. Revision Comm'n Reports 47 (1982). This resolution requests that Congress enact legislation providing that federal law does not preempt the state community property law with regard to the division and award of various federal pension and insurance benefits in marital dissolution proceedings. For federal legislation see Uniform Former Spouses' Protection Act, Cong., 2d Sess., 128 Cong. Rec. H5953 (daily ed. August 16, 1982), H.R. Rept. No. 749, 97th Cong., 2d Sess. 13 (1982).

Resolution Approving Topics for Study

Assembly Concurrent Resolution 76, introduced by Assemblyman McAlister and adopted as Resolution Chapter 18 of the Statutes of 1982, authorizes the Commission to continue the study of 31 topics previously authorized for study.

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 prepared¹ 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 statute of this state unconstitutional has been found.

(3) Two decisions of the California Supreme Court held statutes of this state unconstitutional.²

In *People v. Mirmirani*, 30 Cal.3d 375 (1981), the court held that Penal Code Sections 422 and 422.5 which, read together, make it a felony to threaten to commit certain crimes in order to achieve "social or political goals," are unconstitutionally vague in violation of the guarantees of due process.

In *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982), the court held that subdivision (a) (14) of Penal Code Section 190.2, which imposes the death penalty or life imprisonment on a person found guilty of first degree murder that was "especially heinous, atrocious, or cruel, and manifesting exceptional depravity," was unconstitutionally vague and violative of the Due Process clauses of the Fourteenth Amendment of the United States Constitution, and Article 1, Sections 7 (a) and 15, of the California Constitution.

¹ This study has been carried through 32 Cal.3d (387) (Advance Sheet No. 26, September 28, 1982) and 102 S. Ct. 2976 (Advance Sheet No. 18, July 15, 1982).

² See, *Hustedt v. Worker's Compensation Appeals Bd.*, 30 Cal.3d 329 (1981); *Katz v. Worker's Compensation Appeals Bd.*, 30 Cal.3d 353 (1981). The Supreme Court also held that Labor Code Section 4907 (granting to the Worker's Compensation Appeals Board disciplinary power over persons appearing before it in a representative capacity), as applied to attorneys, is unconstitutional as a violation of the separation of powers doctrine of Article III, Section 3, of the California Constitution.

RECOMMENDATIONS

The Law Revision Commission respectfully recommends that the Legislature authorize the Commission (1) to complete its study of the topics previously authorized for study and (2) to study the new topic the Commission recommends it be authorized to study. See "Calendar of Topics for Study" *supra*.

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

APPENDIX I

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

Recommendation	Action by Legislature
1. <i>Partial Revision of Education Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 12 (1957)	Enacted. 1955 Cal. Stats. chs. 799, 877
2. <i>Summary Distribution of Small Estates Under Probate Code Sections 640 to 646</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1954 at 50 (1957)	Enacted. 1955 Cal. Stats. ch. 1183
3. <i>Fish and Game Code</i> , 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1957 at 13 (1957); 1 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1956 at 13 (1957)	Enacted. 1957 Cal. Stats. ch. 456
4. <i>Maximum Period of Confinement in a County Jail</i> , 1 CAL. L. REVISION COMM'N REPORTS at A-1 (1957)	Enacted. 1957 Cal. Stats. ch. 139
5. <i>Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at B-1 (1957)	Enacted. 1957 Cal. Stats. ch. 540
6. <i>Taking Instructions to Jury Room</i> , 1 CAL. L. REVISION COMM'N REPORTS at C-1 (1957)	Not enacted. But see Code Civ. Proc. § 612.4, enacting substance of this recommendation.
7. <i>The Dead Man Statute</i> , 1 CAL. L. REVISION COMM'N REPORTS at D-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 1261.
8. <i>Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere</i> , 1 CAL. L. REVISION COMM'N REPORTS at E-1 (1957)	Enacted. 1957 Cal. Stats. ch. 490
9. <i>The Marital "For and Against" Testimonial Privilege</i> , 1 CAL. L. REVISION COMM'N REPORTS at F-1 (1957)	Not enacted. But recommendation accomplished in enactment of Evidence Code. See Comment to EVID. CODE § 970.

Recommendation	Action by Legislature
10. <i>Suspension of the Absolute Power of Alienation</i> , 1 CAL. L. REVISION COMM'N REPORTS at G-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 14 (1959)	Enacted. 1959 Cal. Stats. ch. 470
11. <i>Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378</i> , 1 CAL. L. REVISION COMM'N REPORTS at H-1 (1957)	Enacted. 1957 Cal. Stats. ch. 102
12. <i>Judicial Notice of the Law of Foreign Countries</i> , 1 CAL. L. REVISION COMM'N REPORTS at I-1 (1957)	Enacted. 1957 Cal. Stats. ch. 249
13. <i>Choice of Law Governing Survival of Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at J-1 (1957)	No legislation recommended.
14. <i>Effective Date of Order Ruling on a Motion for New Trial</i> , 1 CAL. L. REVISION COMM'N REPORTS at K-1 (1957); 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 16 (1959)	Enacted. 1959 Cal. Stats. ch. 468
15. <i>Retention of Venue for Convenience of Witnesses</i> , 1 CAL. L. REVISION COMM'N REPORTS at L-1 (1957)	Not enacted.
16. <i>Bringing New Parties Into Civil Actions</i> , 1 CAL. L. REVISION COMM'N REPORTS at M-1 (1957)	Enacted. 1957 Cal. Stats. ch. 1498
17. <i>Grand Juries</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 20 (1959)	Enacted. 1959 Cal. Stats. ch. 501
18. <i>Procedure for Appointing Guardians</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 21 (1959)	Enacted. 1959 Cal. Stats. ch. 500
19. <i>Appointment of Administrator in Quiet Title Action</i> , 2 CAL. L. REVISION COMM'N REPORTS, Annual Report for 1959 at 29 (1959)	No legislation recommended.
20. <i>Presentation of Claims Against Public Entities</i> , 2 CAL. L. REVISION COMM'N REPORTS at A-1 (1959)	Enacted. 1959 Cal. Stats. chs. 1715, 1724, 1725, 1726, 1727, 1728; CAL. CONST., ART. XI, § 10 (1960)

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

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

Recommendation	Action by Legislature
43. <i>Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer</i> , 4 CAL. L. REVISION COMM'N REPORTS 1501 (1963)	Enacted. 1963 Cal. Stats. ch. 1684
44. <i>Sovereign Immunity—Amendments and Repeals of Inconsistent Statutes</i> , 4 CAL. L. REVISION COMM'N REPORTS 1601 (1963)	Enacted. 1963 Cal. Stats. chs. 1685, 1686, 2029
45. <i>Evidence Code</i> , 7 CAL. L. REVISION COMM'N REPORTS 1 (1965)	Enacted. 1965 Cal. Stats. ch. 299
46. <i>Claims and Actions Against Public Entities and Public Employees</i> , 7 CAL. L. REVISION COMM'N REPORTS 401 (1965)	Enacted. 1965 Cal. Stats. ch. 653
47. <i>Evidence Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 101 (1967)	Enacted in part. 1967 Cal. Stats. ch. 650. Balance enacted. 1970 Cal. Stats. ch. 69.
48. <i>Evidence—Agricultural Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 201 (1967)	Enacted. 1967 Cal. Stats. ch. 262
49. <i>Evidence—Commercial Code Revisions</i> , 8 CAL. L. REVISION COMM'N REPORTS 301 (1967)	Enacted. 1967 Cal. Stats. ch. 703
50. <i>Whether Damage for Personal Injury to a Married Person Should be Separate or Community Property</i> , 8 CAL. L. REVISION COMM'N REPORTS 401 (1967); 8 CAL. L. REVISION COMM'N REPORTS 1385 (1967)	Enacted. 1968 Cal. Stats. chs. 457, 458
51. <i>Vehicle Code Section 17150 and Related Sections</i> , 8 CAL. L. REVISION COMM'N REPORTS 501 (1967)	Enacted. 1967 Cal. Stats. ch. 702
52. <i>Additur</i> , 8 CAL. L. REVISION COMM'N REPORTS 601 (1967)	Enacted. 1967 Cal. Stats. ch. 72
53. <i>Abandonment or Termination of a Lease</i> , 8 CAL. L. REVISION COMM'N REPORTS 701 (1967); 9 CAL. L. REVISION COMM'N REPORTS 401 (1969); 9 CAL. L. REVISION COMM'N REPORTS 153 (1969)	Enacted. 1970 Cal. Stats. ch. 89

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

Recommendation	Action by Legislature
66. <i>Powers of Appointment</i> , 9 CAL. L. REVISION COMM'N REPORTS 301 (1969)	Enacted. 1969 Cal. Stats. chs. 113, 155
67. <i>Evidence Code—Revisions of Privileges Article</i> , 9 CAL. L. REVISION COMM'N REPORTS 501 (1969)	Vetoed. But see 1970 Cal. Stats. chs. 1396, 1397
68. <i>Fictitious Business Names</i> , 9 CAL. L. REVISION COMM'N REPORTS 601 (1969)	Enacted. 1970 Cal. Stats. ch. 618
69. <i>Representation as to the Credit of Third Persons and the Statute of Frauds</i> , 9 CAL. L. REVISION COMM'N REPORTS 701 (1969)	Enacted. 1970 Cal. Stats. ch. 720
70. <i>Revisions of Governmental Liability Act</i> , 9 CAL. L. REVISION COMM'N REPORTS 801 (1969)	Enacted in part. 1970 Cal. Stats. chs. 662, 1099
71. <i>"Vesting" of Interests Under Rule Against Perpetuities</i> , 9 CAL. L. REVISION COMM'N REPORTS 901 (1969)	Enacted. 1970 Cal. Stats. ch. 45
72. <i>Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions</i> , 10 CAL. L. REVISION COMM'N REPORTS 501 (1971)	Enacted. 1971 Cal. Stats. chs. 244, 950. See also 1973 Cal. Stats. ch. 828
73. <i>Wage Garnishment and Related Matters</i> , 10 CAL. L. REVISION COMM'N REPORTS 701 (1971); 11 CAL. L. REVISION COMM'N REPORTS 101 (1973); 12 CAL. L. REVISION COMM'N REPORTS 901 (1974); 13 CAL. L. REVISION COMM'N REPORTS 601 (1976); 13 CAL. L. REVISION COMM'N REPORTS 1703 (1976); 14 CAL. L. REVISION COMM'N REPORTS 261 (1978)	Enacted in part. 1978 Cal. Stats. ch. 1133. See also 1979 Cal. Stats. ch. 66
74. <i>Proof of Foreign Official Records</i> , 10 CAL. L. REVISION COMM'N REPORTS 1022 (1971)	Enacted. 1970 Cal. Stats. ch. 41
75. <i>Inverse Condemnation—Insurance Coverage</i> , 10 CAL. L. REVISION COMM'N REPORTS 1051 (1971)	Enacted. 1971 Cal. Stats. ch. 140

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

Recommendation	Action by Legislature
88. <i>Payment of Judgments Against Local Public Entities</i> , 12 CAL. L. REVISION COMM'N REPORTS 575 (1974)	Enacted. 1975 Cal. Stats. ch. 285
89. <i>View by Trier of Fact in a Civil Case</i> , 12 CAL. L. REVISION COMM'N REPORTS 587 (1974)	Enacted. 1975 Cal. Stats. ch. 301
90. <i>Good Cause Exception to the Physician-Patient Privilege</i> , 12 CAL. L. REVISION COMM'N REPORTS 601 (1974)	Enacted. 1975 Cal. Stats. ch. 318
91. <i>Improvement Acts</i> , 12 CAL. L. REVISION COMM'N REPORTS 1001 (1974)	Enacted. 1974 Cal. Stats. ch. 426
92. <i>The Eminent Domain Law</i> , 12 CAL. L. REVISION COMM'N REPORTS 1601 (1974)	Enacted. 1975 Cal. Stats. chs. 1239, 1240, 1275
93. <i>Eminent Domain—Conforming Changes in Special District Statutes</i> , 12 CAL. L. REVISION COMM'N REPORTS 1101 (1974); 12 CAL. L. REVISION COMM'N REPORTS 2004 (1974)	Enacted. 1975 Cal. Stats. chs. 581, 582, 584, 585, 586, 587, 1176, 1276
94. <i>Oral Modification of Written Contracts</i> , 13 CAL. L. REVISION COMM'N REPORTS 301 (1976); 13 CAL. L. REVISION COMM'N REPORTS 2129 (1976)	Enacted. 1975 Cal. Stats. ch. 7; 1976 Cal. Stats. ch. 109
95. <i>Partition of Real and Personal Property</i> , 13 CAL. L. REVISION COMM'N REPORTS 401 (1976)	Enacted. 1976 Cal. Stats. ch. 73
96. <i>Revision of the Attachment Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 801 (1976)	Enacted. 1976 Cal. Stats. ch. 437
97. <i>Undertakings for Costs</i> , 13 CAL. L. REVISION COMM'N REPORTS 901 (1976)	Not enacted 1976. But see recommendation to 1979 session (item 118 <i>infra</i>) which was enacted.
98. <i>Admissibility of Copies of Business Records in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2051 (1976)	Not enacted.
99. <i>Turnover Orders Under the Claim and Delivery Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 2079 (1976)	Enacted. 1976 Cal. Stats. ch. 145

Recommendation	Action by Legislature
100. <i>Relocation Assistance by Private Condemnors</i> , 13 CAL. L. REVISION COMM'N REPORTS 2085 (1976)	Enacted. 1976 Cal. Stats. ch. 143
101. <i>Condemnation for Byroads and Utility Easements</i> , 13 CAL. L. REVISION COMM'N REPORTS 2091 (1976)	Enacted in part (utility easements). 1976 Cal. Stats. ch. 994
102. <i>Transfer of Out-of-State Trusts to California</i> , 13 CAL. L. REVISION COMM'N REPORTS 2101 (1976)	Enacted. 1976 Cal. Stats. ch. 144
103. <i>Admissibility of Duplicates in Evidence</i> , 13 CAL. L. REVISION COMM'N REPORTS 2115 (1976)	Not enacted. But see 1977 Cal. Stats. ch. 708, enacting substance of recommendation in modified form.
104. <i>Service of Process on Unincorporated Associations</i> , 13 CAL. L. REVISION COMM'N REPORTS 1657 (1976)	Enacted. 1976 Cal. Stats. ch. 888
105. <i>Sister State Money Judgments</i> , 13 CAL. L. REVISION COMM'N REPORTS 1669 (1976)	Enacted. 1977 Cal. Stats. ch. 232
106. <i>Damages in Action for Breach of Lease</i> , 13 CAL. L. REVISION COMM'N REPORTS 1679 (1976)	Enacted. 1977 Cal. Stats. ch. 49
107. <i>Nonprofit Corporation Law</i> , 13 CAL. L. REVISION COMM'N REPORTS 2201 (1976)	Not enacted. Legislation on this subject, not recommended by the Commission, was enacted in 1978.
108. <i>Use of Keepers Pursuant to Writs of Execution</i> , 14 CAL. L. REVISION COMM'N REPORTS 49 (1978)	Enacted. 1977 Cal. Stats. ch. 155
109. <i>Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors</i> , 14 CAL. L. REVISION COMM'N REPORTS 61 (1978)	Enacted. 1977 Cal. Stats. ch. 499
110. <i>Review of Resolution of Necessity by Writ of Mandate</i> , 14 CAL. L. REVISION COMM'N REPORTS 83 (1978)	Enacted. 1978 Cal. Stats. ch. 286
111. <i>Use of Court Commissioners Under the Attachment Law</i> , 14 CAL. L. REVISION COMM'N REPORTS 93 (1978)	Enacted. 1978 Cal. Stats. ch. 151

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

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

Recommendation	Action by Legislature
135. <i>Guardianship-Conservatorship</i> (technical change), 15 CAL. L. REVISION COMM'N REPORTS 1247 (1980)	Enacted. 1980 Cal. Stats. ch. 246
136. <i>Revision of Guardianship-Conservatorship Law</i> , 15 CAL. L. REVISION COMM'N REPORTS 1463 (1980)	Enacted. 1981 Cal. Stats. ch. 9
137. <i>Enforcement of Judgments Law</i> , 15 CAL. L. REVISION COMM'N REPORTS 2001 (1980)	Enacted. 1982 Cal. Stats. chs. 497, 1364
138. <i>Uniform Durable Power of Attorney Act</i> , 15 CAL. L. REVISION COMM'N REPORTS 351 (1980)	Enacted. 1981 Cal. Stats. ch. 511
139. <i>Non-Probate Transfers</i> , 15 CAL. L. REVISION COMM'N REPORTS 1605 (1980)	Enacted in part (pay-on-death accounts). 1982 Cal. Stats. ch. 269
140. <i>Revision of the Powers of Appointment Statute</i> , 15 CAL. L. REVISION COMM'N REPORTS 1667 (1980)	Enacted. 1981 Cal. Stats. ch. 63
141. <i>State Tax Liens</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 24 (1982)	Enacted. 1981 Cal. Stats. ch. 217
142. <i>Assessment Liens on Property Taken for Public Use</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 25 (1982)	Enacted. 1981 Cal. Stats. ch. 139
143. <i>Federal Pensions as Community Property</i> , 16 CAL. L. REVISION COMM'N REPORTS 47 (1982)	Proposed resolution adopted. 1982 Cal. Stats. res. ch. 44
144. <i>Holographic and Nuncupative Wills</i> , 16 CAL. L. REVISION COMM'N REPORTS 301 (1982)	Enacted. 1982 Cal. Stats. ch. 187
145. <i>Marketable Title of Real Property</i> , 16 CAL. L. REVISION COMM'N REPORTS 401 (1982)	Enacted. 1982 Cal. Stats. ch. 1268
146. <i>Statutory Bonds and Undertakings</i> , 16 CAL. L. REVISION COMM'N REPORTS 501 (1982)	Enacted. 1982 Cal. Stats. chs. 517, 998
147. <i>Attachment</i> , 16 CAL. L. REVISION COMM'N REPORTS 701 (1982)	Enacted. 1982 Cal. Stats. ch. 1198
148. <i>Escheat</i> (technical change), 16 CAL. L. REVISION COMM'N REPORTS 124 (1982)	Enacted. 1982 Cal. Stats. ch. 182

APPENDIX II

REPORT OF ASSEMBLY COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS 707 AND 798

[Extract from Assembly Journal for January 18, 1982 (1981-82 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bills Nos. 707 and 798, the Assembly Committee on Judiciary makes the following report.

Assembly Bills Nos. 707 and 798 were introduced to effectuate the *Tentative Recommendation of the California Law Revision Commission Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980). Except for the new and revised comments set out in a report of the Assembly Judiciary Committee on file with the Committee [and set out below], the Law Revision Commission comments to the various sections of Assembly Bills Nos. 707 and 798 reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bills Nos. 707 and 798. The comments set out in the report on file with the Committee also reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of these bills.

ASSEMBLY BILL NO. 707

§ 680.210. General intangibles

Comment. Section 680.210 is new. The limitation of general intangibles to rights to payment is consistent with Civil Code Section 955.1.

§ 680.220. Instrument

Comment. Section 680.220 is new. In some cases, the term "instrument" may be used with a more limited meaning. See Section 687.020 (endorsement and collection by levying officer). See also Section 680.110 (application of definitions). Securities are excluded from this definition because they are treated separately in many cases under this title. See, *e.g.*, Sections 697.740, 700.130.

§ 680.260. Levying officer

Comment. Section 680.260 is new. In certain situations, other persons are authorized to perform the duties of a levying officer.

See, *e.g.*, Code Civ. Proc. §§ 262.8-262.10 (elisor to perform certain duties when sheriff and coroner are parties to action), 699.080 (levy under writ of execution by registered process server), 715.040 (service of writ of possession of real property by registered process server); Gov't Code § 27469 (coroner to discharge duties of sheriff where sheriff is party to action or proceeding). See also Section 706.101 (service of earnings withholding order by registered process server).

§ 680.345. Security

Comment. Section 680.345 is new.

§ 680.370. Tangible personal property

Comment. Section 680.370 is a new provision that makes clear that tangible personal property includes chattel paper, documents of title, instruments, securities, and money.

§ 681.040. Effective time of filing with levying officer

Comment. Section 681.040 is a new section that prescribes the effective time of filing with the levying officer under this title. If a paper is required to be filed within a particular time period, the requirement of this section must be satisfied and there is no extension of time if the paper is mailed to the levying officer.

§ 681.050. Severability

Comment. Section 681.050 is the same in substance as Section 3 of the Evidence Code, Section 1108 of the Commercial Code, and Section 11 of the Probate Code.

§ 683.310. Judgments under Family Law Act

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 684.020. Service on attorney designated by judgment debtor

Comment. Section 684.020 is a new provision that gives the judgment debtor the option to have papers served either on the judgment debtor or, with the consent of the attorney, on the attorney designated by the judgment debtor. The reference to service of other papers includes such items as interrogatories served pursuant to Section 708.020.

§ 684.110. Manner of personal service

Comment. Subdivision (a) of Section 684.110 adopts by reference the manner for service of summons. Subdivision (b) makes clear that when personal service is required on the judgment debtor or judgment creditor, service on the attorney in the manner provided in Section 684.040 is required in cases where service is required on the attorney instead of on the judgment debtor or judgment creditor (Sections 684.010 and 684.020). Subdivision (c) is the same in substance as Section 488.040(a) (prejudgment attachment). Subdivision (d) limits the manner in which service of a copy of the writ and notice of levy shall be made on a third party by requiring that service be made in the manner provided in Section 415.10 (personal delivery) or 415.20 (substituted service). Various levy procedures require personal service on a third party. See, *e.g.*, Sections 700.040 (tangible personal property in possession of third person), 700.060 (bailed goods not covered by negotiable document), 700.100 (chattel paper in possession of third person), 700.110 (instrument in possession of third person), 700.120 (negotiable document in possession of third person), 700.140 (deposit account), 700.150 (safe deposit box). See also Section 700.190(c) (service on judgment debtor's judgment debtor under a final money judgment levied upon). Specific sections may provide for the manner of service on a third person. See *e.g.*, Section 700.015 (service on occupant of real property).

§ 684.120. Manner of service by mail; extension of time for exercising right or performing act

Comment. Section 684.120 is drawn in part from Sections 1005 and 1013. The manner of computing time under subdivision (b) is the same as under the comparable portions of Sections 1005 and 1013.

§ 684.130. Name and address supplied by judgment creditor

Comment. Section 684.130 is a specific application of Section 687.010 (instructions to levying officer). The address to be supplied by the judgment creditor varies in particular provisions of this title. See, *e.g.*, Sections 684.120 (address for service), 700.015(b) and 700.020(b) (address shown by the records of tax assessor or county recorder). See also Section 687.040 (liability of levying officer for action taken in reliance on written instructions of judgment creditor).

§ 684.140. Service by person authorized by levying officer to make service

Comment. Section 684.140 is derived from a sentence contained in former Section 723.101(c) (personal service of notice or document by wage garnishment debtor). The second to last sentence of Section 684.140 is new, but does not affect the right to recover cost of service by a registered process server to the extent otherwise permitted. See Sections 699.080, 706.101(e), and 715.040.

§ 684.210. Proof of service of notice of court hearing

Comment. Section 684.210 is a new provision that establishes a general requirement that supersedes comparable requirements of former law, such as that of former Section 723.105(e). As to the manner of making proof of service, see Section 684.220. As to the time for giving notice by mail, see Section 684.120.

§ 685.020. Commencement of interest

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 685.030. Cessation of interest

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 685.040. Right to costs of enforcing judgment

Comment. Section 685.040 supersedes former Section 1032.6. The reference to superior, municipal, and justice courts in former Section 1032.6 is not continued because it is unnecessary. Recoverable costs may be limited by statute or may be subject to procedural restrictions. See, *e.g.*, Sections 685.070 (memorandum of costs incurred must be filed within specified period), 699.080, 706.101(e), and 715.040 (cost of registered process server). The second sentence of Section 685.040 makes clear that attorney's fees are not collectible under the section. Specific provisions may prevent recovery of costs in some circumstances. See, *e.g.*, Sections 703.090, 704.840, 708.290.

§ 685.070. Memorandum of costs of enforcing judgment

Comment. Subdivision (a) of Section 685.070 continues the substance of subdivisions (a)-(f) of the first paragraph of former

Section 1033.7, with the exception of the references in former law to the fee for issuance of a writ of prohibition. Subdivisions (b) and (c) continue the substance of the procedural provisions of the first paragraph of former Section 1033.7, except that costs may be claimed within two years after they are incurred rather than six months. Subdivision (d) is consistent with the last paragraph of former Section 1033.7. A motion under this section may be determined at chambers. See Section 166.

The fee for issuance of a writ and the levying officer's costs are automatically added to the amount to be collected under the writ as provided by Section 685.050. The fee of the levying officer for serving an earnings withholding order is automatically added to the amount to be collected under the wage garnishment. See Section 706.125(e). If the amount collected under the writ or wage garnishment is insufficient to satisfy the accrued costs, the judgment creditor must resort to the memorandum of costs procedure in this section in order to have the unsatisfied costs added to the judgment. See Section 685.090 (addition of costs to judgment).

§ 685.080. Motion for costs of enforcing judgment

Comment. Section 685.080 continues the substance of the second paragraph of former Section, 1033.7, except that a motion for costs may be made within two years, rather than six months, after the costs have been incurred. Section 685.080 also permits the judgment creditor by motion to claim costs that could have been claimed pursuant to the memorandum procedure set forth in Section 685.070.

§ 685.090. Addition of costs to judgment

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 687.040. Liability of levying officer

Comment. Subdivision (a) of Section 687.040 supersedes the second sentence of the sixth paragraph of former Section 689, the third paragraph of former Section 689b(9), former Section 697, and the second sentence of Section 488.370(b) (attachment of accounts receivable and choses in action) insofar as it was incorporated by former Section 688(b). For other provisions concerning the levying officer's liability, see Sections 685.100 (failure to advance costs), 687.020 (endorsement and collection of instruments), 699.060 (release), 699.070 (quick sale of

perishable property), 699.090 (levy based on record ownership), 700.070 (payment by cash equivalent in keeper levy on going business), 701.560 (sale without notice), 701.570 (manner of sale), 701.680 (irregular sale). Subdivision (b) is comparable to Section 488.060(b) (attachment).

§ 687.050. Levying officer's lien

Comment. Section 687.050 continues the substance of a portion of former Civil Code Section 3057.

§ 688.030. Exemptions and third-party claims

Comment. Section 688.030 supersedes former Sections 689d (third-party claims) and 690.51 (exemptions). Subdivision (a) continues former law by permitting exemption claims and third-party claims when a notice of levy is issued pursuant to Section 1755 of the Unemployment Insurance Code or a warrant is issued pursuant to Section 1785 of the Unemployment Insurance Code or Section 6776, 7881, 9001, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code. By applying to all warrant and notice of levy provisions of the Public Resources Code, Revenue and Taxation Code (other than warrants to enforce liens for postponed real property taxes under Sections 3201-3204), and Unemployment Insurance Code, subdivision (a) includes warrants issued pursuant to the provisions referred to in the Comment to Section 688.020. Subdivision (a) (2) also applies to third-party claims of a security interest or lien whereas former Section 689d only applied to claims of title under Section 689.

Subdivision (b) makes the procedural adjustments required by the fact that a levying officer is not used in the case of a notice of levy. See Unemp. Ins. Code § 1755.

Subdivision (c) continues the venue provisions of former Sections 689d and 690.51 and picks up the new jurisdictional rules of Section 688.010.

§ 688.050. Date of creation of tax lien

Comment. Section 685.050 is a new provision that facilitates the application of exemption provisions that depend upon the date of creation of a lien. Hence, under this section, the tax lien that arises when a tax liability is due and unpaid with nothing more, such as under Revenue and Taxation Code Section 18881, is not the date of creation of a tax lien for the purpose of Section 688.050.

CHAPTER 19. FORMS

Comment. This chapter provides the forms that are to be used until such time as the Judicial Council issues superseding forms pursuant to Section 681.030.

§ 693.010. Form of writ of execution, possession, and sale

Comment. Section 693.010 supersedes former Section 682.1 (statutory form of writ of execution). Section 577.5 requires that the amount be computed in dollars and cents, rejecting fractions.

§ 694.010. Definitions

Comment. Section 694.010 is drafted on the assumption that the Enforcement of Judgments Law will become effective on January 1, 1983, and will become operative on July 1, 1983.

§ 694.020. General rule concerning application of title

Comment. Section 694.020 states the general rule governing the application of the Enforcement of Judgments Law to pending matters. See also Section 697.510 (judgment lien on personal property available only if judgment first entered in California after June 30, 1983).

§ 694.050. Redemption rights

Comment. Section 694.050 preserves the right of redemption from execution and foreclosure sales where property has been levied upon or foreclosure proceedings or other proceedings for sale have been commenced prior to the operative date unless the parties agree in writing to application of the provisions of this title. See Sections 701.545 (delayed sale), 701.680 (sales absolute). See also Sections 729.010-729.090 (redemption where trust deed or mortgage foreclosed.)

§ 695.030. Property not subject to enforcement of money judgment

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 695.035. Real property leases subject to enforcement

Comment. Section 695.035 is a new provision that sets conditions on the application of leasehold interests to the satisfaction of money judgments, whether by execution sale,

receiver, assignment order, or otherwise. Subdivision (a) of Section 695.035 is drawn from a portion of Civil Code Section 1951.4 pertaining to the lessor's right to enforce a lease after the lessee has breached the lease and abandoned the property. A potential purchaser at an execution or other sale of the judgment debtor's leasehold interest would be wise to negotiate with the lessor before the sale to avoid disputes that might otherwise arise after the sale.

Subdivision (b) makes clear that a provision against involuntary transfer or assignment has no effect if the lease may be reached under subdivision (a). Under former law it appeared that a lessor could avoid an involuntary transfer by providing for a forfeiture upon involuntary transfer. See *Farnum v. Hefner*, 79 Cal. 575, 21 P. 955 (1889) (dictum).

§ 695.060. License to engage in business

Comment. Section 695.060 is derived from a portion of subdivision (f) of former Section 688 which preclude levy or execution sale of a "license issued by this state to engage in any business, profession, or activity." See also Sections 708.630 (receiver to sell liquor license), 708.910-708.930 (enforcement against franchise).

§ 695.070. Property subject to lien after transfer

Comment. Section 695.070 is new. For provisions governing the continuation of liens on property that is transferred or encumbered, see Sections 697.390 (judgment lien on real property), 697.610 (judgment lien on personal property), 697.720-697.750 (execution lien), 697.920 (other liens).

§ 697.020. Relation back of liens

Comment. Section 697.020 states the general rule regarding the relation back of liens to preserve the judgment creditor's priority as of the time of the creation of the first in a series of overlapping liens on the same property. This principle is consistent with case law. See *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242 (1909); *Riley v. Nance*, 97 Cal. 203, 205, 31 P. 1126 (1893); *Bagley v. Ward*, 37 Cal. 121, 131 (1869) (dictum); *Durkin v. Durkin*, 133 Cal. App.2d 283, 294, 284 P.2d 185 (1955); *Balzano v. Traeger*, 93 Cal. App. 640, 643-44, 270 P. 249 (1928).

Attachment liens, which may exist for as long as eight years, are governed by Sections 488.500 and 488.510. The lien of a

temporary protective order served in an attachment proceeding is governed by Section 486.110. An attachment lien relates back to the effective date of the lien of a temporary protective order pursuant to Section 488.500.

Various liens are provided by this title. See Sections 697.310 (judgment lien on real property), 697.510 (judgment lien on personal property), 697.710 (execution lien), 706.029 (lien of earnings withholding order), 708.110 (lien by service of order of examination on judgment debtor), 708.120 (lien by service of order of examination on third person), 708.205 (lien of order in examination proceedings), 708.250 (lien of creditor's suit), 708.320 (lien of charging order), 708.410 (lien in pending action or proceeding), 708.780 (lien on money owed judgment debtor by public entity).

Subdivision (c) of Section 697.020 makes clear that the relation back doctrine does not affect the priority or rights of a third person established while the earlier lien was in effect. Thus, for example, if an earlier judgment lien on personal property was subject to the priority of a later purchase money security interest (see Section 697.590), a later execution lien on the same property will be subject to the earlier established priority. Likewise, if the earlier judgment lien on personal property is no longer in existence at the time of execution because it was terminated by the transfer of the property subject to the judgment lien to a buyer in the ordinary course of business (see Section 697.610), the relation back doctrine of Section 697.020 has no application. Similarly, a transfer by a defendant in violation of a temporary protective order under the Attachment Law to a good faith purchaser will terminate the lien created by the temporary protective order (see Section 486.110) and the relation back doctrine will not apply.

General provisions concerning the priority of liens appear in Civil Code Sections 2897-2899. Note that a lien on after-acquired property arises as of the time when the property is acquired by the person whose property is subject to the lien. Civil Code § 2883. Special rules may, however, be applicable in such case. See Sections 697.380(g) (judgment lien on real property), 697.590(b)-(c) and 697.600(b) (judgment lien on personal property).

§ 697.030. Duration of liens generally

Comment. Section 697.030 is new. It makes clear that a lien terminates when the period of enforceability of the judgment expires. For the period of enforceability of a judgment, see

Chapter 3 (commencing with Section 683.010) of Division 1. See also Sections 683.180-683.200 (extension of lien under renewed judgment). This section includes language which recognizes that a particular lien may be more limited in duration. See Sections 697.510(b) (five-year judgment lien on personal property), 697.710 (two-year lien of execution).

A lien may also be extinguished in connection with an order staying enforcement of the judgment as provided in Section 697.040.

§ 697.040. Effect of stay of enforcement of judgment

Comment. Subdivisions (a) and (c) of Section 697.040 supersede and generalize provisions formerly found in Section 674. Subdivision (a) and Section 697.050 also supersede former subdivision (b) of Section 916. Section 1710.50, which is referred to in subdivision (c), relates to enforcement of sister state money judgments. Section 1699, also referred to in subdivision (c), relates to enforcement of sister state support orders.

Subdivision (b) is a new provision that applies to the situation where the trial court stays enforcement of a judgment under Section 918 (stay for a limited time which cannot extend more than 10 days after the last date on which a notice of appeal could be filed). Subdivision (b) makes clear that, unless the court otherwise expressly orders, the granting of a stay under Section 918 does not affect the creation or continuance of a judgment lien on real or personal property. No other enforcement lien may be created or continued during the period of the stay unless the court expressly orders otherwise. These rules are consistent with prior law. See *Industrial Indem. Co. v. Levine*, 49 Cal. App.3d 698, 122 Cal. Rptr. 712 (1975) (granting of stay by trial court under former Section 681a and pursuant to stipulation did not prevent the recording of an abstract of judgment to create a judgment lien on real property). The subdivision, however, authorizes the court to make an order expressly providing another rule appropriate to the circumstances of the particular case. Such an order might provide, for example, that the stay of enforcement shall prevent the creation of a judgment lien, that a judgment lien in existence shall terminate, that property levied on shall continue to be subject to the execution lien but that further proceedings under the levy shall be deferred during the period of the stay, or that specific property may be levied on despite the stay. See also Section 1268.160 (excess withdrawal of deposit in eminent domain proceeding).

§ 697.060. Judgment liens under federal judgments

Comment. Section 697.060 makes clear that judgment liens on real and personal property are available to enforce federal money judgments. See 28 U.S.C. § 1962 (1976) (judgment lien of federal judgment to same extent and in same manner as state judgment if so authorized by state law). Subdivision (a) continues the substance of a portion of former Section 674(a). See also 28 U.S.C. § 1963 (1976) (registration of judgment of one district court in another district).

§ 697.310. Creation and duration of judgment lien on real property generally

Comment. Subdivisions (a) and (b) of Section 697.310 supersede provisions formerly found in Section 674(a). However, unlike the former provision, the 10-year period under subdivision (b) of Section 697.310 is not extended in certain cases where the enforcement of the judgment is stayed. The lien does not continue after the expiration of the period of enforceability of the judgment. See Sections 683.020, 697.030.

Section 697.310 applies to lump-sum money judgments, including certain lump-sum judgments payable in installments. See subdivision (c) (municipal, justice, and small claims court judgments payable in installments and certain vehicle accident judgments payable in installments) and Section 697.330 (judgments entered on workers' compensation awards in a lump sum). Only lump-sum judgments payable in installments like those listed in subdivision (c) are included under subdivision (c). As to support judgments and certain other judgments requiring periodic payments, see Sections 697.320 and 697.330. See also Welf. & Inst. Code § 908 (order for support of ward or dependent child deemed judgment for purposes of this article). As to the procedure for extending the duration of the judgment lien when the judgment is renewed, see Section 683.180.

§ 697.320. Judgment lien for installments under support judgment or judgment against health care provider

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 697.340. Interests subject to judgment lien on real property

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 697.370. Release or subordination of judgment lien

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 697.510. Creation and duration of judgment lien on personal property

Comment. Subdivision (a) of Section 697.510 provides for the creation of a judgment lien on personal property by filing pursuant to this article. Only money judgments entered on or after the operative date of this title may be enforced pursuant to this article. The property that becomes subject to the lien is described in Section 697.530. Subdivision (a) permits the creation of a judgment lien under this article only where the money judgment is a lump-sum money judgment. Because of the disruptive effect of a judgment lien on the business of the judgment debtor, a lien cannot be created under this article pursuant to an installment judgment if there are unmaturing installments at the time of filing. Compare Sections 697.320 and 697.330 (judgment lien on real property under certain installment judgments).

Subdivision (b) makes the duration of the judgment lien on personal property the same as the effective period of a filed financing statement under Commercial Code Section 9403(2). Unlike a security interest, however, the judgment lien on personal property may not be extended beyond the five-year period. The five-year period is sufficient to permit the judgment creditor to apply the property to the satisfaction of the judgment by execution or otherwise. If the judgment creditor files a second notice of judgment lien on the same property, the second filing does not affect the first lien nor extend the five-year period of its duration. Subdivision (c) makes clear that the priority and duration of the second lien is based on its date of filing and does not relate back to the date of the filing of the notice of the first lien. However, if a judgment lien is created under this article, it may relate back to an earlier attachment lien. See Section 697.020 and the Comment thereto.

§ 697.530. Property subject to judgment lien

Comment. Section 697.530 specifies the types of personal property that are subject to a judgment lien. Under subdivision (a), the property subject to a judgment lien must be property of the described kind in which a security interest could be perfected by filing a financing statement with the Secretary of State. Thus, for example, money, instruments and securities that do not constitute part of chattel paper, and letters and advices of credit are omitted from subdivision (a) because under the Commercial Code security interests in such collateral are generally perfected by taking possession. See Com. Code §§ 5116, 9304, 9305. If possession of a type of property would be required for perfection of a security interest under the Commercial Code, the judgment creditor will generally find it necessary to take possession by means of a levy of execution if the property is in the possession of the judgment debtor. See, *e.g.*, Sections 700.030 (levy on tangible personal property in possession of judgment debtor), 700.110 (levy on instruments), 700.130 (levy on securities).

If the property would be included within one of the types listed in subdivision (a), a judgment lien cannot be created under this article if a security interest in the property would be perfected by a filing in a place other than in the office of the Secretary of State. Thus, a judgment lien cannot be created under this article on consumer goods (Com. Code § 9109), growing crops, or timber to be cut or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead because the filing under the Commercial Code in such cases is made in the office of the county recorder rather than in the office of the Secretary of State. See Com. Code § 9401 (place of filing under Commercial Code). Similarly, if equipment has become a fixture, the judgment lien will not attach to the property. See Com. Code § 9313 (fixture filing). See also subdivision (e) (judgment lien extinguished when property becomes fixture).

Under subdivision (b), the judgment lien on personal property is a lien on after-acquired property of a type described in subdivision (a). This lien on after-acquired property is analogous to the one provided by Commercial Code Section 9204. As to the priorities in the case of after-acquired property, see Sections 697.590(b)-(c), 697.600(b).

Despite the unavailability of a judgment lien on money, checks, and deposit accounts by filing under this article, Section 697.620 provides for the continuation of the judgment lien in

identifiable cash proceeds of a transfer of property that is subject to a judgment lien. This provision for a lien on proceeds is consistent with but more limited than Commercial Code Section 9306. See the Comment to Section 697.620.

Subdivision (d) (1) precludes creation of a judgment lien on a vehicle or vessel required to be registered with the Department of Motor Vehicles, or on a mobilehome or commercial coach required to be registered with the Department of Housing and Community Development, even though a security interest in such property may be perfected by filing with the Secretary of State in some circumstances.

Subdivision (d) (2) recognizes an important limitation on the judgment lien on inventory consistent with the limitation on a non-purchase money nonpossessory security interest in the inventory of a retail merchant under Commercial Code Section 9102(4).

§ 697.590. Priority of judgment lien against security interests

Comment. Subdivision (a) of Section 697.590 makes clear that Commercial Code Section 9301 applies to judgment liens on personal property. The general rule in subdivision (b) is consistent with Commercial Code Section 9312. The last portion of subdivision (b) is drawn from Commercial Code Section 9301(2). Subdivision (c) resolves a circular priority problem that could arise under subdivision (b).

§ 697.640. Recording of documents extinguishing judgment lien on personal property

Comment. Section 697.640 provides a procedure for extinguishing of record judgment liens on personal property. Section 724.050 provides a procedure for obtaining an acknowledgment of satisfaction of judgment. See also Sections 724.060 (contents of acknowledgment of satisfaction), 724.100 (clerk's certificate).

§ 697.660. Release of erroneous judgment lien on personal property

Comment. Section 697.660 is comparable to Section 697.410, but also permits a secured party to seek the release of an erroneous judgment lien. See the Comment to Section 697.410.

§ 697.710. Creation and duration of execution lien

Comment. Section 697.710 supersedes a portion of the first sentence of former Section 688(e). The one-year execution lien under former law is superseded by the two-year lien provided by Section 697.710. The running of the lien is not tolled during a stay of enforcement and the lien may in some cases be extinguished under Section 697.040 (effect of stay of enforcement of judgment). Property is not affected by issuance of a writ or the delivery of a writ to the levying officer and no execution lien attaches to the property until levy. For general provisions governing liens, see Article 1 (commencing with Section 697.010). For a special provision applicable to an execution lien on an interest in personal property in the estate of a decedent, see Section 700.200(d). Failure to post, serve, or mail a copy of the writ and notice of levy does not affect an execution lien created by levy of execution. See Section 699.550.

§ 697.920. Effect of lien

Comment. Section 697.920 gives a lien under this article the same effect as is given an execution lien where the property is not in custody of a levying officer, except that Section 697.920 applies to all property, real and personal, subject to the lien.

§ 699.060. Release of property from lien and custody

Comment. Section 699.060 supersedes the portion of subdivision (b) of former Section 688 that incorporated the manner of release of attachment. Section 699.060 is drawn from Section 488.560 (release of attachment). Subdivision (b), however, provides additional detail governing the disposition of unclaimed proceeds.

§ 699.080. Levy by registered process server

Comment. Section 699.080 supersedes subdivisions (b) and (c) of former Section 687. This section expands and clarifies the role of the registered process server in levying on property pursuant to a writ of execution. See also Section 715.040 (service and posting of writ of possession of real property).

Subdivision (a) of Section 699.080 specifies the methods of levy that may be performed by a registered process server. This authority is limited to cases where the levy does not involve the possibility of taking immediate possession of the property.

Subdivision (b) makes clear that the registered process server is required to perform certain duties ancillary to the levy that

would normally be performed by the levying officer at the time of levy or promptly thereafter. Subdivision (c) requires that the levying officer be provided with the information necessary to perform the remaining duties under the writ and to make a return on the writ. Subdivision (d) continues the substance of former Section 687(c). Subdivision (e) makes it discretionary with the court whether a fee for a registered process server will be allowed as costs. Whether the registered process server was used as a convenience to the judgment creditor or because service would not have been made if a public employee were used is an element to be considered by the court in exercising its discretion. If the court decides to allow a fee, subdivision (e) incorporates the general standard for recovery of the costs of employing a registered process server. For a limitation on this provision, see Section 706.101(e) (earnings withholding order).

§ 699.090. Liability for levy based on record ownership

Comment. Section 699.090 continues the substance of a portion of the second paragraph of former Section 689. See also Section 700.090 (notice to legal owner of certain vehicles, vessels, mobilehomes, and commercial coaches).

§ 699.510. Issuance of writ of execution

Comment. Subdivision (a) of Section 699.510 supersedes portions of the first sentences of former Sections 681 and 682 pertaining to issuance of writs of execution, and continues the substance of the first and last sentences of subdivision (a) of former Section 687. The time during which a writ of execution may be issued is determined pursuant to Chapter 3 (commencing with Section 683.010) of Division 1. Where writs of execution are issued for two or more counties, the judgment creditor has a duty to see that an excessive levy is not made. *Cf. White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 347-50, 438 P.2d 345, 66 Cal. Rptr. 697 (1968) (excessive attachment as abuse of process). The same duty to avoid an excessive levy would exist, for example, where one writ is retained after the 180-day period for the purpose of completing a sale or continuing a collection and the judgment creditor obtains another writ to reach other property in the same county. As to levy by a registered process server, see Section 699.080. See also Section 706.101(e) (wage garnishment).

Subdivision (a) also supersedes prior law under which no more than one writ could be outstanding in one county for the enforcement of the same judgment. See subdivision (b) of

former Section 683. See also 32 Ops. Cal. Att'y Gen. 22 (1958). Subdivision (a) permits the issuance of a writ of execution for a particular county once every 180 days (unless the prior writ is earlier returned) and Section 699.530 provides a 180-day period during which property may be levied upon under the writ. During the 180-day period, any number of levies are permitted on the same writ. Hence, only one writ at a time provides authority for levy in a given county although several writs might be outstanding since Section 699.560 permits a writ to be retained for the completion of sale or collection until two years after the writ was issued. This arrangement provides the judgment creditor with needed flexibility; one writ may be retained by the levying officer for the purpose of completing a sale or continuing collection while another writ may be issued in the same county to reach newly discovered property after the 180-day period for levy under the first writ has expired.

Subdivision (b) makes clear that a judgment creditor seeking to enforce a support judgment is required to comply with Civil Code Section 4383 which permits enforcement of installments not more than 10 years overdue by execution without the need for prior court approval. As to installments more than 10 years overdue, see Civil Code Sections 4380 and 4384. See also Section 683.310 and the Comment thereto.

The provisions of this section are subject to limitations provided elsewhere. See, *e.g.*, Sections 683.010-683.220 (time for enforcement), 686.020 (enforcement after death of judgment debtor), 916-923 (stay of enforcement).

§ 699.530. Delivery and execution of writ; limitation on time for levy

Comment. Subdivision (a) of Section 699.530 continues the practice under former law that the levying officer will not act until the judgment creditor delivers the writ of execution and written instructions to levy upon specific property. See Sections 262 (instructions of a party or the party's attorney not an excuse from liability unless in writing), 684.130 (name and address for service), 687.010 (instructions to levying officer). Subdivision (a) also supersedes the first portion of the first sentence of former Section 691. The mandatory order of levy provided in subdivision 1 of former Section 682 is not continued, but the judgment creditor's instructions may designate the order of levy. See also Sections 685.050 (costs and interest under writ), 685.090 (addition of costs to judgment), 685.100 (deposit of levying

officer's costs), 699.080 (levy by registered process server), 699.710 (property subject to levy of execution).

Subdivision (b) prescribes the time within which property may be levied upon under a writ of execution. The 180-day period runs from the date of issuance of the writ, whereas under subdivision (a) of former Section 683 the writ was to be returned within 60 days after its receipt by the levying officer.

§ 699.540. Contents of notice of levy

Comment. Section 699.540 prescribes the contents of the notice of levy. A statutory form is provided in Section 693.020. The Judicial Council has authority to supersede the statutory form. See Section 681.030. Under prior law, the notice of levy was recognized by Section 688(b), but there was no provision for an official form of the notice. Instead, the form of the notice of levy was determined by the levying officers. See, e.g., Marshal's Manual of Procedure §§ 302.1, 344.1 (rev. 1980); Cal. State Sheriffs' Ass'n, Civil Procedural Manual 4.10, 4.10.4, 4.19-4.20, 4.23-4.24 (rev. 1980). The notice of levy is directed to the person being notified whereas the writ of execution is directed to the levying officer or a registered process server. See Sections 699.510 (issuance of writ) and 699.520 (contents of writ of execution). The judgment creditor must supply written instructions to the levying officer which provide sufficient information to complete the notice of levy. See Sections 684.130 (name and address for service), 687.010 (instructions to levying officer), 699.530 (delivery of instructions to levying officer).

§ 699.560. Return of writ of execution

Comment. Subdivision (a) of Section 699.560 supersedes subdivisions (a), (c), and (d) of former Section 683. Under subdivision (a), the period at the end of which the writ must be returned runs from the date of issuance of the writ rather than from the date the writ was received by the levying officer. The provision of former Section 683 that the writ could not be returned before the expiration of 10 days is not continued. If a levy takes place under the writ, any sale of property or collection of a debt under the writ must be completed before the expiration of two years from the date of issuance of the writ under which levy took place (except in the case of an interest in a decedent's estate governed by Section 700.200). Ultimately, return must be made at the expiration of the period of enforceability of a judgment provided by Chapter 3 (commencing with Section

683.010) of Division 1. Redelivery of the writ, alias writs, and alias returns are not authorized as they were under former Sections 683 and 688(e).

Subdivision (b) recognizes that a special rule is provided in subdivision (e) of Section 700.200.

The provisions of this section are incorporated for the purpose of returns of writs of possession and writs of sale. See Section 712.050.

§ 699.710. Property subject to execution

Comment. Section 699.710 supersedes provisions of former law that purported to prescribe the property subject to execution. See subdivision 1 of former Section 682 (personal property, real property, and real property subject to judgment lien) and former Section 688(a) (“All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property levied upon under attachment in the action, are subject to execution.”). The type of property that may be reached by levy under a writ of execution is limited by the general principles determining the classes of property that may be applied toward the satisfaction of a money judgment through any procedure. See Sections 695.010-695.070 and the Comments thereto. The introductory clause of Section 699.710 recognizes that certain types of property that are subject to enforcement of a money judgment are not subject to levy under a writ of execution. See Section 699.720 (property not subject to execution). See also Section 700.180 (limitation on levy on certain property that is subject of pending action).

§ 699.720. Property not subject to execution

Comment. Subdivision (a) of Section 699.720 describes certain types of property that are not subject to levy of execution. Subdivision (b) recognizes, however, that such property may be subject to enforcement of a money judgment through some other procedure in Chapter 6. See Article 4 (commencing with Section 708.310) (charging orders against interest of partner in partnership property), Article 5 (commencing with Section 708.410) (lien in pending action or proceeding), Article 6 (commencing with Section 708.510) (assignment order reaching such payments as payments and wages due from the federal government, rents, commissions, royalties, payments due from patent or copyright), Section 708.630 (receiver to transfer

alcoholic beverage license), Article 8 (commencing with Section 708.710) (money, other than wages, owing and unpaid by a public entity to the judgment debtor), Section 708.920 (enforcement against franchise), Article 10 (commencing with Section 709.010) (interest as a beneficiary of a trust, interest in property that is not a vested interest, property in guardianship or conservatorship estate). See also Section 700.180 (limitation on levy on certain property that is subject of pending action).

Subdivision (a) (6) recognizes that life insurance loan values are not subject to execution. See *Equico Lessors, Inc. v. Metropolitan Life Ins. Co.*, 88 Cal. App.3d Supp. 6, 7-10, 151 Cal. Rptr. 618 (1978). As to the procedure for reaching the loan value, see the discussion in the Comment to Section 704.100. The cash surrender value is not subject to enforcement of a money judgment. See Sections 703.030(b), 704.100(a).

Subdivision (a) (7) supersedes former Section 724a which subjected franchises to levy and sale under execution. A franchise may be applied to the satisfaction of a money judgment pursuant to Article 9 (commencing with Section 708.910) of Chapter 6 (miscellaneous creditors' remedies).

Property that is exempt by statute without the need to make an exemption claim is not subject to any procedure for the enforcement of a money judgment. See Section 703.030(b).

§ 700.015. Real property

Comment. Section 700.015 is comparable to Section 488.310 (levy upon interests in real property pursuant to the Attachment Law) which was incorporated by former Section 688(b). Any legal or equitable interest in land that is subject to the enforcement of a money judgment is subject to execution unless another exclusive method of enforcement is specified, such as, for example, a partner's interest in partnership real property (where the partner and not the partnership is a judgment debtor) which may be reached by a charging order pursuant to Section 708.310. See Sections 695.010 (property subject to enforcement of money judgment), 699.710 (property subject to execution); *Lynch v. Cunningham*, 131 Cal. App. 164, 173-75, 21 P.2d 154, 21 P.2d 973 (1933). See also Sections 697.710 (execution lien), 697.720 (effect of transfer or encumbrance).

Leasehold interests are subject to levy as real property under Section 700.015. See Sections 680.320 ("real property" defined), 695.035 (leases subject to enforcement). It was the practice under former law to treat some leases as personal property and

some as real property for purposes of levy. See Marshal's Manual of Procedure § 300.3 (rev. 1977).

Former law did not require recordation of the writ and notice of levy if there was an existing judgment lien on the property. See *Lehnhardt v. Jennings*, 119 Cal. 192, 195-97, 48 P. 56, 51 P. 195 (1897) (no levy required where judgment is lien). However, the practice has been to levy in every case. See Marshal's Manual of Procedure § 303.2 (rev. 1980); Cal. State Sheriffs' Ass'n, Civil Procedural Manual 4.10.1 (rev. 1980). Section 700.015 continues existing practice by requiring a complete levy to be made regardless of whether there is a prior judgment lien or attachment lien on the property in favor of the judgment creditor.

§ 700.020. Growing crops, timber to be cut, minerals to be extracted

Comment. Section 700.020 is derived from a portion of Section 488.360(c) (attachment of growing crops and timber to be cut) which was incorporated by former Section 688(b), and from subdivisions 1a and 2a of former Section 542 (repealed by 1974 Cal. Stats. ch. 1516, § 12, operative January 1, 1977). The provision concerning levy on minerals or the like and accounts receivable resulting from the sale of minerals is drawn from Commercial Code Sections 9103(5) and 9401(1)(b). Once the crops are harvested, the timber is cut, or the minerals or the like are extracted, the property may be levied upon in the manner provided for levy upon tangible personal property. See Sections 700.030-700.070. The levying officer or a receiver may cultivate, care for, harvest, pack, and sell the property levied upon, if necessary, pursuant to court order under Section 699.070. Subdivision (b)(2) is new. As to the place of filing financing statement concerning growing crops, timber to be cut, and minerals or the like, see Com. Code § 9401(1)(b). See also Sections 697.710 (execution lien), 697.750 (effect of transfer).

§ 700.030. Tangible personal property in possession of judgment debtor

Comment. Section 700.030 continues the substance of the first sentence of subdivision (c) of former Section 688. For the manner of taking custody, see Section 687.030. The introductory clause of Section 700.030 recognizes that the general rule does not apply where another section of this article is applicable to a particular type of property. See Sections 700.070 (tangible

personal property of going business) and 700.080 (personal property used as dwelling). See also Sections 697.710 (execution lien), 697.730-697.740 (effect of transfer).

§ 700.040. Tangible personal property in possession of third person

Comment. Subdivision (a) of Section 700.040 continues the substance of a portion of the last sentence of subdivision (b) of former Section 688. The introductory portion of subdivision (a) recognizes that the general rule is subject to exceptions, such as that provided in subdivision (b). See also Sections 700.050 (property in custody of levying officer), 700.060 (bailed goods not covered by negotiable document of title), 700.150-700.160 (safe deposit boxes). See also Sections 697.710 (execution lien), 697.740 (effect of transfer).

Subdivision (b) corresponds to subdivision (d) of Section 488.330 (attachment) which was incorporated by former Section 688(b).

§ 700.050. Personal property in custody of levying officer

Comment. Section 700.050 is restricted to cases where the property levied upon is already in the custody of a levying officer. Paragraph (1) of subdivision (a) is based on case law concerning a "paper levy" involving only one levying officer. See, *e.g.*, *O'Connor v. Blake*, 29 Cal. 312, 315 (1865); *Colver v. W.B. Scarborough Co.*, 73 Cal. App. 441, 443, 238 P. 1104 (1925). Under paragraph (1), the execution lien under Section 700.050 arises at the time the writ is delivered to the levying officer. See Section 697.710 (execution lien). Paragraph (1) applies in cases where the judgment creditor has previously attached the property as well as in cases where another judgment creditor has had the property taken into custody on attachment or execution. Paragraph (2) governs levies involving two levying officers, such as where property already levied upon and in the custody of a sheriff is sought to be levied upon under a writ directed to a marshal. See also Section 697.730 (effect of transfer).

Subdivision (b) clarifies the effect of a paper levy. See also Section 701.810(g) (distribution of excess proceeds under paper levies).

§ 700.060. Bailed goods not covered by negotiable document of title

Comment. Section 700.060 is a new provision that changes the rule in *Crow v. Yosemite Creek Co.*, 149 Cal. App.2d 188, 308

P.2d 421 (1957). Although levy establishes the judgment creditor's lien, it does not affect any superior rights the holder of a perfected security interest may have. See Section 701.040. A levy on goods subject to a security interest pursuant to this section reaches both the judgment debtor's interest in any surplus remaining after satisfaction of the interest of the secured party and the judgment debtor's right to redeem the property from the security interest. See Civil Code § 2903; Com. Code §§ 9504, 9506. If a negotiable document of title has been issued, it may be levied upon pursuant to Section 700.120. See also Section 697.710 (execution lien), 697.740 (effect of transfer).

§ 700.070. Tangible personal property of going business

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 700.080. Personal property used as dwelling

Comment. Section 700.080 supersedes the third and fourth sentences of former Section 688(c). Levy is accomplished by notice to the occupant under subdivision (a) or, if such service cannot be made, by posting; but if the judgment creditor desires greater security, a keeper may be used pursuant to subdivision (b). See also Sections 697.710 (execution lien), 697.730-697.740 (effect of transfer). Subdivision (c) supersedes the fourth sentence of former Section 688(c) which required the keeper to take exclusive custody of the property at the end of two days or a longer period agreed upon by the parties. This subdivision recognizes the right of the occupant to have a judicial determination of the occupant's right of possession (including any claim to a dwelling exemption). See also Section 700.090 (notice to legal owner of vehicle, vessel, mobilehome, or commercial coach where certificate of ownership has been issued).

§ 700.100. Chattel paper

Comment. Section 700.100 is derived from Section 488.380 (attachment of chattel paper) which was incorporated by former Section 688(b). For duties and liabilities of garnishees, see Sections 701.010-701.030. For duties and liabilities of account debtors, see Section 701.050. Article 3 (commencing with Section 697.510) of Chapter 2 provides an alternate method for obtaining a lien on chattel paper. See also Sections 697.710 (execution lien), 697.730-697.740 (effect of transfer).

The method of levy on chattel paper is not affected by the fact that the chattel paper may be subject to a perfected security interest:

(1) If the chattel paper is in the possession of a third person who claims to be a secured party, the third person may protect his or her rights by delivering the chattel paper to the levying officer and obtaining a determination of priority through the third-party claims procedure (Division 4 (commencing with Section 720.010)) or by refusing to deliver the chattel paper to the levying officer. See Section 701.010 (duty of garnishee in general). If the third person refuses to deliver and the security interest claimed is subordinate to the rights of the judgment creditor under the levy (see Com. Code § 9301), the third person is liable to the judgment creditor. See Section 701.020.

(2) If the chattel paper is in the possession of the judgment debtor, and a secured party has left the liberty in the judgment debtor to collect the chattel paper or to enforce or accept the return of property under the chattel paper (see Com. Code § 9205), the judgment creditor may disregard the security interest and seize the chattel paper; the secured party's remedy is by way of a third-party claim. If the secured party has possession of the chattel paper in such a case, the account debtor may be served with a copy of the writ and a notice of levy to guard against payment or the return of property to the judgment debtor, whether or not possession of the chattel paper is obtained by the levying officer.

Subdivision (c) makes clear that a levy on chattel paper reaches all the judgment debtor's rights in the property, the security interest in which or the lease of which resulted in the chattel paper. For example, the judgment debtor may have a reversionary right as a lessor. This enables a creditor who levies on chattel paper to have priority over another creditor who later levies on the property.

§ 700.110. Instruments

Comment. Section 700.110 is derived from a portion of Section 488.400 (attachment of negotiable instruments) which was incorporated by former Section 688(b). The coverage of this section is broader than former law because it is not restricted to negotiable instruments. See Section 680.220 ("instrument" defined). See also Sections 697.710 (execution lien), 697.730-697.740 (effect of transfer).

Subdivision (b) provides a new restriction on giving notice to the obligor under the instrument: such notice may be given only

if the levying officer has obtained possession of the instrument. This limitation is intended to prevent interference with the rights of secured parties and holders in due course. As to the duties and liabilities of garnishees, see Sections 701.010-701.030. As to the duties and liabilities of obligors, see Section 701.060. As to the duty of the levying officer to endorse and present an instrument for payment, see Section 687.020.

§ 700.120. Negotiable documents of title

Comment. Section 700.120 continues the substance of a portion of Section 488.400 (attachment of negotiable documents) which was incorporated by former Section 688(b). See also Sections 697.710 (execution lien), 697.730-697.740 (effect of transfer. Section 700.040(b) precludes levy on goods in the possession of a third person that are covered by a negotiable document of title. See also Com. Code §§ 1201(15), 7602. Article 3 (commencing with Section 697.510) of Chapter 2 provides an alternate method of obtaining a lien on a negotiable document of title.

§ 700.130. Securities

Comment. Section 700.130 supersedes Section 488.410 (attachment of securities) insofar as it was incorporated by former Section 688(b) for the purposes of execution. See also Sections 697.710 (execution lien), 697.730-697.740 (effect of lien).

§ 700.150. Safe deposit boxes

Comment. Section 700.150 is new. Subdivisions (a), (b), and (e) are analogous to Section 488.390 (attachment of deposit accounts). Subdivision (c) is drawn from a portion of the fourth sentence of former Section 682a. Subdivision (d) is drawn from the last sentence of former Section 682a. If the judgment creditor is required to pay the costs of forcibly opening a safe deposit box pursuant to subdivision (d), the costs may be later recovered from the judgment debtor. See Section 685.040. For provisions governing levy on a safe deposit box standing in the name of a person other than the judgment debtor, see Section 700.160. See also Sections 697.710 (execution lien), 697.730-697.740 (effect of lien).

§ 700.170. Accounts receivable and general intangibles

Comment. Section 700.170 supersedes a portion of the last sentence of former Section 688(b) and Section 488.370

(attachment of accounts receivable and choses in action) to the extent it was incorporated by former Section 688(b). The introductory portion of subdivision (a) recognizes that a different method of levy may be provided for some types of property. See, *e.g.*, Sections 700.020 (account receivable resulting from sale of minerals, oil, or gas at wellhead or minehead), 700.140 (deposit accounts). See also Sections 697.710 (execution lien), 697.740 (effect of lien).

Subdivision (b) is a new provision that recognizes the need for special provisions if the account receivable or general intangible is subject to collection by a third person, such as pursuant to a security interest or assignment for collection. In such a situation, the levy by service on the account debtor establishes the judgment creditor's priority. The account debtor continues payment to the third person pending resolution of any disputes. See Section 701.050 (duty of account debtor). See also Division 4 (commencing with Section 720.010) (third-party claims); Com. Code § 9301 (lien creditor has priority over unperfected security interest). Service of notice of levy on the third person operates as a levy on any amounts owed to the judgment debtor by the third person. This protects the rights of the judgment creditor, for example, to any surplus payments remaining after satisfaction of a security interest or to payments in the hands of a collecting agent. This preserves the rule in such cases as *Axe v. Commercial Credit Corp.*, 227 Cal. App.2d 216, 38 Cal. Rptr. 558 (1964) (surplus payments under pledged accounts receivable), and *Puissegur v. Yarbrough*, 29 Cal.2d 409, 175 P.2d 830 (1946) (note held for collection). See also Section 701.040 (duty of secured party upon levy). Article 3 (commencing with Section 697.510) of Chapter 2 provides an alternate method for obtaining a lien on accounts receivable and general intangibles.

§ 700.180. Levy on property that is subject of pending action or proceeding

Comment. Section 700.180 deals with the effect of a levy on property that is the subject of a pending action or special proceeding. Subdivision (a) describes the types of property that may be levied upon regardless of whether the property is the subject of a pending action or proceeding. Such property is levied upon just as if there were no pending action or proceeding, and the levying officer serves the notice of levy upon the same persons and in the same manner as is required in connection with any other levy on such property. Subdivision (e) makes clear that the judgment creditor may also obtain a lien in

the pending action or proceeding under Article 5 (commencing with Section 708.410) of Chapter 6. If a lien is obtained by the judgment creditor under Article 5, the judgment debtor cannot settle the action or proceeding without either satisfying the judgment of the judgment creditor or obtaining the written consent of the judgment creditor or court approval. See Section 708.440. See also Section 708.480 (enforcement of judgment creditor's lien after final judgment in action or proceeding). In addition, if a lien under Article 5 is obtained, the judgment debtor's right to enforce the judgment obtained in the action or proceeding is subject to the same limitations as the judgment debtor's right to settle the action or proceeding. See Section 708.440.

Subdivision (b) makes ineffective a levy upon property other than that described in subdivision (a) if the property is the subject of a pending action or proceeding. Generally this property is tangible personal property not in the possession of the judgment debtor or intangible personal property (such as a debt owed the judgment debtor). If property cannot be levied upon as provided in this section, subdivision (e) makes clear that the judgment creditor can obtain a lien on the property that is the subject of the pending action or proceeding by filing as provided under Article 5 (commencing with Section 708.410) of Chapter 6. This protects the rights of the judgment creditor and, at the same time, permits the third person to await the outcome of the pending litigation before making a decision concerning whether to deliver the property or to pay the debt that is the subject of the litigation.

Subdivision (c) requires that the garnishee's memorandum contain information to enable a judgment creditor who has made an ineffective levy upon property that is the subject of a pending action or proceeding (see subdivision (b) of this section) to file the necessary documents in the pending action or proceeding to obtain a lien under Article 5 (commencing with Section 708.410) of Chapter 6. The fact that the levy is ineffective does not negate the duty to provide a garnishee's memorandum if requested by the levying officer. See Section 701.030(a).

Subdivision (d) clarifies the meaning of "pending action or special proceeding" as used in this section.

§ 701.040. Rights and duties of secured party

Comment. Section 701.040 reflects the principle that where practicable an execution levy should not affect the right of a prior

secured party to resort to collateral and should not disrupt ongoing business relations between account debtors and secured parties in the absence of a determination or an admission that the judgment creditor's lien has priority. See also Com. Code § 9203 (attachment of security interest). The levy is generally intended to appropriate the rights of the judgment debtor to any excess remaining after satisfaction of the security interest. See subdivision (b). See also Com. Code §§ 9311 (permissibility of involuntary alienation of debtor's rights in collateral), 9504 (satisfaction of security interest). As recognized by the introductory clause of subdivision (a), this right of the secured party is subject to an exception where a court order determining that the judgment creditor has priority is obtained. See Com. Code § 9301(1)(b) (lien creditor has priority over unperfected security interest). Of course, the secured party may voluntarily release the collateral if the secured party recognizes that the judgment creditor has a clear priority. The duties and liabilities of the secured party under this section may be enforced pursuant to Article 2 (commencing with Section 708.110) (examination proceedings) or Article 3 (commencing with Section 708.210) (creditor's suit) of Chapter 6.

Under subdivision (a), the secured party may enforce the security interest without interference from the levy only if the property or obligation levied upon is not in the custody of the levying officer. See also Section 701.050 (duty of account debtor).

The requirement that the secured party pay excess proceeds and deliver excess property to the levying officer is an exception to the normal requirements under Commercial Code Section 9504 that the secured party apply proceeds to the indebtedness secured by a subordinate security interest and account to the debtor for any surplus.

§ 701.060. Duty of obligor under instrument

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 701.530. Notice of sale of personal property

Comment. Subdivisions (a)-(c) of Section 701.530 continue the substance of the first sentence of subdivision 2 of former Section 692. The 10-day period provided in subdivision (b) is not extended if service on the judgment debtor is by mail (Section 684.120 extending time when service is by mail does not apply to this situation), but the time under subdivision (d) may be

extended by Section 684.120. See the Comment to Section 703.520. Subdivision (d) is a new provision intended to afford an individual an opportunity to claim any available exemptions.

§ 701.545. Period that must elapse before giving notice of sale

Comment. Section 701.545 delays the giving of notice of a sale of real property for at least 120 days after the notice of levy is served on the judgment debtor. This 120-day delay is provided to give the judgment debtor an opportunity to redeem the property from the judgment creditor's lien before the sale or to seek potential purchasers. The statutory right of redemption from execution sales of real property provided by former Sections 700a-707 is repealed. See Section 701.680 and the Comment thereto (sales absolute). See also Section 729.010 (redemption from certain foreclosure sales).

§ 701.547. Notice to prospective bidders

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 701.550. Notice of sale to persons requesting notice

Comment. Subdivisions (a) and (b) of Section 701.550 continue the substance of portions of former Section 692a. This procedure applies to sales under writs of execution and other writs. The clerk must note the request for notice on the writ. See Sections 699.520 (writ of execution), 712.020 (writs of possession and sale). Sales of property take place under writs of execution and writs of sale as a matter of course (see Sections 701.510, 716.020) and under writs of possession of personal property as an ancillary matter (see Section 714.020). Notice of sale is required to be given to the judgment debtor and lienholders of record of real property in all cases. See Section 701.540.

Subdivision (c) is a new provision for requesting notice of sale of property that has already been levied upon.

§ 701.555. Judgment creditor and judgment debtor may advertise sale

Comment. Advertising under Section 701.555 may be appropriate where certain types of property with a specialized market are to be sold, such as stamps, coins, or rare books. Expenses of the judgment creditor's advertising in this manner are recoverable if reasonable, but as a practical matter the

judgment creditor may be unable to recover such costs. See Sections 685.080, 685.090. Section 701.555 is permissive, not restrictive.

§ 701.590. Manner of payment

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 701.600. Defaulting bidder

Comment. Subdivision (a) of Section 701.600 supersedes the first portion of former Section 695. See *Bell v. Redwine*, 98 Cal. App. 784, 787, 277 P. 1050 (1929) (officer must resell property). If a new sale is held, it must satisfy the requirements of notice, time, place, and manner of sale provided by this article.

Subdivision (b) is designed to handle situations where there is a default by a bidder who elects to treat the sale as a credit transaction pursuant to Section 701.590(c)-(d).

Subdivision (c) supersedes the latter portion of former Section 695. This subdivision authorizes the judgment creditor or the judgment debtor to sue the defaulting bidder whereas former Section 695 provided that the officer could recover the amount of the loss, with costs. However, case law under former Section 695 permitted the judgment debtor to recover from the defaulting bidder. See *Meherin v. Saunders*, 131 Cal. 681, 689-91, 63 P. 1084 (1901). Paragraph (1) of subdivision (c) codifies the case law rule that the amount of the loss is the difference between the unpaid bid and a lower price obtained at a later sale. See *Johns v. Trick*, 22 Cal. 511, 513 (1863); *Meherin v. Saunders*, 131 Cal. 681, 687-88, 63 P. 1084 (1901) (dictum).

Subdivision (d) continues the substance of former Section 696.

§ 701.620. Minimum bid

Comment. Section 701.620 is a new provision not found in prior law. Section 701.620 supersedes a portion of former Section 690.2(b) (minimum bid at sale of motor vehicle). See also Sections 701.810 (distribution of proceeds of sale or collection), 704.800 (minimum bid at sale of homestead).

§ 701.630. Extinction of liens upon sale

Comment. Section 701.630 is new. The portion of Section 701.630 dealing with extinction of subordinate liens is consistent with the rule under prior law. See *Mitchell v. Alpha Hardware & Supply Co.*, 7 Cal. App.2d 52, 45 P.2d 442 (1935). See also Civil

Code § 2910 (extinction of lien upon sale). Subordinate lienholders may be entitled to share in any excess proceeds of sale even though their liens are extinguished. See Section 701.810 (distribution of proceeds).

§ 701.680. Sales absolute; liability

Comment. Section 701.680 supersedes former Section 708 which provided rights for the purchaser in case the sale is set aside. Section 701.680 does not permit the sale to be set aside unless the sale was made to the judgment creditor and an action is brought within six months after the date of sale. The judgment debtor is protected by provisions permitting a stay of enforcement pending appeal and a court determination pending sale of whether property is exempt or not subject to enforcement. See Sections 695.040 (release of property not subject to enforcement), 703.510 (determination of exemptions), 916 (stay on appeal).

Section 701.680 also supersedes the first sentence of subdivision (a) of former Section 700a which made absolute only sales of personal property and of leasehold estates with unexpired terms of less than two years. Section 701.680 reflects the repeal of the statutory right of redemption after execution sales. See former Sections 700a-707. Sales of interests in real property (except leasehold estates with less than two years' unexpired term at the time of levy) are delayed at least 140 days, however, in order to provide an opportunity for the judgment debtor to redeem the property from the judgment creditor's lien *before* sale, to advertise the sale and give notice to potential buyers, or to make a settlement with the judgment creditor. See Civil Code § 2903; Code Civ. Proc. § 701.545. The elimination of the statutory right to redeem after a sale pursuant to this article does not affect rights to redeem afforded by other law. See, *e.g.*, Code Civ. Proc. § 729.010 (redemption from certain foreclosure sales); Harb. & Nav. Code § 504 (20-day redemption period after sale of vessel on lien for repairs); Rev. & Tax. Code § 4101 (redemption of tax-deeded real property); Sts. & Hy. Code § 6530 (12-month redemption period after sale by treasurer to collect assessments under Improvement Act of 1911); I.R.C. § 6337 (120-day redemption period after sale of real property to collect federal taxes).

§ 701.810. Distribution of proceeds of sale or collection

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 701.820. Time for distribution of proceeds

Comment. Section 701.820 is a new provision intended to accomplish the prompt and orderly distribution of proceeds of a sale or collection under this title. For the determination of conflicting claims to proceeds, see Section 701.830.

§ 701.830. Procedure where conflicting claims to proceeds

Comment. Section 701.830 provides a new procedure for resolving conflicting claims to proceeds known to the levying officer. This procedure is drawn in part from Probate Code Sections 2522-2526 (guardianship and conservatorship).

§ 703.030. Manner of claiming exemptions; effect of failure to claim

Comment. Subdivisions (a) and (b) of Section 703.030 continue the substance of subdivisions (a) and (c) of former Section 690 but are broader in their application since they are not limited to exemptions provided in this chapter. Former law also referred to exemptions “from execution” whereas Section 703.010 makes clear that exemptions apply in all proceedings for the enforcement of a money judgment. The introductory clause of subdivision (b) recognizes that property described as “exempt without making a claim” may nevertheless be subject to enforcement of a money judgment in certain circumstances. See, *e.g.*, Section 704.110(c) (exception to public retirement exemption in case of enforcement of support judgment).

If property is levied upon by a levying officer, the applicable procedure for claiming an exemption is that provided in Article 2 (commencing with Section 703.510), with the exception of the homestead exemption which is governed by Article 4 (commencing with Section 704.710). The exemption procedure is also incorporated in other instances, *e.g.*, where property is attached under an *ex parte* writ of attachment (see Section 485.610) or where a warrant or notice of levy for the collection of taxes is treated as a writ of execution (see Section 688.030). If the property is sought to be reached by a procedure other than by levy under a writ, a court hearing is required and exemption claims will be determined at such time or later upon noticed motion. See Sections 708.120 (examination proceedings), 708.260 (creditor’s suit), 708.450 (lien in pending action), 708.550 (assignment orders), 708.770 (collection where public entity is debtor of judgment debtor).

Subdivision (c) recognizes the power of the court under Section 473 to relieve the claimant from the consequences of failure properly to file a claim of exemption through mistake, inadvertence, surprise, or excusable neglect.

§ 703.080. Tracing exempt funds

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 703.110. Application of exemptions to marital property

Comment. Subdivision (a) of Section 703.110 is an application of the basic rule that exemptions apply to property that is liable for the satisfaction of a judgment. If the judgment debtor is married, the property liable for the satisfaction of the judgment may include the community property and the separate property of both spouses in certain situations. See generally Civil Code § 5100 *et seq.* In such situations, both spouses may claim any applicable exemptions but the exemptions are not increased for the marital unit. The fact that one or both spouses are judgment debtors, or that community or separate property is sought to be applied to the satisfaction of the judgment, does not affect the exemptions applicable to the spouses as a marital unit.

Generally, property that is not liable for the satisfaction of a judgment does not enter into exemption determinations. Subdivision (b) creates an exception to this rule for exemptions based on the needs of the judgment debtor and the spouse and dependents of the judgment debtor. See Sections 704.020 (household furnishings), 704.050 (health aids), 704.060 (tools of the trade), 704.100(c) (life insurance benefits), 704.140 (damages for personal injury), 704.150 (damages for wrongful death). In such situations, the court must take into account both nonliable and liable property in making a determination of need. See also Sections 706.051 (earnings necessary for support), 706.052 (earnings withholding order for support).

An exemption may be required to be applied first to property not before the court. See Section 704.100(b) (life insurance policies). Subdivision (c) makes clear that in applying an exemption to property not before the court, the court should consider marital property that would not be liable for satisfaction of the judgment as well as property that would be liable for satisfaction.

Subdivision (d) recognizes that exemptions may be claimed by both the judgment debtor and the spouse of the judgment

debtor. See Section 703.020 (persons entitled to claim exemptions). See also 704.720(c) (one homestead of spouses exempt).

§ 703.130. Exemptions in bankruptcy

Comment. Section 703.130 continues what appears to have been the substance of subdivision (b) of former Section 690. See 1981 Cal. Stats. ch. 455.

Subdivision (b) continues the substance of paragraph (1) of subdivision (b) of former Section 690. Subdivision (b) of Section 703.130 permits spouses in a joint case under the Bankruptcy Code (Title 11 of the United States Code) to jointly elect to claim either the federal exemptions under subdivision (d) of Section 522 of Title 11 of the United States Code or the state exemptions. However, in a joint case, one spouse may not claim the federal exemptions and the other state exemptions.

Subdivision (c) of Section 703.130 makes clear the apparent effect of paragraph (2) of subdivision (b) of former Section 690 which apparently was intended to preclude one spouse in an individual bankruptcy case from claiming the federal exemptions under subdivision (d) of Section 522 of Title 11 of the United States Code if the other spouse claimed exemptions under the applicable exemption provisions of state law in a separate bankruptcy case. The language of the former section has been revised to phrase the provision in terms that describe when the federal exemptions provided in Section 522(d) are authorized in this state so that the provision will more clearly conform to the authority of paragraph (1) of subsection (b) of Section 522 of Title 11 of the United States Code. The revision also makes clear that the rule stated in subdivision (c) of Section 703.130 applies only during the period that a case is pending under Title 11 of the United States Code; the former provision was not specifically so limited.

Subdivisions (b), (c), and (d) of Section 703.130 are severable from subdivision (a), and the invalidity of any or all of these subdivisions does not affect the rule stated in subdivision (a). See Section 681.050

§ 703.510. Application of article

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 703.520. Claim of exemption

Comment. Section 703.520 supersedes subdivision (a) of former Section 690.50. Section 703.520 contains provisions (not included in the former law) that are designed to provide information necessary to determine certain exemption claims. Where the motor vehicle exemption (Section 704.010) is claimed, paragraph (3) of subdivision (b) requires that the claimant describe not only the motor vehicle or proceeds levied upon which are claimed to be exempt but also any other motor vehicle and the proceeds of any other motor vehicle if such motor vehicle or proceeds are claimed to be exempt. This requires that the claimant make an election as to the motor vehicle or proceeds to which the exemption is to be applied. Where the tools of the trade exemption (Section 704.060) is claimed, paragraph (3) requires the claimant to describe not only the items or proceeds levied upon which are claimed to be exempt but also any other tools of the trade and proceeds of tools of the trade if such tools or proceeds are claimed to be exempt. Here again, the claimant is required to make an election as to the tools of the trade and the proceeds to which the exemption is to be applied. It should be noted that the claimant may elect to apply the exemption to the items levied upon and to items not levied upon (to the extent that the aggregate equity in such items does not exceed the amount of the exemption). The items to which the exemption is not so applied are thereafter not exempt from levy by the same creditor. Where the insurance exemption is claimed, the listing of other insurance is required by paragraph (3) so that the provisions of the relevant exemption provisions can be implemented by the court, since the exemption is first applied to insurance not levied upon. See subdivision (b) of Section 704.100. See also Sections 703.020 (persons entitled to exemptions), 703.030 (manner of claiming exemptions; late claims). The 10-day period under subdivision (a) of Section 703.520 is extended if the notice of levy was served by mail. See Section 684.120.

§ 703.550. Opposition to exemption claim; release

Comment. The first two sentences of Section 703.550 supersede portions of subdivisions (c), (e), and (i) of former Section 690.50. Section 703.550, unlike former law, does not provide the claimant with the right to request a hearing on the claim of exemption since, if the judgment creditor does not file a notice of opposition and file a notice of motion for an order

determining the claim of exemption within the time provided, the property is released pursuant to Section 699.060, making a hearing unnecessary. Consequently, the delay between the filing of the counteraffidavit and the notice of motion provided by subdivision (e) of former Section 690.50 has been eliminated. The 10-day period for filing the notice of opposition and notice of motion runs from the date of service of the notice of claim of exemption. In the case of service by mail, the time is extended. See Section 684.120 (time for performing act). The third sentence of Section 703.550 supersedes subdivisions (d) (release if no counteraffidavit served) and (f) (release if no motion) of former Section 690.50.

§ 703.570. Notice of hearing on motion

Comment. Section 703.570 supersedes portions of subdivisions (c) and (e) of former Section 690.50. If service of the notice of the hearing is made by mail, an additional period of notice is required. See Section 684.120.

§ 703.610. Disposition of property during pendency of proceedings

Comment. Subdivision (a) of Section 703.610 continues the substance of subdivision (h) and the second sentence of subdivision (j) of former Section 690.50. Although the language in subdivision (j) of former Section 690.50 pertaining to waiver of an appeal has not been specifically continued, subdivision (a) of Section 703.610 continues its substance since an exemption is finally determined if an appeal is waived. Subdivision (a) requires, as did former Section 690.50(h), that the levying officer preserve the status quo by maintaining the levy on the property. For exceptions to the general rule provided in subdivision (a), see Sections 685.100 (release for failure to pay levying officer's costs), 699.060 (release in general), 699.070 (sale to preserve value of property), 720.660 (release pursuant to third person's undertaking). Subdivision (b) continues the substance of subdivision (g) of former Section 690.50, except that orders for the disposition of perishable property are governed by Section 699.070. Subdivision (c) is new. For provisions governing enforcement and stays pending appeal, see Sections 916-923.

§ 704.010. Motor vehicle

Comment. Section 704.010 supersedes subdivisions (a), (d), and (e) of former Section 690.2.

Subdivision (a) increases the motor vehicle exemption from \$500 to \$1,200, which is the same amount as is provided in the Bankruptcy Code. See 11 U.S.C. § 522(d)(2) (Supp. III 1979). Paragraph (1) of subdivision (a) applies the exemption to the judgment debtor's total equity in motor vehicles. Paragraph (2) continues the exemption for execution sale proceeds provided by former Section 690.2(e). Paragraph (3) provides a new exemption for insurance proceeds. *Cf.* Houghton v. Lee, 50 Cal. 101, 103 (1875) (exemption of proceeds from insurance of homestead).

Subdivision (b) continues the exemption period of former Section 690.2(e).

Subdivision (c) continues a portion of former Section 690.2(a).

Subdivision (d) supersedes a portion of former Section 690.2(d) and makes clear that an exemption of proceeds is allowed without a claim where there is only one motor vehicle. See also Section 703.030 (waiver of exemption). Section 701.810 requires distribution of the exempt proceeds to the judgment debtor before any distribution is made to the judgment creditor. See also Section 701.620 (sale price must exceed proceeds exemption).

§ 704.020. Household furnishings and personal effects

Comment. Section 704.020 supersedes the first sentence of former Section 690.1 and makes clear that the exemption applies to a second household where the spouses live separate and apart. Section 704.020 continues the ordinarily and reasonably necessary standard but includes a new provision in subdivision (b) which is designed to permit the creditor to reach an item such as an antique having extraordinary value or an extraordinarily valuable piano or painting. Subdivision (b) is intended to change the result in cases such as *Independence Bank v. Heller*, 275 Cal. App.2d 84, 70 Cal. Rptr. 868 (1969), and *Newport Nat'l Bank v. Adair*, 2 Cal. App.3d 1043, 83 Cal. Rptr. 1 (1969). Subdivision (c) provides a new limited proceeds exemption. See also Sections 701.620 (sale price must exceed proceeds exemption), 701.810 (distribution of proceeds of execution sale).

§ 704.040. Jewelry, heirlooms, works of art

Comment. Section 704.040 supersedes portions of former Section 690.1 which provided an exemption for wearing apparel, furnishings, and works of art "of or by the debtor and his resident family."

§ 704.060. Personal property used in trade, business, or profession

Comment. Subdivision (a) of Section 704.060 supersedes former Section 690.4 and a portion of former Section 690.17 (building materials not exceeding \$1,000). Subdivision (a) makes clear that an additional exemption is available to the spouse of the judgment debtor as well as to the judgment debtor.

Subdivision (b) provides a new exemption for proceeds analogous to that provided by Section 704.010 (motor vehicle). See also Sections 701.620 (sale price must exceed proceeds exemption), 701.810 (distribution of proceeds of execution sale), 703.520 (contents of claim of exemption).

Subdivision (c) is a new provision that makes clear the relation between this section and Section 704.010 (motor vehicle exemption).

§ 704.070. Paid earnings

Comment. Section 704.070 is new. Subdivision (b)(1) continues the protection of wages that have already been garnished or subjected to a wage assignment for support for 30 days after they are paid. Subdivision (b)(2) applies an exemption analogous to that provided by Section 706.050 to paid earnings that have not been garnished or subjected to a wage assignment for support in the hands of the employer.

§ 704.080. Deposit account in which social security payments are directly deposited

Comment. Section 704.080 supersedes former Section 690.30. Social Security payments may be directly deposited pursuant to 31 U.S.C. § 492 (1976). Subdivision (a) continues a portion of the introductory clause and subdivision (c) of former Section 690.30. Subdivision (b) continues the substance of the first paragraph and subdivision (a) of former Section 690.30. Subdivision (c) continues the substance of the introductory paragraph of former Section 690.30(b). Subdivision (d) continues the substance of former Section 690.30(b)(1).

Subdivision (e) supersedes paragraphs (2), (3), and (4) of subdivision (b) of former Section 690.30. Subdivision (e), along with subdivision (f), clarifies the procedure applicable to claiming exemptions for excess amounts in deposit accounts described in this section and the relation between this procedure and the procedure provided by Article 2 (commencing with Section 703.510) (superseding former Section 690.50,

incorporated by reference in former Section 690.30). The 5-day period under paragraph (1) is extended if the judgment creditor was served by mail. See Section 684.120. Paragraph (5) supersedes former Section 690.30(b) (3). The provision of former law for an order determining priority or dividing the property between several creditors is superseded by Section 701.810 (distribution of proceeds). Paragraph (6) continues former Section 690.30(b) (4).

Where a deposit account is not one described by subdivision (a) or where an exemption of excess funds in a deposit account described in subdivision (a) is claimed under another exemption provision, the procedure provided in Article 2 (commencing with Section 703.510) applies to the determination of the exemption. See subdivision (f) of Section 704.080.

§ 704.100. Life insurance, endowment, annuity policies

Comment. Section 704.100 supersedes the exemptions provided in former Sections 690.9 (life insurance represented by \$500 annual premium), 690.10 (group life insurance), and 690.14 (fraternal benefit society). Under subdivision (a), the judgment creditor is precluded from reaching an unmaturing policy except for its loan value; this prevents the judgment creditor from forcing the judgment debtor to surrender a life insurance policy for its cash value.

Subdivision (b) protects a portion of the loan value of unmaturing insurance policies. It provides for doubling of the exemption in the case of a married judgment debtor. Each spouse may claim an exemption in the same policy or different policies. The loan value is not subject to execution (see Section 699.720(a)) but may be reached by some other appropriate procedure. See Sections 708.110 (examination of judgment debtor), 708.205 (order in examination proceedings), 708.510 (assignment order). The exemption is applied first to policies that are not levied upon. See Section 703.520 (exemption claim discloses policies not levied upon).

The exemption of benefits under subdivision (c) is available to the judgment debtor regardless of whether the judgment debtor was the insured or the beneficiary under the policy. This is consistent with prior law. See *Jackson v. Fisher*, 56 Cal.2d 196, 200, 363 P.2d 479, 14 Cal. Rptr. 439 (1961). Under subdivision (c), the exemption may be asserted against creditors of the insured or of the spouse or dependents of the insured. See *Holmes v. Marshall*, 145 Cal. 777, 779-82, 79 P. 534 (1905).

§ 704.113. Public employee vacation credits

Comment. Subdivision (b) of Section 704.113 continues a portion of former Section 690.18(b) which made vacation credits exempt without making a claim. Subdivision (c) supersedes the portion of former Section 690.18(b) that made vacation credits that were payable exempt except from enforcement of child or spousal support and makes clear that vacation pay is treated the same as earnings for exemption purposes. See Sections 706.050-706.052.

§ 704.115. Private retirement and related benefits and contributions

Comment. Section 704.115 supersedes subdivision (d) of former Section 690.18. Subdivision (c) governs the application of the exemption for payable but unpaid benefits against enforcement of child or spousal support. Subdivision (c) (1) applies the general rule governing exemptions in support cases. Subdivision (c) (2) recognizes that federal law requires the protection of periodic payments pursuant to a pension or retirement program to the same extent as wages. See Section 706.052 and the Comment thereto. The exemption provided in subdivision (d) applies whether money received by the judgment debtor is in the actual possession of the recipient or has been deposited. See Section 703.080 (tracing exempt funds). The general rule governing exemptions in support cases provided by Section 703.070 applies to benefits after they have been paid.

Subdivisions (e) and (f) are new. Subdivision (e) requires that the court consider all resources—such as social security payments and other income and assets—that are likely to be available to the judgment debtor when the judgment debtor retires. Accordingly, where it will be a number of years before the judgment debtor will retire, the court will take into account not only all the assets of the judgment debtor at the time the exemption claim is determined but also all the assets and income (including pension rights) that the judgment debtor is likely to acquire prior to retirement. Subdivision (f) recognizes that the federal law requires the protection of periodic payments pursuant to a retirement program. See 15 U.S.C. §§ 1672(a), 1673(a).

§ 704.120. Unemployment benefits and contributions; strike benefits

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 704.130. Disability and health benefits and contributions

Comment. Subdivision (a) of Section 704.130 supersedes former Sections 690.11 (disability or health insurance benefits represented by \$500 annual premium) and 690.14 (fraternal benefit society funds) and portions of former Sections 690.13 (money used exclusively in payment of sick benefits by fraternal organization to bona fide members), 690.18 (disability benefits from retirement plans).

§ 704.720. Homestead exemption

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 704.730. Amount of homestead exemption

Comment. Subdivision (a) of Section 704.730 continues the substance of portions of former Civil Code Section 1260(a) (amount of homestead exemption). Subdivision (a)(2)(B) replaces the phrase "head of a family" with the phrase "family unit" and makes clear there is no increased exemption if the members of the family unit also own interests in the homestead (except a community property interest).

Subdivision (b) is new. It is intended to preclude the exemption of unduly large amounts and the inequitable application of exemptions that might otherwise occur under subdivision (a) because of the variety of ways that spouses can hold property and attempt to qualify for increased exemptions.

§ 704.770. Notice of hearing

Comment. Subdivision (a) of Section 704.770 supersedes the introductory portions of former Civil Code Section 1246 and former Code of Civil Procedure Section 690.31(d). Subdivision (b) supersedes former Civil Code Section 1257 and former Code of Civil Procedure Section 690.31(1). A longer period of notice is required under subdivision (b) if the judgment debtor is served by mail. See Section 684.120.

§ 704.800. Sale of homestead

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 704.910 Application of article

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.920. Request for conditional release of judgment lien

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.930. Response to judgment creditor

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.940. Conditional release of judgment lien

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.950. Opposition to homestead claim

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 740.960. Judgment debtor's application for court order conditionally releasing liens

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.970. Effect of conditional release

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.980. Attachment of lien to proceeds in escrow

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 704.990. Limitations on levy of execution

Comment superseded by Senate Judiciary Committee Report.
See Appendix III.

§ 706.011. Definitions

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

§ 706.029. Lien on employer's property

Comment. Section 706.029 continues the substance of former Section 723.029 and makes clear that the lien covers all property of the employer subject to the enforcement of a money judgment. The lien may give the levying creditor priority over competing claims by third parties (*e.g.*, in bankruptcy) where the priority questions are not already regulated by other provisions of this chapter. See Section 706.023 and the Comment thereto.

The rule of Section 706.029 that the lien continues for one year from the date the earnings become payable prevails over the general rule governing the duration of a lien created by levy under a writ of execution. See Section 697.710. 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 under the wage garnishment. See *Boyle v. Hawkins*, 71 Cal.2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969).

§ 706.050. Exemption from levy; amount of earnings

Comment. Section 706.050 continues the substance of former Section 723.050. The introductory clause is added to reflect the fact that a different amount may in some cases be withheld. This addition is not a substantive change. Section 706.050 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 706.030 and 706.052) or certain withholding orders for taxes (Section 706.076). See also Sections 706.031 (wage assignments for support), 706.051 (exemption obtained by special hardship showing), 706.074(b) (agency issued withholding order for taxes in lesser amount), 706.075(c) (exemption obtained by special hardship showing to agency which issued withholding order for taxes), 706.105(f) (modification or termination of earnings withholding order where exemption claims are unopposed).

Where a wage assignment for support (defined in subdivision (g) of Section 706.011) 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 706.050 on an earnings withholding order on an ordinary money judgment. See Section 706.031 and Comment thereto. The amount that may be withheld pursuant to an administratively issued earnings withholding order for taxes when any wage assignment for support is in effect is computed in the same manner. See Section 706.031 and the Comment thereto.

The amount of earnings that are paid to the employee whose earnings are garnished remains exempt as provided in Section 704.070.

§ 706.051. Earnings necessary for support of judgment debtor or his family

Comment. Section 706.051 continues former Section 723.051.

Subdivision (a) of Section 706.051 contains a new definition that is needed to simplify the drafting of the remainder of the section.

Subdivision (b) continues without substantive change the provision of former Section 723.051 that stated the hardship exemption. Exceptions to the hardship exemption—cases where the exemption is not allowed even though the judgment debtor can show the necessity for exempting additional earnings—are set out in subdivision (c).

Paragraph (1) of subdivision (c) continues the exception for “common necessities of life” provided by former Section 723.051.

Paragraphs (2)-(4) of subdivision (c) continue the substance of portions of former Section 723.051. For a special provision applicable where the earnings withholding order is for the collection of delinquent support payments, see Section 706.052. See also Sections 706.075(c) (administrative hearing for possible relief from hardship in connection with a withholding order for taxes), 706.076(e) (amount of court issued withholding order for taxes).

§ 706.101. Service; earnings withholding order; employer; employee; delivery; notice or document

Comment. Section 706.101 continues the substance of former Section 723.101 and specifies the manner of service under this chapter. The provision in subdivision (a) (1) concerning service in the case of a state employee is new. 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 the employer's return the date service was completed. See Section 706.126(b) (1). As to service of withholding orders for taxes, see Section 706.080. 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 706.101(c) and 706.126(b) (6). See also, for example, the Comment to Section 706.027. As to the service of an earnings withholding order for taxes, see Section 706.080.

The portion of former Section 723.101 that authorized service by a person authorized by the levying officer is continued and generalized in Section 684.140. That section continues to apply to wage garnishments.

§ 706.102. Application for order by judgment creditor prior to return of writ of execution; issuance

Comment. Section 706.102 continues former Section 723.102. Subdivision (a) 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 706.120. See also Section 706.121 (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 706.101 (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 706.105, 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 allowance of an exemption claim which results in the termination of withholding will also preclude the judgment creditor from applying for a new order for a specified time. See Section 706.105 (h). The earnings withholding order will be effective only if served within 180 days of the issuance of the writ. See Sections 699.530(b), 706.103(c).

For special provisions regarding the issuance of a withholding order for taxes, see Article 4 (commencing with Section 706.070).

§ 706.103. Service on employer; documents and instructions; limitations

Comment. Section 706.103 continues former Section 723.103 and prescribes what must be served upon the employer by the levying officer and when such service must be accomplished to be effective. The earnings withholding order must be served within 180 days of the issuance of the writ. See Section 699.530(b).

Section 706.103 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 rights with respect to the order. The employer is required to deliver these papers to the employee within 10 days of service. See Section 706.104. The person to be served and the manner of service of the earnings withholding order and related documents is specified in Section 706.101.

§ 706.105. Exemption; claim by judgment debtor

Comment. Section 706.105 continues former Section 723.105 and outlines generally the procedure for the hearing of a judgment debtor's claim for the exemption under Section 706.051. The general provisions governing the procedures for claiming exemptions from execution are 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 706.120. See also Sections 706.123 and 706.124 (contents of documents), 706.129

(levying officers to supply forms free of charge). 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 with the levying officer within 10 days after the levying officer mails notice of claim of exemption. See subdivisions (d), (e). Unless (1) the notice of opposition is filed within the 10-day period and (2) the levying officer is given notice of the hearing on the claim of exemption not later than 10 days after the filing of the notice of opposition, 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 706.123), 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 706.101(c) and 706.126(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 takes precedence over the general provisions of Section 684.120 (extra time to act after mail "service"). And the 10-day period for service of the notice of hearing is not subject to Section 684.120 (increase in period of notice of hearing where notice served by mail).

The form of the notice of opposition is prescribed by the Judicial Council. See Section 706.120. See also Section 706.128 (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 706.123 (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 706.022 makes clear that the employer is not liable to the debtor for such amounts, and subdivision (i) of Section 706.105 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 703.600. Under subdivision (j) of Section 706.105, 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 706.070). See also Section 706.075. Nor does this section apply to a withholding order for support; the exemption in the case of such an order is determined under Section 706.052 which specifies the procedure for claiming the exemption.

§ 706.122. Notice to employee of earnings withholding order; contents

Comment. Section 706.122 continues former Section 723.122 (a)-(d). Subdivision (e) of former Section 723.122 is not continued because it is unnecessary in light of the deletion of former subdivision (c) of Labor Code Section 300. See the Comment to Labor Code § 300. The form for the notice to the employee is prescribed by the Judicial Council (see Section 706.120) or, in the case of a notice of a withholding order for taxes, by the state (see Section 706.081). For the notice to the employee in the case of a withholding order for taxes, see Section 706.075.

See also Section 706.076(f) (temporary earnings holding order). Under Section 706.122, the Judicial Council may, for example, provide a statement that informs the employee where to seek legal advice.

§ 706.124. Judgment debtor's financial statement; execution; contents

Comment. Section 706.124 supersedes former Section 723.124. Section 706.124 adopts the general financial statement requirements of Section 703.530 with additional required information. The form for the financial statement is prescribed by the Judicial Council. See Section 706.120. Levying officers must provide copies of the forms without charge. See Section 706.129.

§ 708.010. Application of article

Comment. Subdivision (a) of Section 708.010 is consistent with former Section 714.5 which provided that interrogatories may be served "any time after execution . . . may properly be issued." See also Section 683.010 *et seq.* (period for enforcement of judgment).

Subdivision (b) makes clear that when a statute or court order provides for a stay of the enforcement of a money judgment, the stay applies to the use of written interrogatories under this article. However, subdivision (b) also makes clear that the court may permit proceedings under this article despite a stay unless the stay is based on the giving of an undertaking.

§ 708.120. Examination of third person

Comment. Subdivision (a) of Section 708.120 supersedes the first sentence of the first paragraph of former Section 717. It provides for the issuance of an order for the examination of the debtor of a judgment debtor or a person holding property of the judgment debtor. The minimum indebtedness required before an examination order may issue has been raised from an amount exceeding \$50 to an amount exceeding \$250 to compensate for the change in the value of the dollar since this procedure was originally enacted in 1851 (1851 Cal. Stats. ch. 5, § 241). The requirement of the first sentence of former Section 717 that a writ of execution be first issued against the property of the judgment debtor is not continued. The third person may not be ordered to appear when the judgment is no longer enforceable. See Section 683.020. The provision for an affidavit based on

information and belief codifies *Tucker v. Fontes*, 70 Cal. App.2d 768, 771, 161 P.2d 697, 699 (1945). The proper court for an examination under this section is prescribed in Section 708.160. As to the powers of a referee, see Section 708.140.

Subdivision (b) is new. Prior law did not prescribe the time within which the debtor of the judgment debtor was to be served and did not provide for any notice to the judgment debtor. The requirement that the judgment debtor be given notice changes the rule announced in *High v. Bank of Commerce*, 95 Cal. 386, 30 P. 556 (1892). See also Section 684.120 (extension of time where notice by mail).

Subdivision (c) is comparable to subdivision (d) of Section 708.110 and the second sentence of subdivision (a) of Section 708.205. If the property or debt is described in the judgment creditor's application for an order for examination of a third person and the court ultimately orders the property or debt applied to the satisfaction of the judgment, the priority of the lien under Section 708.205 will date from the service of the order on the third person pursuant to subdivision (c). See also Section 697.920 (effect of lien).

Subdivision (d) is drawn from comparable provisions in the Attachment Law. See Sections 482.100 and 484.070. It makes explicit a principle that was implicit in a provision of former Section 719 for the application of property "not exempt from execution" toward the satisfaction of the judgment. This necessarily involves a determination of the existence of exemptions prefatory to issuing an order applying the property toward satisfaction of the judgment. See Section 703.010 (exemptions apply to all procedures for enforcement of money judgments).

The court may also determine in the examination proceedings that the property sought to be reached may properly be applied to the satisfaction of the judgment through an order in examination proceedings. *Cf. Pacific Bank v. Robinson*, 57 Cal. 520, 524 (1881) (supplementary proceedings appropriate to reach patent rights).

For the extent of the duty of a third person to protect the exemption rights of the debtor, see *Bowie v. Union Bank*, 11 Cal. App.3d 807, 815-16, 90 Cal. Rptr. 103 (1970); *Agnew v. Cronin*, 148 Cal. App.2d 117, 126-29, 306 P.2d 527, 533-34 (1957); *Hing v. Lee*, 37 Cal. App. 313, 316-18, 174 P. 356, 358-59 (1918). If the judgment debtor fails to claim the exemption at the hearing when required to do so under subdivision (d), the exemption is waived, subject

to the authority of the court to relieve the judgment debtor from the failure pursuant to Section 473. See Section 703.030 and the Comment thereto (manner of claiming exemptions).

Paragraph (1) of subdivision (e) continues the substance of the third paragraph of former Section 717 and adds the requirement that the notice advise the third person that failure to appear may result in attorney's fees being imposed. See Section 708.170. Paragraph (2) is new and is necessitated by the requirement in subdivision (d) that when the property in the hands of the third person or the debt is described in the application for an order of examination, a judgment debtor with at least 10 days' notice of the examination proceeding shall claim any exemption at the hearing. See also Section 703.030 (waiver by failure to claim exemption).

Subdivision (f) continues the second sentence of former Section 717.1, except that the former provision for mileage fees of fifteen cents per mile has been revised to incorporate the mileage fees for witnesses in civil proceedings in the court where the examination proceeding is pending. See Gov't Code § 68093. Mileage fees are recoverable costs under Section 685.040.

Where a corporation is indebted to or holds property of a judgment debtor, the manner of appearance of the corporation is prescribed in Section 708.150. Where the debtor of the judgment debtor is a public entity, the judgment creditor must follow the procedures set forth in Article 8 (commencing with Section 708.710).

§ 708.180. Determination of third person's adverse claim

Comment. Subdivisions (a) and (b) of Section 708.180 are drawn from provisions in the Probate Code relating to the determination of certain claims in the course of estate administration or in guardianship or conservatorship proceedings. See Prob. Code §§ 851.5-853, 2520-2528. Under former Section 719, the court lacked the power to determine the interests in property in the hands of a third person or whether the third person was indebted to the judgment debtor when the third person claimed an interest in the property adverse to the judgment debtor or denied the debt. The provision of subdivision (b) requiring the third person's claim to be in good faith codifies the rule of *Thomas v. Thomas*, 192 Cal. App.2d 771, 776, 13 Cal. Rptr. 872 (1961). As to the effect of the failure to determine the interests in the property or the existence of the debt under Section 708.180, see Section 708.205 (b).

Subdivisions (c) and (d) are analogous to Section 708.240 (order forbidding transfer of property or payment of debt in a creditor's suit).

§ 708.260. Judgment debtor's claim of exemption

Comment. Section 708.260 is new and is comparable to subdivision (d) of Section 708.120 (exemption claim in proceeding for examination of third person). See also Section 708.280 (court determination of exemption claim). The 30-day period of notice of motion is extended if served by mail. See Section 684.120.

§ 708.290. Costs

Comment. Section 708.290 is new. It makes clear that the cost of litigation under this article required through no fault of the judgment debtor may not ultimately be imposed on the judgment debtor.

§ 708.310. Enforcement by charging order

Comment. Section 708.310 incorporates the charging order provisions of Corporations Code Sections 15028 and 15573. The charging order is the usual manner for applying the interest of a partner in the partnership to the satisfaction of a judgment against a judgment debtor who is a partner. See Section 699.720(a) (property not subject to execution); *Evans v. Galardi*, 16 Cal.3d 300, 310, 546 P.2d 313, 128 Cal. Rptr. 25 (1976); *Baum v. Baum*, 51 Cal.2d 610, 335 P.2d 481 (1959). Enforcement pursuant to this section is subject to the general rules concerning the time within which judgments may be enforced. See Chapter 3 (commencing with Section 683.010) of Division 1.

§ 708.410. Judgment creditor's lien in pending action or proceeding

Comment. Sections 708.410-708.480 supersede former Section 688.1. A lien under this article reaches the judgment debtor's right to money under the judgment in the pending action or proceeding as permitted by former law. See *Abatti v. Eldridge*, 103 Cal. App.3d 484, 163 Cal. Rptr. 82 (1980). The lien also reaches any right of the judgment debtor to property under the judgment.

The purpose of this lien is to establish and preserve the judgment creditor's priority until the judgment is final and

nonappealable. See subdivision (d) (action pending until judgment is final). Upon motion of any party to the action including the judgment creditor who has obtained a lien, the money or property to which the judgment debtor is entitled upon judgment in the action may be applied to the satisfaction of the judgment creditor's judgment as ordered by the court. See Section 708.470. If no motion is made by a party, the judgment creditor may seek to reach the judgment subject to the lien by some other enforcement procedure if no settlement is agreed upon. See Section 708.480 and the Comment thereto. The lien is ineffective after the time for enforcement of the judgment creditor's money judgment has expired. See Section 683.020. The duration of the lien may be extended as provided in Section 683.190.

If property that is the subject of a pending action or proceeding is real property, growing crops, timber to be cut, minerals or the like (including oil and gas) or accounts receivable resulting from the sale thereof at the wellhead or minehead, tangible personal property in the possession of the judgment debtor or a levying officer, or the interest of an heir, devisee, or legatee in personal property in the estate of a decedent, the judgment creditor may levy on the property under a writ of execution. See Section 700.180. This remedy can be used as an alternative to the lien or in addition to the lien.

Subdivision (b) of Section 708.410 provides for the creation of the lien by filing in the pending action or proceeding a notice of lien and an abstract or certified copy of the judgment creditor's money judgment. The requirement of a prior court hearing authorizing the creation of the lien under former Section 688.1 is not continued. Although former Section 688.1 required a hearing on noticed motion before the court could order that a lien be created, the section provided no standard for denial of such an order. It was held under former law to be an abuse of discretion for the court to refuse to order the lien on the ground that it would impede settlement negotiations. *Atiya v. DiBartolo*, 63 Cal. App.3d 121, 133 Cal. Rptr. 611 (1976). Section 708.410 avoids the need for a court hearing before a lien can be created. Although a dictum in the *Atiya* case stated that a substantial showing that other assets were available might justify denial of the lien, Section 708.410 leaves to the judgment creditor the choice of which assets to pursue in satisfaction of the judgment. This is consistent with the judgment creditor's freedom to select assets of the debtor when levy of execution is the method of

collection used. If the judgment debtor wishes to avoid the lien under this article, he or she may do so by voluntarily applying other available assets, if any, to the satisfaction of the judgment.

Former Section 688.1 required that all parties to the action or proceeding be given notice of the application for the lien. Under Section 708.410, the lien is created by the filing in the action or proceeding. Notice to all parties who have appeared in the action or proceeding is required by subdivision (c) of Section 708.410, but this subdivision makes clear that failure to give notice to one or more of the parties does not affect the validity of the lien. Subdivision (c) also makes clear that the rights of a party who makes a settlement, dismissal, compromise, or satisfaction without notice of the existence of the lien are not affected. This principle of protecting obligors without notice is comparable to other provisions. See, *e.g.*, Civil Code §§ 954.5, 955.1; Com. Code § 9318.

§ 708.480. Enforcement of lien after final judgment

Comment. Section 708.480 makes available a variety of remedies for the enforcement of a lien created under this article, such as levy on the judgment under a writ of execution (see Section 700.190 relating to levy on final money judgment) and sale or collection pursuant to such levy (see Sections 701.510 and 701.520), appointment of a receiver to collect the judgment (see Section 708.620), application for an assignment order (see Section 708.510), and collection from a public entity owing money to the judgment debtor (see Sections 708.710-708.795). If, for example, the judgment creditor obtains a writ of execution and levies on a money judgment obtained by the judgment debtor in the action or proceeding, the execution lien on the judgment obtained by the levy of execution relates back to the lien created under this article. See Section 697.020. In certain cases the property that is the subject of the pending action or proceeding may be levied upon prior to the final judgment in the action or proceeding. See Section 700.180.

Under former law, it appeared that where the judgment debtor of the judgment debtor did not voluntarily pay the judgment creditor to discharge the lien and the judgment debtor took no steps to enforce the judgment, the judgment creditor had to bring an action to foreclose the lien in order to reach the amount represented by the judgment. See *Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc.*, 14 Cal.3d 742, 748, 537 P.2d 399, 403, 122 Cal. Rptr. 567, 571 (1975) (*dictum*).

Section 708.480 expands the remedies available to the judgment creditor and provides remedies that will be more effective than an equitable action to foreclose a lien.

§ 708.510. Order to assign right to payment

Comment. Section 708.510 provides a new procedure for reaching certain forms of property that cannot be reached by levy under a writ of execution, such as the nonexempt loan value of an unmaturing life insurance, endowment, or annuity policy. See Sections 699.720(a)(6), 704.100. It also provides an optional procedure for reaching assignable forms of property that are subject to levy, such as accounts receivable, general intangibles, judgments, and instruments. This section does not make any property assignable that is not already assignable. This remedy may be used alone or in conjunction with other remedies provided in this title for reaching rights to payment, such as execution, orders in examination proceedings, creditors' suits, and receivership. The use of this remedy is subject to limitations on the time for enforcement of judgments. See Sections 683.010-683.220.

The introductory clause of subdivision (a) recognizes that certain rights to future payments, such as pension benefits, are protected by law from assignment. See, *e.g.*, 5 U.S.C. § 8346 (1976) (federal government employees' retirement benefits); 45 U.S.C. § 231m (1976) (railroad employees' annuities).

Paragraph (1) of subdivision (a) provides a new means to reach federal employees' wages. Such wages generally may not be garnished but may be reached in examination proceedings by an order to the judgment debtor to endorse and deliver paychecks to a receiver. See *Sheridan v. Sheridan*, 33 Cal. App.3d 917, 109 Cal. Rptr. 466 (1972). However, pursuant to 42 U.S.C. § 659 (Supp. III 1979), the wages of federal employees may be garnished for the enforcement of child support and alimony payments as if the United States were a private person.

Paragraph (2) permits issuance of an order for the assignment of the right to payment of rent. Under former law, it was held that future rental installments could not be reached by garnishment. See *Hustead v. Superior Court*, 2 Cal. App.3d 780, 785-87, 83 Cal. Rptr. 26 (1969).

The assignment of a right to charge commissions or royalties pursuant to paragraphs (3) and (4) may be a more appropriate manner for reaching such uncertain amounts than through levy and sale as permitted in *Meacham v. Meacham*, 262 Cal. App.2d 248, 252, 68 Cal. Rptr. 746 (1968).

The nonexempt loan value (see Section 704.100) of an unmatured life insurance, endowment, or annuity policy may not be reached by a levy of execution (see Section 699.720), but may be reached by an assignment order under paragraph (6).

Subdivision (c) is based on the standard for fixing the amount of payments under the New York installment payment order procedure. See N.Y. Civ. Proc. Law & R. § 5226 (McKinney 1978).

Subdivision (d) recognizes that the amount collected by the judgment creditor pursuant to this article may not exceed the amount necessary to satisfy the judgment. See also Sections 685.020 (accrual of interest), 685.030 (cessation of interest), 685.040 (right to costs).

Subdivisions (e) and (f) recognize limitations on the assignment order procedure imposed by exemption laws. See Section 703.010.

§ 708.620. Appointment of receiver

Comment. Section 708.620 supersedes portions of Section 564 that authorized the appointment of a receiver to enforce a judgment. It eliminates as a prerequisite to the appointment of a receiver a showing that a writ of execution has been returned unsatisfied or that the judgment debtor refuses to apply property in satisfaction of the judgment as was formerly required by subdivision 4 of Section 564. See *Olsan v. Comora*, 73 Cal. App.3d 642, 647-49, 140 Cal. Rptr. 835 (1977).

Under Section 708.620, a receiver may be appointed where a writ of execution would not reach certain property and other remedies appear inadequate. A receiver may also be appointed in examination proceedings under Article 2 (commencing with Section 708.110) where the requisite showing is made under this section. *Cf. Tucker v. Fontes*, 70 Cal. App.2d 768, 771-72, 161 P.2d 697, 699 (1945); *Medical Finance Ass'n v. Short*, 36 Cal. App.2d Supp. 745, 747, 92 P.2d 961, 962 (1939) (appointment of receiver in supplementary proceedings under former law). A receiver may be appointed to enforce a charging order against a partnership under Corporations Code Section 15028. See Section 708.310 (charging orders). As to the appointment of a receiver where necessary to preserve the value of property, see Section 699.070.

A receiver may also be appointed to enforce a judgment for the possession or sale of property. See Section 712.060. See also Section 708.920 (receiver for enforcement against franchise granted by public entity).

§ 708.630. Receiver to transfer alcoholic beverage license

Comment. Section 708.630 supersedes a portion of former Section 688(f). After the amendment of former Section 688 in 1959 (1959 Cal. Stats. ch. 2140, § 1), alcoholic beverage licenses were not reachable by any state enforcement process. See 37 Ops. Cal. Att'y Gen. 4 (1961). Alcoholic beverage licenses are not subject to levy under a writ of execution. See Section 699.720(a). The Alcoholic Beverage Control Act (commencing with Business and Professions Code Section 23000) provides detailed procedures for the sale of alcoholic beverage licenses which make use of a receiver appropriate. *Cf.* *Mollis v. Jiffy-Stitcher Co.*, 125 Cal. App.2d 236, 270 P.2d 25 (1954).

In order to prevent a situation where the judgment creditor forces the sale of the judgment debtor's license but does not receive any proceeds to be applied toward satisfaction of the judgment, subdivision (b) precludes transfer if the judgment debtor shows that it is unlikely that the sale of the license would yield any excess over the amount required to satisfy delinquent taxes under Business and Professions Code Section 24049 and claims of creditors with priority over the judgment creditor under Business and Professions Code Section 24074. The scheme of priorities set out in Section 24074 is "mandatory and exclusive." *Grover Escrow Corp. v. Gole*, 71 Cal.2d 61, 65, 453 P.2d 461, 463, 77 Cal. Rptr. 21, 23 (1969). See also Bus. & Prof. Code § 24076.

Subdivision (c) enables the receiver to exercise the powers of the licensee as necessary to comply with the transfer provisions of the Alcoholic Beverage Control Act. The strict regulation of all aspects of alcoholic beverage licenses by the Alcoholic Beverage Control Act requires that the receiver comply with its procedures and the regulations of the Department of Alcoholic Beverage Control.

§ 708.770. Notice of deposit with court; exemption claim

Comment. Subdivision (a) of Section 708.770 requires service on the judgment debtor of a notice of a deposit made pursuant to Section 708.740 or 708.750. This notice enables the judgment debtor to make a claim of exemption before the money is paid over to the judgment creditor.

Subdivisions (b)-(f) provide a procedure for determining exemption claims under this article.

The limitation on the time for claiming an exemption provided by subdivision (b) is the same as the period applicable to exemption claims under a writ of execution. See Section 703.520.

§ 715.040. Service and posting by registered process server

Comment. Section 715.040 is a new provision permitting registered process servers to serve or post writs of possession of real property. Registered process servers do not, of course, have the authority to remove occupants pursuant to Section 715.020(c). Section 715.040 is consistent with Section 699.080 (authority of registered process server under writ of execution).

§ 716.020. Execution of writ of sale

Comment. Section 716.020 continues the substance of former law regarding enforcement of a judgment for the sale of real or personal property. See former Section 684, former portion of Section 726; *Johnson v. Tyrrell*, 77 Cal. App. 179, 182-83, 246 P. 140 (1926) (foreclosure sale of real property made in same manner as execution sale); *Podrat v. Oberndorff*, 207 Cal. 457, 459-60, 278 P. 1035 (1929) (foreclosure sale of personal property under chattel mortgage made in same manner as execution sale); *Marshal's Manual of Procedure* §§ 452.1, 452.2 (rev. 1965); *Cal. State Sheriffs' Ass'n, Civil Procedural Manual* 6.28 (1978). Section 716.020 changes the former practice under which the judgment debtor was requested to bring personal property to the sale and, if he or she refused, the judgment creditor had to bring a claim and delivery action. See *Ely v. Williams*, 6 Cal. App. 455, 457-58, 92 P. 393 (1907). For special procedures applicable where property is sold subject to the right of redemption, see Sections 726(e) and 729.010-729.090.

§ 720.150. Effect of filing or not filing third-party claim

Comment. Section 720.150 is new. Subdivision (a) makes clear that enforcement procedures against an item of property claimed by a third person must cease except as otherwise provided. See, *e.g.*, Sections 699.070 (disposition of perishable property), 720.160 (effect of filing undertaking), 720.430 (satisfaction from released property after hearing). Subdivision (b) makes clear that a third person does not waive a superior interest in the property levied upon by failure to make a third-party claim pursuant to this chapter. This principle is a corollary of the general rule that a judgment or levy reaches only the interest of the debtor in the property. See Sections 695.010-695.070 (property subject to enforcement of money judgment), 699.710-699.720 (property subject to execution).

§ 720.210. Application of chapter

Comment. Subdivision (a) of Section 720.210 supersedes a portion of former Section 689b(2). See the Comment to Section 720.110. This chapter permits a secured party or other lienholder to make a third-party claim concerning personal property (and fixtures to the extent provided by subdivision (b)), whereas former Section 689b governed only claims by conditional sellers and chattel mortgagees. See Division 9 (commencing with Section 9101) of the Commercial Code (secured transactions). For a transitional provision applicable to claims filed prior to the operative date of this chapter, see Section 694.070.

§ 720.260. Effect of undertaking or deposit; contents of undertaking

Comment. Subdivision (a) of Section 720.260 supersedes parts of subdivisions (8) and (9) of former Section 689b. Under paragraph (2) of subdivision (a), the property may be sold free of all interests for which an undertaking is given or deposit is made. However, whether or not the creditor has filed an undertaking or made a deposit, the secured party or lienholder may prevent a sale in an appropriate case by obtaining a stay pursuant to Section 720.380.

Subdivisions (b) and (c) supersede portions of the first and second paragraphs of subdivision (9) of former Section 689b. The option of giving an undertaking in a flat amount pursuant to subdivision (b) is new. The amounts are the same as the amounts set for an initial undertaking in attachment. See Section 489.220(a). The secured party or lienholder (1) may apply to the court for an order requiring an undertaking in a greater amount pursuant to Sections 720.760-720.770 or (2) may obtain the release of the property by giving an undertaking pursuant to Chapter 6 (commencing with Section 720.610) in the same amount as the creditor's undertaking.

Subdivision (d) is new and is drawn from existing practice developed as a result of Section 1058 which provides that public entities are generally exempt from giving statutory undertakings. See California State Sheriffs' Ass'n, Civil Procedural Manual 13.02 (rev. ed. 1980).

§ 720.360. Burden of proof

Comment. of Section 720.360 continues the substance of the tenth sentence of the eighth paragraph of former Section 689.

§ 720.370. Dismissal

Comment. The first sentence of Section 720.370 continues the substance of the sixth sentence of the eighth paragraph of former Section 689. The second sentence is new.

§ 720.620. Filing of undertaking to release property

Comment. Section 720.620 supersedes a portion of former Sections 710b and 711. This section permits the filing of an undertaking to release property at any time that a third person could make a third-party claim as to property that can be released pursuant to Section 720.610 and also requires that the third person file a third-party claim. Former law did not prescribe the time for filing an undertaking to release property, nor did it require the third person to file a third-party claim. Section 720.620 requires the undertaking to be filed with the levying officer, whereas former Section 711 provided for filing with the court. Undertakings filed with the levying officer under this chapter are eventually filed with the court. See Sections 720.330, 720.800.

§ 720.800. Undertaking filed in action

Comment. Section 720.800 is new. Former law did not provide for the disposition of the undertaking. In cases where an undertaking is given and a hearing is held, the levying officer will file the undertaking with the court prior to the hearing. See Section 720.330.

§ 724.010. Satisfaction of money judgment

Comment. Subdivision (a) of Section 724.010 is drawn from language that was contained in subdivision (a) of former Section 675. See also *Yost-Linn Lumber & Finance Co. v. Bennet*, 116 Cal. App. 155, 2 P.2d 488 (1931) (part payment in full satisfaction); *Schwartz v. California Claim Service*, 52 Cal. App.2d 47, 125 P.2d 883 (1942) (part payment). Subdivision (a) of Section 724.010 is not an exclusive statement of the methods for satisfying a money judgment. See, *e.g.*, Section 431.70 and *Murchison v. Murchison*, 219 Cal. App.2d 600, 33 Cal. Rptr. 285 (1963) (use of judgment as offset); *George S. Nolte Consulting Civil Engineers, Inc. v. Magliocco*, 93 Cal. App.3d 190, 155 Cal. Rptr. 348 (1979) (entry of satisfaction ordered where trial court determined that \$4,000 contingent liability could be disregarded since contingency would not occur); *Yanchor v. Kagan*, 22 Cal. App.3d 544, 99 Cal.

Rptr. 367 (1971) (covenant not to enforce judgment); Penal Code § 1205 (criminal fine satisfied by serving term).

Subdivisions (b) and (c) provide special rules governing when the obligation to file an acknowledgment of satisfaction arises.

§ 724.030. Judgment creditor or assignee to file acknowledgment of satisfaction of judgment

Comment. Section 724.030 continues what appears to have been required under the second sentence of former Section 675(a). The requirement that the filing be made “immediately” upon the satisfaction of the judgment is drawn from Section 117.9 (small claims court). Section 724.030 does not apply where the judgment is satisfied pursuant to a writ because in that case the court clerk is required to enter satisfaction. See Section 724.020. For an additional requirement when an abstract of the judgment has been recorded to create a lien on real property, see Section 724.040. See also Section 697.640 (extinguishing of judgment lien on personal property). As to the duty to file an acknowledgment of satisfaction of a small claims court judgment, see Section 117.9.

§ 724.040. Judgment creditor’s or assignee’s duty where abstract of judgment recorded

Comment. Section 724.040 generally continues what appears to have been required under subdivision (b) of former Section 675. However, the former requirement that the acknowledgment be filed and served within 30 days after the judgment is paid in full has been replaced by the requirement that such filing and service be made immediately upon satisfaction of the judgment. The former 30-day period apparently was provided because the failure without just cause to file and serve within the time allowed resulted in liability for damages and forfeiture of \$100. See former Section 675(b). Under this chapter, the sanction is imposed only for failure to file or serve after a demand by the judgment debtor. See Section 724.050. This change makes Section 724.040 consistent with Section 724.030 and conforms to the procedure provided in Section 117.9 (small claims court). Section 724.040 applies whether the judgment is satisfied pursuant to a writ or by other means.

Section 724.040 requires service of an acknowledgment of satisfaction of judgment on the judgment debtor for two reasons: (1) To give the judgment debtor a list of the county or counties where the abstract of the judgment has been recorded and (2)

to give notice to the judgment debtor that the acknowledgment of satisfaction of judgment or a certificate of satisfaction of judgment (see Section 724.100) must be recorded in each such county in order to release the judgment lien. See Sections 697.400 (release of judgment lien on real property) and 724.060 (execution of and information required to be included in acknowledgment of satisfaction of judgment).

§ 724.050. Demand for filing or delivery of acknowledgment of satisfaction of judgment

Comment. Section 724.050 provides a means whereby the judgment creditor can be compelled to file an acknowledgment of satisfaction of judgment in any case where a money judgment has been satisfied, whether pursuant to a writ, by payment, offset, or other means. The other provisions of this chapter which require the filing of an acknowledgment of satisfaction of judgment are limited in scope. See Sections 724.030 (judgment creditor to file an acknowledgment of satisfaction of judgment if judgment satisfied other than pursuant to a writ), 724.040 (judgment creditor to file an acknowledgment of satisfaction of judgment if abstract of judgment recorded). Subdivision (e) provides a sanction if the judgment creditor fails without just cause to file within the time allowed after actual receipt of the demand.

Section 724.050 also provides a method whereby a judgment debtor may obtain an acknowledgment of satisfaction of judgment, whether or not one is required to be served on the judgment debtor under Section 724.040. In addition, this section provides a method whereby the owner of real or personal property subject to a judgment lien or a person having a security interest in or other lien on personal property subject to a satisfied judgment lien may obtain an acknowledgment of satisfaction of judgment. See Sections 697.400 (release of judgment lien on real property), 697.640 (release of judgment lien on personal property).

Subdivisions (a) and (c) of Section 724.050 are drawn from the first portion of subdivision (c) of former Section 675. Subdivision (b) is new. Subdivision (d) of Section 724.050 supersedes the last portion of the second sentence of subdivision (a) of former Section 675. Subdivision (e) is drawn from the last sentence of subdivision (b) and subdivision (c) of former Section 675.

Section 724.050 continues the substance of subdivision (c) of former Section 675 (demand for *delivery* of acknowledgment to person making demand) and also provides for a demand for the

filing of an acknowledgment of satisfaction. Section 724.050 also supersedes the last sentence of subdivision (b) of former Section 675 which imposed a sanction even though the judgment debtor had not made a demand. A sanction is imposed under subdivision (e) of Section 724.050 only if a demand is made and the judgment creditor fails without just cause to comply with the demand within the 15-day period allowed. This change adopts the procedure provided in Section 117.9 (small claims court). The requirement that a demand be made protects against imposition of the sanction where, for example, the failure to file or deliver the acknowledgment is the result of an oversight on the part of the judgment creditor. But see Section 724.090 (other remedies preserved).

§ 724.250. Contents and manner of execution of acknowledgment of satisfaction of matured installments

Comment. Subdivision (a) of Section 724.250 is adapted from Section 724.120 which prescribes the contents and manner of execution of an acknowledgment of partial satisfaction of judgment. Subdivision (b) continues the substance of a portion of subdivision (b) of former Section 674.5. Section 724.060 specifies the manner of execution and the persons who may execute.

ASSEMBLY BILL NO. 798

Civil Code § 986 (technical amendment). Sale of work of fine art

Comment. Section 986(a) (6) is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law). The reference to attachment has been deleted as unnecessary because Code of Civil Procedure Section 487.020 incorporates for attachment the exemptions from enforcement of a money judgment. Subdivision (b) (6) is added to make clear that the artist has no right to receive a percentage of proceeds from the sale of a work of art to satisfy a money judgment.

Civil Code § 1861.25 (added). Third-party claims

Comment. Section 1861.25 is a new provision that makes clear that the third-party claims procedures set forth in Code of

Civil Procedure Sections 720.010-720.800 are available under this article.

Civil Code § 3057 (repealed). Levying officer's lien

Comment. The substance of Section 3057 is continued in Code of Civil Procedure Sections 488.100 (attachment) and 687.050 (enforcement of judgments).

**Code of Civil Procedure § 564 (technical amendment).
Receivers**

Comment. Subdivision 4 of Section 564 is amended to conform to the Enforcement of Judgments Law. Proceedings in aid of execution are entitled examination proceedings under the new law. See Sections 708.110-708.205. The prerequisite that an execution be returned unsatisfied or that the debtor refuse to apply property to the satisfaction of the judgment is not continued. See Section 708.620 and the Comment thereto. The provision for appointment of a receiver during the redemption period applies in a more limited class of cases. See Sections 726(e), 729.010. Redemption is no longer available after execution sales. See Section 701.680. See also Section 712.060 (receiver to enforce judgment for possession or sale of property).

**Code of Civil Procedure § 568.5 (technical amendment).
Sale by receiver**

Comment. The first sentence of Section 568.5 is amended to refer to the sale provisions of the Enforcement of Judgments Law. The third sentence is deleted as unnecessary because the right of redemption is available only in cases described in Section 729.010. See also Section 701.680 (execution sales absolute).

Code of Civil Procedure § 674 (amended). Abstract of judgment

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

Code of Civil Procedure § 674.5 (repealed). Lien of judgment or order for spousal or child support

Comment. Former Section 674.5 is superseded by provisions of the new Enforcement of Judgments Law. Subdivision (a) of

former Section 674.5 is superseded by Sections 697.320-697.390. The remainder of former Section 674.5 is superseded by Sections 697.370-697.400 and 724.210-724.260.

Code of Civil Procedure § 675 (repealed). Satisfaction of judgment

Comment. Former Section 675 is superseded by Sections 697.410 and 724.010-724.260. See those sections and the Comments thereto.

**Code of Civil Procedure § 725a (technical amendment).
Foreclosure of deed of trust or mortgage with power of sale**

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

**Code of Civil Procedure § 726 (technical amendment).
Foreclosure of mortgage or deed of trust**

Comment. The provisions of Section 726 relating to commissioners appointed to sell real property under a judgment of foreclosure are repealed. Pursuant to Section 712.060 a receiver may be appointed to sell the property under the direction of the court. See also Sections 567 (oath and undertaking of receiver), 568 (powers of receiver), 568.5 (sales by receiver), 708.620 (appointment of receiver). The provisions concerning the qualification and duties of receivers and commissioners were essentially the same under former law. Consequently, special commissioners have been eliminated in favor of the uniform provisions concerning receivers. The provisions of Section 726 concerning receivers are unnecessary. See, *e.g.*, Section 262.8.

A provision for the application of the costs of levy is added to Section 726(a) because Section 716.010 requires levy under a writ of sale if the judgment is enforced by a levying officer.

Subdivision (c) codifies the rule in *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870), to the effect that the interest of a junior lienholder of record is not affected by the foreclosure of a senior lien if the junior lienholder is not joined.

Subdivision (e) specifies the manner of sale depending upon whether the property is to be sold subject to the right of redemption.

See Chapter 1 (commencing with Section 712.010) and Chapter 4 (commencing with Section 716.010) of Division 3 of Title 9 for provisions governing the enforcement of judgments for sale of real property.

Code of Civil Procedure § 729.010 (added). Property subject to redemption; manner of sale

Comment. Sections 729.010-729.090 provide a limited procedure for redemption of real property from sale. Under Section 729.010, redemption is available only in a case where the judgment creditor is seeking a deficiency judgment. If the proceeds of sale are insufficient to satisfy the secured indebtedness the property may be redeemed until one year after the sale; if the secured indebtedness is satisfied by the sale, the redemption period is three months. See Section 729.030. This continues a former portion of Section 725a.

Subdivision (b) contains special provisions applicable where property is to be sold subject to the right of redemption.

Code of Civil Procedure § 729.020 (added). Persons entitled to redeem

Comment. Section 729.020 supersedes former Section 701 and restricts the right of redemption to the judgment debtor and his or her successor in interest. Successors in interest may include an assignee after the foreclosure sale of the debtor's right of redemption as part of a transfer of the debtor's reversionary interest, a trustee in bankruptcy, or a junior lienholder who has acquired the judgment debtor's interest in the property through a prior foreclosure.

Code of Civil Procedure § 729.030 (added). Redemption period

Comment. Section 729.030 continues the substance of a former portion of Section 725a.

729.040 (added). Certificate of sale

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

Code of Civil Procedure § 729.050 (added). Notice of right of redemption

Comment. Section 729.050 supersedes the first sentence of subdivision (b) of former Section 700a. See Section 729.030 (redemption period).

Code of Civil Procedure § 729.060 (added). Deposit of redemption price

Comment. Subdivision (a) of Section 729.060 supersedes the first paragraph of former Section 702 and portions of former Section 705. Under Section 729.060, the redemption price is deposited with the levying officer whereas under former Sections 702-704 the judgment debtor or redemptioner could pay the redemption price directly to the purchaser or earlier redemptioner. Under paragraph (4) of subdivision (b), interest on the amounts comprising the redemption price is at the legal rate (see Section 685.010) whereas it was two-thirds of one percent per month in the case of redemption from the purchaser under former Section 702.

Subdivision (c) is derived from the second sentence of former Section 707 pertaining to rents and profits and codifies the rule in *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450 (1963), pertaining to the value to the purchaser of the use of the premises. If these amounts are not offset, they may be recovered as provided in Section 729.090.

Code of Civil Procedure § 729.070 (added). Disagreement on redemption; summary proceeding

Comment. Section 729.070 is derived from the second paragraph of former Section 702 but makes several modifications of the former procedure made necessary by the provision for offsetting certain amounts under Section 729.060 and the elimination of the option of paying the redemption price directly to the purchaser. See Section 729.060 and the Comment thereto. Under Section 729.070, the redemption price is deposited with the levying officer just as under Section 729.060, whereas under former Section 702 the deposit was made with the clerk in the case of a disagreement. Notice of the filing of the petition must be given to the levying officer to prevent issuance of a deed of sale under Section 729.080 at the expiration of the redemption period.

Code of Civil Procedure § 729.080 (added). Issuance of deed of sale or certificate of redemption; tender of deposit

Comment. Section 729.080 is new. If no redemption takes place within the redemption period applicable under Section 729.030 or as extended by Section 729.070(g), subdivision (b) requires the levying officer who conducted the sale to issue a deed to the purchaser. If the property is redeemed, subdivision (b) requires the levying officer to tender the deposit to the purchaser and issue a certificate of redemption if the tender is accepted or is in the amount of the redemption price as determined by the court under Section 729.070. Under former law, redemption could take place without going through the levying officer, although written notice of redemption was required to be given to the levying officer and recorded. See the third paragraph of former Section 703 and former Section 704. Formerly, if the judgment debtor redeemed, the person receiving payment issued and recorded a certificate of redemption. See the sixth paragraph of former Section 703. The last redemptioner was formerly "entitled to a sheriff's deed." See the fourth paragraph of former Section 703.

The first sentence of subdivision (c) continues the former rule that tender was equivalent to payment which applied where the judgment was payable in a specified kind of money. See the last clause of the last sentence of former Section 704. However, under subdivision (c), tender is not equivalent to payment where the parties disagree on the redemption price and the price has not been determined by a court order. The remainder of subdivision (c) is new.

Subdivision (d) continues the substance of the last sentence of the fifth paragraph of former Section 703, with the exception noted.

Subdivision (e) changes the prior rule that liens subordinate to that under which the sale was held reattach upon redemption by the judgment debtor or a successor in interest. See *Call v. Thunderbird Mortgage Co.*, 58 Cal.2d 542, 548, 375 P.2d 169, 25 Cal. Rptr. 265 (1962). The prior rule that upon redemption by the judgment debtor the judgment lien under which the property was sold reattaches for the amount of the deficiency is also not continued. See *Moore v. Hall*, 250 Cal. App.2d 25, 29, 58 Cal. Rptr. 70 (1967). Only unsatisfied liens that are superior to the lien on which the property is sold survive the sale, whether or not there is a redemption. This encourages the judgment creditor and

subordinate lienholders to protect their interests by looking to the property sold. See Sections 701.630 (extinction of liens upon sale), 726(c) (preservation of lien of record where lienholder not made a party to action). Subdivision (e) makes clear that once a lien is extinguished a lien may not be created on the same property to enforce the same claim or judgment. Hence, for example, a judgment creditor whose judgment lien is extinguished may not again record the judgment to create a lien on the same property, nor may the judgment creditor obtain an execution lien by levy of a writ of execution on the property.

Code of Civil Procedure § 729.090 (added). Rents and profits; entry of purchaser; waste

Comment. Section 729.090 is based on former Sections 706 and 707 and the second sentence of the first paragraph of former Section 702. If there is a tenant on the property under a lease which preceded the lien under which the property was sold, the purchaser at the sale acquires only the lessor's reversionary interest and right to rents, and the tenant may remain in possession during the term of the lease. However, the purchaser is entitled to receive the rents from the property or the reasonable value of the use of the property. Such amounts are a credit on the redemption price (see Section 729.060) or may be recovered after redemption as provided in subdivision (b). If the purchaser is in possession of the property during the time between the sale and the redemption, the person who redeems is entitled to receive the reasonable value of the occupation and use of the property. *House v. Lala*, 214 Cal. App.2d 238, 245-46, 29 Cal. Rptr. 450 (1963); *Christensen v. Forst*, 153 Cal. App.2d 465, 471-72, 314 P.2d 746 (1957). The provisions of former Section 707 extending the redemption period pending the determination of rents and profits are not continued. Former Section 707 provided a special procedure to resolve disputes concerning the existence and amount of a similar credit but provided for ultimate resort to an action for an accounting. Rents and profits that are not offset pursuant to Section 729.060(c) or determined pursuant to 729.070 may be recovered in an action.

Subdivision (c) is drawn from former Section 706 and the second sentence of former Section 702. The determination of what constitutes waste is no longer specified in the statute. This determination should be made by a court in light of the facts of the case. The person in possession may be liable for waste. *Cf.* Section 732 (liability of tenant for waste); *American Sav. & Loan*

Ass'n v. Leeds, 68 Cal.2d 611, 614 n.2, 440 P.2d 933, n.2, 68 Cal. Rptr. 453, n.2 (1968).

Code of Civil Procedure § 745 (amended). Restraint of waste during foreclosure or before sale pursuant to levy

Comment. Section 745 is amended to reflect the provision which requires a delay in the sale of certain real property. See Section 701.545.

Code of Civil Procedure § 746 (amended). Damages for waste after sale pursuant to levy

Comment. Section 746 is amended to reflect that execution sales and certain foreclosure sales (see Section 726(e)) are absolute pursuant to Section 701.680 and that Section 701.545 requires a delay of such sales after levy.

Code of Civil Procedure § 1033.7 (repealed). Costs after judgment

Comment. Former Section 1033.7 is superseded by Chapter 5 (commencing with Section 685.010) of Division 1 of Title 9. The reference to superior, municipal, and justice courts in the introductory clauses of the first and second paragraphs of former Section 1033.7 is not continued because it is unnecessary. The substance of subdivisions (a) and (b) is continued in Section 685.070(a)(1). Subdivisions (c) and (d) are superseded by Sections 685.070(a)(3) (unsatisfied costs allowable pursuant to memorandum) and 685.050(a)(1) (entry on writ of costs of issuing writ). See also Section 680.380 ("writ" defined). The portion of subdivision (c) pertaining to a writ of prohibition is not continued because it is unnecessary. Subdivision (e) is superseded by Sections 685.050 (costs under writ) and 685.070(a)(3) (unsatisfied costs of levying officer). Subdivision (f) is superseded by Section 685.070(a)(5) (costs determined in special enforcement procedures).

The substance of the procedural provisions concerning the memorandum of costs in the first paragraph of former Section 1033.7 is continued in Section 685.070(b), (c), except that the time for filing the memorandum has been increased from six months to two years. Section 685.070(b) also makes clear that the motion to tax must be noticed. See 4 B. Witkin, *California Procedure Judgment* § 113, at 3264 (2d ed. 1971) (motion customarily made on notice). The references in former law to

the judgment creditor's agent and attorney are not continued; Section 685.070(b) provides for a memorandum on oath of a person who has knowledge of the facts. See 1 B. Witkin, *California Procedure Attorneys* § 23, at 32-33, § 107, at 117-19 (2d ed. 1970) (authority of attorney). See also Sections 680.150 ("costs" means fees, commissions, charges, disbursements, and other expenses), 166 (judicial powers at chambers).

The substance of the procedural provisions concerning the motion for costs in the second paragraph of former Section 1033.7 is continued in Section 685.080, but the time for making the motion has been increased from six months to two years. See also Section 167 (judge performing clerk's duties).

The third paragraph of former Section 1033.7 is superseded by Sections 685.090 (addition of costs to judgment) and 685.050 (costs entered on writ).

Code of Civil Procedure § 1174 (amended). Judgment for restitution of premises

Comment. Section 1174 is amended to conform to Title 9 (commencing with Section 680.010) of Part 2 (Enforcement of Judgments Law). Former subdivision (d) is superseded by a new subdivision (d). The substance of former subdivision (d) is continued in Sections 715.010 (writ of possession of real property), 715.020 (execution of writ of possession).

Code of Civil Procedure § 1710.45 (technical amendment).

Delay of enforcement of judgment entered on basis of sister state judgment

Comment. Section 1710.45 is amended to make clear that all procedures for the enforcement of a money judgment entered pursuant to this chapter are subject to the limitations on enforcement by execution provided by this section.

Commercial Code § 9301 (amended). Priority of lien creditor

Comment. Subdivision (3) of Section 9301 is amended to make clear that a judgment creditor who acquires a judgment lien on personal property pursuant to Code of Civil Procedure Sections 697.510-697.670 is a "lien creditor." See Code Civ. Proc. § 697.590 (priority of judgment lien on personal property against security interest).

Subdivision (5) requires a judgment creditor who seeks to establish the priority of a judgment lien on personal property to serve a copy of the notice of judgment lien on the secured party as a prerequisite to a determination that the secured party had knowledge of the judgment lien.

Commercial Code § 9304 (amended). Perfection of security interest in instrument in custody of levying officer

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

Commercial Code § 9306 (amended). Security interest in proceeds

Comment. Subdivision (6) is added to Section 9306 to make clear that custody of cash proceeds by a levying officer does not affect the status of the cash proceeds provided by this section.

Commercial Code § 9504 (amended). Disposition of surplus proceeds of collateral

Comment. Section 9504 is amended to clarify the manner of disposition of proceeds of collateral remaining after satisfaction of the indebtedness to a secured party who has a priority over a lien creditor.

Financial Code § 864 (amended). Bank setoff

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

Financial Code § 7609.5 (amended). Savings and loan association setoff

Comment. Section 7609.5 is amended to correct cross-references and to conform Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law). The form of the declaration is amended to conform to Code of Civil Procedure Section 2015.5(b).

Financial Code § 14864 (repealed). Exemption of credit union shares

Comment superseded by Senate Judiciary Committee Report. See Appendix III.

Government Code § 7170 (amended). State tax lien

Comment. Subdivision (c) (5) is added to Section 7170 to make clear that a judgment lien on personal property filed pursuant to Code of Civil Procedure Sections 697.510-697.670 will have priority over a later filed notice of state tax lien.

Government Code § 26606 (repealed). Release of attachments and garnishments

Comment. Section 26606 is superseded by Code of Civil Procedure Sections 488.730, 699.060.

Government Code § 26664 (amended). Liability of sheriff

Comment. Section 26664 is amended to conform to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law) and to Code of Civil Procedure Section 262 (instructions from attorney or from party if no attorney). This amendment also makes the sheriff liable for failure to perform duties under a writ of attachment or a prejudgment writ of possession. See Code Civ. Proc. §§ 481.010-493.060 (attachment), 511.010-516.050 (claim and delivery).

Government Code § 26726 (technical amendment). Fee for keeper levy on motor vehicle

Comment. Subdivision (a) of Section 26726 is amended to conform to the terminology of Division 3 (commencing with Section 712.010) of Title 9 of Part 2 of the Code of Civil Procedure. Subdivision (b) provides a new daily fee for maintaining custody under a keeper levy. Subdivision (c) is amended to provide the standard fee.

Government Code § 26750 (technical amendment). Fee for duties under Wage Garnishment Law

Comment. Section 26750 is amended to correct the references to the Wage Garnishment Law and to provide the standard fee.

Government Code § 27248 (technical amendment). Books of county recorder

Comment. Section 27248 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law) and to add subdivision (b) which provides for the manner of the recording and indexing of certified copies of certain judgments payable in installments that are recorded to create judgment liens and other documents affecting judgment liens in real property. Subdivision (b) implements the provisions of Code of Civil Procedure Sections 697.320, 697.330, and 697.400. Nothing in Section 27248 is intended to require the county recorder to keep a separate, rather than a general, index as prescribed in Section 27257.

Government Code § 27249 (technical amendment). Books of county recorder

Comment. Section 27249 is amended to conform to the language used in the Attachment Law. See Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure. The issuance of a writ of attachment does not result in a recording with the county recorder; only the levy is recorded with the county recorder.

Government Code § 69503.1 (technical amendment). Destruction of court records

Comment. Section 69503.1 is amended to delete a reference to former Code of Civil Procedure Section 685. The court procedure provided by former Code of Civil Procedure Section 685 is superseded by Code of Civil Procedure Sections 683.110-683.220 (renewal of judgments by filing notice of renewal).

Labor Code § 300 (amended). Wage assignment

Comment. Subdivision (a) of Section 300 is amended to supply cross-references to other sections that provide for wage assignments for support. The provision formerly contained in subdivision (c) for delaying the effective date of an earnings withholding order where a wage assignment is in effect when the earnings withholding order is served is not continued because it

was an unnecessary complication. Subdivisions formerly lettered as (d) through (i) are relettered as (c) through (h) respectively.

Probate Code § 732.5 (repealed). Redemption from sale

Comment. Section 732.5 is repealed. The right of redemption from execution sales has been repealed. See Code Civ. Proc. §§ 701.545, 701.680. The right of redemption from foreclosure sales is limited as provided in Code of Civil Procedure Section 729.010.

Probate Code § 205 (technical amendment). Liability of surviving spouse

Comment. Section 205 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law).

Probate Code § 660 (technical amendment). Possession of family dwelling

Comment. Section 660 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law).

Probate Code § 663 (technical amendment). Liability of probate homestead

Comment. Section 663 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law).

Probate Code § 704.2 (technical amendment). Debts of deceased spouse

Comment. Section 704.2 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law).

Probate Code § 704.4 (technical amendment). Debts of surviving spouse

Comment. Section 704.4 is amended to conform to the terminology of Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law).

Probate Code § 3088 (amended). Wage assignment

Comment. Subdivision (e) of Section 3088 is amended for consistency with other comparable provisions. See Civil Code §§ 4701, 4801.6.

Revenue & Taxation Code § 32373 (amended). Redemption from sale

Comment. Section 32373 is amended to reflect the repeal of the statutory right of redemption from execution sales. See Code Civ. Proc. §§ 701.545, 701.680, and the Comments thereto.

Streets & Highways Code § 5422 (amended). Redemption from sale

Comment. Section 5422 is amended to reflect the repeal of the statutory right of redemption from execution sales. See Code Civ. Proc. §§ 701.545, 701.680, and the Comments thereto.

Streets & Highways Code § 6617 (repealed). Redemption from judicial sale

Comment. Section 6617 is repealed because the statutory right of redemption from execution sales has been repealed. See Code Civ. Proc. §§ 701.545, 701.680, and the Comments thereto.

Streets & Highways Code § 8832 (amended). Judicial sale of property subject to assessment lien

Comment. Section 8832 is amended to reflect the repeal of the statutory right of redemption from execution sales. See Code Civ. Proc. §§ 701.545, 701.680, and the Comments thereto.

Streets & Highways Code § 9356 (amended). Sale of property subject to reassessment lien

Comment. Section 9356 is amended to reflect the repeal of the statutory right of redemption from execution sales. See Code Civ. Proc. §§ 701.545, 701.680, and the Comments thereto.

APPENDIX III

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILLS 707, 798, AND 2332

[Extract from Senate Journal for June 24, 1982 (1981-82 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bills 707, 798, and 2332, the Senate Committee on Judiciary makes the following report.

Assembly Bills 707 and 798 were introduced to effectuate the California Law Revision Commission's *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bills 707 and 798 (as revised or supplemented by comments contained in the Report adopted by and on file with the Assembly Committee on Judiciary) reflect the intent of the Senate Committee on Judiciary in approving Assembly Bills 707 and 798.

Assembly Bill 2332 was introduced to effectuate the California Law Revision Commission's *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bill 2332 reflect the intent of the Senate Committee on Judiciary in approving the provisions of Assembly Bill 2332.

ASSEMBLY BILL 707

§ 680.270. *Money judgment*

Comment. Section 680.270 is drawn from Section 1710.10 ("sister state judgment" defined). See also Section 577.5 (amount of judgment shall be computed and stated in dollars and cents); 65 Harv. L. Rev. 887 (1952) (obligation payable in foreign currency is converted into dollars by judgment in court in United States).

As used in this title, "money judgment" includes judgments and orders for child or spousal support that are payable in installments. See also Sections 680.230 (judgment includes order), 680.365 (spousal support includes support for a former spouse).

* 680.320. *Real property*

Comment. Section 680.320 is new. Under prior law, a leasehold interest in real property was treated as personal property in some instances. See the Comment to Section 700.015. Under this title, a leasehold interest is treated as real property. See, e.g., Section 700.015 and the Comment thereto (method of levy on real property). For some purposes, however, leases having unexpired terms of less than two years are treated differently from other leases. See, e.g., Sections 701.545 (notice of sale of real property), 704.740 (homestead exemption), 704.910 ("dwelling" defined for purposes of declared homestead).

§ 680.365. Spousal support

Comment. Section 680.365 makes clear that a reference to spousal support includes not only the obligation owed to the judgment debtor's spouse but also the obligation owed to a former spouse of the judgment debtor in the case where an obligation exists to support a former spouse.

§ 683.310. Judgments under Family Law Act

Comment. Section 683.310 excludes judgments enforceable under the Family Law Act from the coverage of this chapter. See Civil Code §§ 4383 (enforcement for amounts not more than 10 years overdue), 4384 (enforcement after 10 years), 4385 (judgments enforceable under Family Law Act). Foreign support orders registered pursuant to the Revised Uniform Reciprocal Enforcement of Support Act (Sections 1650-1699) are also excluded from this chapter. See Section 1699 (registered foreign support order treated as domestic support order) and Civil Code Section 4385. See also Section 697.320 (judgment lien on real property under installment judgment for support).

§ 685.010. Rate of interest on judgment

Comment. Section 685.010 supersedes former Section 685.010 (as enacted by 1982 Cal. Stats. ch. 150). Subdivision (a) continues subdivision (a) of former Section 685.010 which set the legal rate of interest on judgments at 10 percent as permitted by Section 1 of Article 15 of the California Constitution. Subdivision (b), which supersedes subdivision (b) of former Section 685.010, states the reserved power of the state to alter the interest rate as to interest that accrues after the operative date of the statute that changes the rate and omits the minimum rate provided in the former provision.

§ 685.020. Commencement of interest

Comment. Subdivision (a) of Section 685.020 continues the general rule as to the time postjudgment interest commences to run. See former Section 682.2, Section 1033; *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App.3d 964, 122 Cal. Rptr. 202 (1975). See also Sections 695.210 and 724.010 (amount to satisfy a judgment).

Subdivision (b) codifies the rule concerning accrual of interest on support judgments payable in installments and extends the rule to other judgments payable in installments. See, e.g., *Huellmantel v. Huellmantel*, 124 Cal. 583.589-90.57 P.582 (1899); *In re Marriage of Hoffee*, 60 Cal. App.3d 337, 131 Cal. Rptr. 637 (1976). The introductory clause of subdivision (b) also recognizes that in certain circumstances the court may have the authority to order that interest accrues from the date of entry of a judgment rendered in an amount certain but payable in installments. See Section 85 (municipal or justice court may fix terms and conditions of payment of money judgment), 117 (small claims court may fix terms and conditions of payment).

Section 685.020 does not affect the rules that determine the extent to which prejudgment interest is to be included in a judgment. See Section 685.110.

§ 685.030. Cessation of interest

Comment. Section 685.030 supersedes portions of former Sections 682.1 and 682.2 (interest to date of levy). In order to facilitate full satisfaction in a case where a garnishee pays the full amount due on the judgment pursuant to a levy, subdivision (a) (1) cuts off interest as of the date of levy. In other cases, such as where property is to be sold at an execution sale or where a garnishee does not pay the full amount due on the judgment in a lump sum, subdivision (a) (2) cuts off interest when proceeds are received by the levying officer.

Subdivisions (b) and (c) implement statements in the cases that interest runs until a judgment is paid. See *State v. Day*, 76 Cal. App.2d 536, 556, 173P.2d 399 (1946); *City of Los Angeles v. Aitken*, 32 Cal. App.2d 524, 531-32, 90 P.2d 377 (1939). Hence, if the judgment debtor voluntarily pays the judgment, the judgment creditor is entitled to interest to the date of satisfaction, as provided in subdivision (b). Similarly, if the judgment is partially satisfied, whether pursuant to a writ or otherwise, subdivision (c) makes clear that interest runs on the part satisfied until the date the satisfaction is made.

Subdivision (d) recognizes that a judgment may be satisfied other than by a writ or voluntary payment to the judgment creditor. See, e.g., *Beeler v. American Trust Co.*, 28 Cal.2d 435, 170 P.2d 439 (1946) (tender of amount due); *Pinecrest Prods., Inc. v. RKO Teleradio Pictures, Inc.*, 14 Cal. App.3d 6, 92 Cal. Rptr. 44 (1970) (deposit with court). See also Section 724.010 (judgment deemed satisfied if judgment creditor accepts a lesser sum in full satisfaction). For additional discussion concerning methods of satisfying a money judgment, see the Comment to Section 724.010.

For provisions governing the distribution of proceeds and the allocation of proceeds between interest and principal, see Sections 695.220, 701.810-701.830, 704.850.

§ 685.090. Addition of costs to judgment

Comment. Subdivisions (a) and (b) of Section 685.090 supersede the last paragraph of former Section 1033.7. Subdivisions (c) and (d) provide a new procedure for adding certain costs to the amount to be satisfied under a writ after the writ has been issued. See Section 685.050 (costs added to writ).

§ 694.030. Period for enforcement of judgments

Comment. Section 694.030 makes the 10-year period for enforcement of a judgment applicable to a judgment entered prior to the operative date (defined in Section 694.010). The 10-year period commences to run when the judgment is entered (Section 683.020) or when the installment on an installment judgment becomes due (Section 683.030). Accordingly, for a lump-sum judgment entered prior to the operative date the period will have commenced to run prior to the operative date. The judgment may be renewed after the operative date under the general provisions applicable to renewal of judgments. See Sections 683.110-683.220. This permits renewal of the judgment if the application for renewal is filed at any time before the expiration of the 10-year period of enforceability of the judgment. See Section 683.130.

Subdivision (b) of Section 694.030 is a special provision applicable where the period of enforceability of the judgment under Section 683.020 or 683.030 has expired on the operative date or will expire before the end of two years after the operative date. Subdivision (b) permits the court to make an order authorizing renewal of the judgment if the requirements of the subdivision are satisfied, even though the judgment could not be renewed under the general provisions applicable to renewal because the time for filing the application for renewal under Section 683.130 has expired.

The introductory clause of subdivision (a) makes clear that Section 694.030 does not apply to a judgment described in Section 683.310 (judgment under Family Law Act) or Section 683.320 (money judgment against public entity). The limitations as to the time within which these judgments may be enforced are governed by other provisions. See the Comments to Sections 683.310 and 683.320.

§ 694.090. *Effect of homestead declaration*

Comment. Section 694.090 makes clear that a homestead declaration recorded pursuant to former Civil Code Sections 1237-1304 is effective as an exemption from creditors only as provided in Sections 704.910-704.990. A homestead declaration under prior law is not effective as a restriction on conveyance or encumbrance. See Section 704.940.

§ 695.030. *Property not subject to enforcement of money judgment*

Comment. Subdivision (a) of Section 695.030 states the general rule that property is not subject to enforcement unless it is assignable or transferable. See, e.g., 1 A. Freeman, *Law of Executions* § 109 (3d ed. 1900); *Murphy v. Allstate Ins. Co.*, 17 Cal.3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976) (chase in action founded upon tort subject to creditor's suit only if assignable by the law of the state).

Paragraph (1) of subdivision (b) codifies existing case law. See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 87 P.2d 880 (1939) (spendthrift trust). See also 7 B. Witkin, *Summary of California Law Trusts* §§ 94-99, at 5452-60 (8th ed. 1974). As to the method of enforcement against a judgment debtor's interest as a beneficiary of a trust, see Section 709.010 and Civil Code Section 859. Paragraph (2) continues a principle inherent in former Section 688.1. This provision recognizes that a nonassignable cause of action, such as for negligently caused personal injury, may be subject to a lien pursuant to Article 5 (commencing with Section 708.410) of Chapter 6, if it is the subject of a pending action.

Property that is exempt by statute without the need to claim the exemption is not subject to any procedure for enforcement of a money judgment unless a particular exemption provision otherwise provides. See Section 703.030(b) and the Comment thereto.

§ 697.320. *Judgment liens for installments under support judgment or judgment against health care provider*

Comment. Section 697.320 supersedes portions of former Sections 674.5 (support judgment) and 674.7 (judgment against health care provider). This section also applies to a judgment requiring installment payment of workers' compensation. See

Section 697.330(a)(2). The amount of a judgment lien created under this section is determined pursuant to Section 697.350(c) and includes past due installments that remain enforceable. If the judgment lien is not extended by rerecording within the time prescribed in subdivision (b), this does not prevent the creation of a new judgment lien by recording under subdivision (a), but the new lien does not cover any amounts of the judgment that are not enforceable at the time the new lien is created. The lien does not continue after the expiration of the period of enforceability of the judgment. See Sections 683.020, 697.030

§ 697.340. *Interests subject to judgment lien on real property*

Comment. Subdivision (a) of Section 697.340 expands the class of interests covered under former law by a judgment lien. Under a provision formerly found in Section 674, the judgment lien reached only vested legal ownership interests. See, e.g., *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 537-39, 76 P. 243 (1904); *Lang v. Klinger*, 34 Cal. App.3d 987, 991, 110 Cal. Rptr. 532 (1973); *Belieu v. Power*, 54 Cal. App. 244, 210 P. 620 (1921); *Shirran v. Dallas*, 21 Cal. App. 405, 418-21, 132 P. 454 (1913). Under subdivision (a), the judgment lien will reach any interest in real property that is subject to enforcement of a money judgment (see Sections 695.010-695.035) but will not reach a right to rents, a leasehold interest with less than two years to run, or the interest of a beneficiary under a trust. (For the procedure for reaching rents, see Sections 700.170 (garnishment of rents), 708.510 (assignment of right to rents). For the procedure for reaching the interest of a trust beneficiary, see Section 709.010.) Hence, contingent remainders and equitable interests, such as that of a purchaser under a land sale contract, are subject to the judgment lien. See also Section 709.020 (motion procedure to reach contingent interest). Subdivision (a) also recognizes that a judgment lien reaches the community property interest of the judgment debtor's spouse by reference to the provisions concerning property subject to enforcement of a money judgement. See Section 695.020. The judgment lien also attaches to real property used as a dwelling, even though it may later be found to be totally or partially exempt. However, as recognized by the introductory clause, a judgement lien does not attach to property if a homestead declaration describing such property was first recorded. See Section 704.950. See also Health & Safety Code § 18551 (mobilehome installed on foundation system deemed a fixture and a real property improvement). As to real property subject to a general power of appointment, see Civil Code §§ 1390.1-1390.5.

Subdivision (b) continues former law as to the time a judgment lien arises on after-acquired property. See former subdivision (a) of Section 674; *Hertweck v. Fearon*, 180 Cal. 71, 179 P. 190 (1919). The priority of a lien on after-acquired property is determined pursuant to Section 697.380(g).

§ 697.370. *Release or subordination of judgment lien*

Comment. Section 697.370 is a new provision that recognizes the practice of releasing all or a part of the property from a judgment lien on real property or subordinating a judgment lien on real

property to another lien or encumbrance. The provision excusing minor errors that are not seriously misleading is drawn from Commercial Code Section 9402(5), (7) (contents of financing statement). As to the date a judgment lien on real property is created, see Sections 697.310 and 697.320.

§ 697.610. *Effect of transfer of property upon which judgment lien exists*

Comment. Section 697.610 specifies the effect of a judgment lien on personal property if the property is transferred.

Section 697.610 has no effect on the rights of transferees or assignees of persons other than the judgment debtor in the property subject to the lien. An assignee of a security interest that has priority over the judgment creditor's lien may enforce the security interest under the terms of the Commercial Code and is not restricted in any way by this section. See, e.g., Com. Code § 9318. As to payment or compromise by a person obligated on an account receivable or chattel paper, see Section 697.530(f).

§ 700.070. *Tangible personal property of going business*

Comment. Section 700.070 supersedes the fifth through the tenth sentences of former Section 688(c) which required a keeper levy for at least two days on the tangible personal property of a going business if the judgment debtor consented. Under this section the keeper levy is optional; unless the judgment creditor elects this option, the tangible personal property of a going business is levied upon as tangible personal property generally pursuant to Section 700.030. Article 3 (commencing with Section 697.510) of Chapter 2 provides an alternative procedure for obtaining a lien on certain property of a going business. See also Section 697.710 (execution lien).

Subdivision (b)(1) makes clear that, despite the judgment creditor's election to use the procedure provided by Section 700.070, the judgment debtor may prevent the placement of a keeper in the business, in which case the levying officer must take exclusive possession of the property if the judgment creditor's lien is to be maintained. This continues an aspect of former Section 688(c). The judgment creditor may instruct the levying officer to release the property rather than to take exclusive custody. See Section 699.060 (release). Subdivision (b)(3) is a new provision that establishes a maximum limit on the keeper period. See also Gov't Code § 26726 (keeper fee).

§ 701.040. *Rights and duties of secured party*

Comment. Section 701.040 reflects the principle that where practicable an execution levy should not affect the right of a prior secured party to resort to collateral and should not disrupt ongoing business relations between account debtors and secured parties in the absence of a determination or an admission that the judgment creditor's lien has priority. See also Com. Code § 9203 (attachment of security interest). The levy is generally intended to appropriate the rights of the judgment debtor to any excess remaining after satisfaction of the security interest. See subdivision (b). See also Com. Code §§ 9311 (permissibility of involuntary alienation of

debtor's rights in collateral), 9504 (satisfaction of security interest). As recognized by the introductory clause of subdivision (a), this right of the secured party is subject to an exception where a court order determining that the judgment creditor has priority is obtained. See Com. Code § 9301(1)(b) (lien creditor has priority over unperfected security interest). Of course, the secured party may voluntarily release the collateral if the secured party recognizes that the judgment creditor has a clear priority. The duties and liabilities of the secured party under this section may be enforced pursuant to Article 2 (commencing with Section 708.110) (examination proceedings) or Article 3 (commencing with Section 708.210) (creditor's suit) of Chapter 6.

Under subdivision (a), the secured party may enforce the security interest without interference from the levy only if the property or obligation levied upon is not in the custody of the levying officer. See also Section 701.050 (duty of account debtor).

§ 701.060. Duty of obligor under instrument.

Comment. Section 701.060 makes clear that the obligor under an instrument has a duty to make payments to the levying officer only if the levying officer has obtained possession of the instrument. See also Section 700.110 (method of levy on instruments). This is consistent with Commercial Code Section 3301 (rights of a holder of negotiable instrument). This section also applies to instruments that are not negotiable. For a provision governing the endorsement and presentation of demand instruments, see Section 687.020.

§ 701.547. Notice to prospective bidders.

Comment. Section 701.547 is a new provision not found in prior law. See also Section 729.010(b)(1) (statement concerning right of redemption where decree of foreclosure of a mortgage or trust deed on real property determines that a deficiency judgment may be ordered against the defendant).

§ 701.590. Manner of payment

Comment. Subdivisions (a) and (b) of Section 701.590 codify the practice under former law. Marshal's Manual of Procedure § 423.4 (rev. 1980); Cal. State Sheriffs' Ass'n, Civil Procedural Manual 6.10-6.11, 6.20 (1978). See also *Turner v. Donovan*, 64 Cal. App.2d 375, 148 P.2d 912 (1944); *Kelly v. Barnet*, 24 Cal. App. 119, 140 P. 605 (1914).

Under subdivision (b), if the judgment creditor bids at the auction, the judgment creditor may use the judgment as a credit to pay all or a portion of the bid instead of cash. However, the judgment creditor must pay in cash or its equivalent the costs of the officer conducting the sale, preferred labor claims, superior state tax liens, and exempt sale proceeds. See Sections 701.620 (minimum bid), 701.810 (distribution of proceeds). For special rules applicable to the sale of a homestead, see Sections 704.800 (minimum bid) and 704.850 (distribution of proceeds). See also Section 704.780 (manner of sale of homestead).

Subdivision (b) recognizes that a transfer of cash back and forth between the judgment creditor and the levying officer generally can

be dispensed with. Under former law, the levying officer apparently had the discretion to refuse the judgment as a credit and to require cash payment. See *Mitchell v. Alpha Hardware & Supply Co.*, 7 Cal. App.2d 52, 60-61, 45 P.2d 442 (1935); *Kelly v. Barnet*, 24 Cal. App. 119, 140 P. 605 (1914).

Subdivisions (c) and (d) are derived from Revenue and Taxation Code Section 3693.1 (sales of tax deeded property to private persons). If additional costs—such as keeper or storage fees—accrue after the sale, the credit bidder must satisfy them. The credit bidder must also pay interest on the balance of the amount bid to compensate for the delay in payment. If the amount bid is not paid, Section 701.600 applies.

Subdivision (e) makes clear that a credit bidder under subdivision (c) or (d) is not entitled to the property until the full price has been paid. See also Sections 701.650, 701.660.

§ 701.670. Contents of certificate or deed of sale

Comment. Section 701.670 makes general the requirements for the certificate of sale provided by subdivision (a) of former Section 700a (certificate of sale or real property). The provisions of former Section 700a requiring a statement of the price of the property and a notice of the right of redemption are not continued except as provided in Section 729.040 (certificate of foreclosure sale of property where deficiency judgment available). See Section 701.680 and the Comment thereto.

§ 701.810. Distribution of proceeds of sale or collection

Comment. Section 701.810 supersedes former Sections 689c, portions of former Section 690.2(c)-(d), and a portion of former Section 691. See also former Sections 682.1 and 682.2. Section 701.810 applies to the distribution of the proceeds of a sale or collection pursuant to the enforcement of a money judgment and, by way of incorporation, to cases where levy takes place under a writ of possession for the recovery of costs and damages or the value of the property, or under a writ of sale for the recovery of costs and damages. See Section 712.040, 714.020. The introductory portion of Section 701.810 recognizes that different schemes for the distribution of proceeds apply in some cases. Section 704.850 governs the distribution of proceeds where a homestead is sold. For other distribution provisions, see, *e.g.*, Section 726 (foreclosure of mortgage); Harb. & Nav. Code §§ 495.8, 495.9 (proceeds of sale of ship); Penal Code §§ 11231 (proceeds under Red Light Abatement Law), 11313 (proceeds of sale of gambling ship); Welf. & Inst. Code § 14124.74 (proceeds under Medi-Cal).

The levying officer determines the manner of distribution under this section, but may deposit proceeds with the court if there are conflicting claims. See Section 701.830.

Subdivision (a) recognizes that preferred labor claims may be entitled to priority under Section 1206.

Subdivision (b) makes clear that superior state tax liens are to be paid. See also Section 701.620 (minimum bid).

Subdivision (c) treats the judgment creditor as a third person with a superior interest to the extent that the judgment creditor is

subrogated to the rights of a secured party pursuant to Section 720.290.

In certain circumstances, the judgment debtor will be entitled to receive a portion of the proceeds as provided by subdivision (d). The provision for satisfaction of subordinate consensual liens and encumbrances and liens for labor or materials out of exempt proceeds preserves the priority of the judgment creditor in any excess value of the property but recognizes that certain state tax liens, consensual liens, and liens for labor and materials are not subject to exemptions from enforcement of money judgments. See Section 703.010(b). The judgment debtor is free to use a prospective exemption of proceeds as a fund to secure a loan or to finance improvements or repairs of the property. Consensual liens that are not satisfied under subdivision (d) (such as where the proceeds are inadequate or where the judgment debtor is not entitled to an exemption of proceeds) may be satisfied out of any surplus remaining after the satisfaction of the judgment creditor's lien as provided in subdivision (g).

As a general rule, the costs of the levying officer are required to be prepaid. See Section 685.100. However, in some instances costs are not prepaid, such as where a governmental agency is the creditor. See, e.g., Labor Code § 101. Subdivision (e) provides for the reimbursement of such costs before any payments are made to the creditor.

Subdivision (f) sets forth the order in which proceeds are allocated to the judgment creditor and is based on former Sections 682.1 and 682.2. This subdivision codifies the existing practice of first satisfying new costs and interest and then the principal amount of the judgment (including previously allowed costs) as entered on the writ. The interest accruing after issuance of the writ is computed on a daily basis as provided by Section 685.050. See also Section 695.220 (manner of crediting money received in satisfaction of judgment).

Subdivision (g) is based on the rule in *Mitchell v. Alpha Hardware & Supply Co.*, 7 Cal. App.2d 52, 57, 45 P.2d 442 (1935). Cf. *Caito v. United California Bank*, 20 Cal.3d 694, 701, 576 P.2d 466, 144 Cal. Rptr. 751 (1978); *Nomellini Constr. Co. v. Modesto Sav. & Loan Ass'n*, 275 Cal. App.2d 114, 118, 79 Cal. Rptr. 717 (1969).

§ 703.080. *Tracing exempt funds*

Comment. Section 703.080 provides for the continuation of an exemption for amounts that can be traced into a deposit account and in the form of cash and its equivalent, such as cashier's checks, certified checks, and money orders.

Subdivision (a) is consistent with decisions under prior law. See, e.g., *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 367, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (unemployment benefits in checking account); *Holmes v. Marshall*, 145 Cal. 777, 782-83, 79 P.534 (1905) (life insurance benefits deposited in bank account); *Bowman v. Wilkinson*, 153 Cal. App.2d 391, 395-96, 314 P.2d 574 (1957) (life insurance check converted to cashier's check and deposited in attorney's trust account). See also former Sections 690.18(a) (pension benefits exempt in debtor's possession and when deposited), 690.30 (direct deposit of social security payments);

Philpott v. Essex County Welfare Bd., 409 U.S. 413, 416-17 (1973) (disability benefits in bank account); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (veterans' benefits in savings and loan account). This section applies to any fund that is exempt, but may be limited in its application. The introductory clause of subdivision (a) recognizes that certain proceeds may be traced as exempt only for a limited period. See Sections 704.010 (90 days in case of motor vehicle), 704.020 (90 days in case of household furnishings and other personal effects), 704.060 (90 days in case of tools), 704.720 (six months in case of claimed homestead), 704.960 (six months in case of declared homestead). See also Section 704.070 (earnings paid during previous 30 days).

Subdivision (b) continues existing law concerning the burden of tracing exempt funds. See, e.g., former Section 690.30(b) (2) (tracing Social Security payments). This is consistent with the general burden on the claimant in exemption proceedings. See Section 703.580(b).

Subdivision (c) prescribes the general rule for tracing exempt funds in deposit accounts. It rejects the rule in *California United States Bond & Mortgage Corp. v. Grodzins*, 139 Cal. App. 240, 242-43, 34 P.2d 192 (1934) (portion of life insurance benefits that exceeded exempt amount when received was earmarked for creditors even though benefits remaining at time of levy were below exempt amount). Under the lowest intermediate balance rule, the exempt fund may not exceed the lowest balance occurring at any time between the deposit of the exempt amount of money and the time of levy. New deposits do not replenish the original exempt fund although the new deposits may themselves be exempt. See *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375, 379 (9th Cir. 1935), concerning the determination of the lowest intermediate balance. As an example of the operation of the lowest intermediate balance principle, suppose the judgment debtor has a deposit account in which there is a balance of \$400 composed of nonexempt funds. The judgment debtor then makes a deposit of \$400 of exempt funds (leaving a balance of \$800), a withdrawal of \$600 (leaving a balance of \$200), and a deposit of \$300 of nonexempt funds (leaving a balance of \$500). The total exempt funds deposited were \$400, but under the lowest intermediate balance rule, the \$600 withdrawal reduces first the nonexempt funds and then the exempt funds, leaving \$200 of exempt funds. The final \$300 deposit does not affect the exempt funds, which remain exempt in the amount of \$200, the lowest intermediate balance, despite the final balance of \$500.

§ 703.100. Time for determination of exemptions

Comment. Subdivision (a) of Section 703.100 rejects the holding in *California United States Bond & Mortgage Corp. v. Grodzins*, 139 Cal. App. 240, 242-43, 34 P.2d 192 (1934) (portion of life insurance benefits that exceeded exempt amount when received was earmarked for creditors even though benefits remaining at time of levy were below exempt amount). It adopts the principle that the question of exemptions does not arise until the judgment creditor has sought to apply the judgment debtor's property toward the satisfaction of the judgment. See *Medical Fin. Ass'n v. Rambo*, 33 Cal. App.2d Supp. 756, 758-60, 86 P.2d 159 (1938). The creation of a

judgment lien on real property is, for example, an event that establishes the time for determining under subdivision (a) whether the property is exempt.

For special provisions relating to the homestead exemption where a dwelling is acquired with exempt proceeds, see Sections 704.710 ("homestead" defined) and 704.960 (reinvestment of proceeds of declared homestead).

Subdivision (b) gives the court discretion to adjust the rule of subdivision (a) in cases where it appears appropriate to do so in light of the purposes of the exemption. Where the exemption is based upon the use made of the property, the judgment debtor is entitled to the exemption only if the property was used for the exempt use at the time of levy or commencement of enforcement proceedings or creation of the lien, but the court may disallow the exemption of the property if it is later devoted to another use.

§ 703.510. Application of article

Comment. Subdivision (a) of Section 703.510 indicates the scope of this article. As recognized by the introductory clause, special exemption procedures apply in certain cases where property has been levied upon. See, e.g., Sections 484.070 (attachment), 704.080 (deposit accounts consisting of Social Security benefits), 704.710-704.850 (real property homestead), 706.010-706.154 (earnings).

Subdivision (b) supersedes former Section 690(c) which provided that property for which a claim of exemption was not required was not subject to enforcement procedures. See also Section 703.030. Subdivision (b) makes clear that if such property is levied on, its release may be obtained through the exemption procedures. See also Section 695.040 (release of property not subject to enforcement of a money judgment).

§ 704.120. Unemployment benefits and contributions; strike benefits

Comment. Section 704.120 supersedes former Sections 690.13, 690.16, and 690.175 and portions of former Section 690.18(c) and (d) and Unemployment Insurance Code Sections 988 and 1342. Subdivision (b)(8) is new. Subdivision (d) is a new provision designed to implement Section 2335 of the federal Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, pertaining to enforcement of child support. It is patterned after an exception applicable to the exemption for retirement benefits. See Section 704.110.

§ 704.190. Financial aid provided to student by institution of higher education

Comment. Section 704.190 is a new provision that provides an exemption for financial aid provided to a student by an institution of higher education. The section adopts the definition found in Section 1141(a) of Title 20 of the United States Code, as amended. This provision, as amended by Pub. L. 44-382, Title I, § 181, Oct. 12, 1976, reads:

(a) The term "institution of higher education" means an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited. Such term also includes any school which provides not less than a one-year program of training to prepare students for gainful employment in a recognized occupation and which meets the provisions of clauses (1), (2), (4), and (5). For purposes of this subsection, the Commissioner shall publish a list a nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered. Such term also includes a public or nonprofit private educational institution in any State which, in lieu of the requirement in clause (1), admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located and who have the ability to benefit from the training offered by the institution.

§ 704.710. Definitions

Comment. Subdivision (a) of Section 704.710 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former Civil Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (housetrailer, mobilehome, houseboat, boat, or other waterborne vessel), 690.31 (a) (dwelling house). Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law and any other property in which the judgment debtor or the judgment debtor's spouse actually resides.

Subdivision (b) continues the substance of former Civil Code Section 1261(2) except that the minor grandchild of a deceased spouse and a child or grandchild of a former spouse are included in the listing.

Subdivision (c) is intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. Subdivision (c) also makes clear that, even though an abstract of judgment has been recorded to create a judgment lien, the existence of such lien does not prevent

a homestead exemption on after-acquired property which is acquired as the principal dwelling using exempt proceeds. Subdivision (c) is an exception to the rule of Section 703.100 (time for determination of exemption). See also Section 704.960 (homestead declaration relating to dwelling acquired using exempt proceeds).

Subdivision (d) preserves the effect of former Civil Code Sections 1300-1304 (married person's separate homestead). The effect of subdivision (d) is to permit each spouse to claim a separate homestead after entry of a judgment decreeing legal separation or of an interlocutory judgment of dissolution of the marriage, because subdivision (c) of Section 704.720 is not applicable.

§ 704.720. Homestead exemption

Comment. Subdivision (a) of Section 704.720 supersedes former Civil Code Section 1240 (providing for a declared homestead) and former Code of Civil Procedure Sections 690.3 and 690.31(a) (providing for a claimed dwelling exemption). As to the effect of a declaration of homestead made under prior law, see Section 694.090. See also Section 704.970 (effect of declared homestead). Unlike the former provisions, Section 704.720 does not specify the interest that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the judgment creditor in the homestead is subject to the exemption. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivision (b) provides an exemption for proceeds of an execution sale of a homestead, for proceeds from insurance or indemnifications for the damage or destruction of a homestead, and for an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision (b) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not found in former law. But see *Houghton v. Lee*, 50 Cal. 101, 103 (insurance proceeds for destruction of declared homestead exempt). See also Section 704.960 (proceeds of declared homestead). As under former law, proceeds of a voluntary sale of the homestead are not exempt under the proceeds exemption provided by subdivision (b). Compare Section 704.960 (exemption for proceeds of voluntary sale of declared homestead).

Subdivision (c) is new. The spouses may select which of the homesteads is exempt; if the spouses are unable to agree, the court determines which homestead is exempt. See Section 703.110 (application of exemptions to marital property). Note that a married person may, after a decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a homestead in his or her own right, and this right is not affected by subdivision (c). See Section 704.710(d) ("spouse" defined) and the Comment thereto. See also Section 704.930 (person entitled to execute homestead declaration).

§ 704.780. Hearing

Comment. Section 704.780 supersedes former Civil Code Section 1247, a portion of former Civil Code Section 1250, and a portion of subdivision (c), subdivision (e), and a portion of subdivision (f) of former Code of Civil Procedure Section 690.31. Subject to the requirements of Section 704.790, if an order for sale is obtained, the dwelling may be sold as provided in Sections 701.510 *et seq.* Notice of sale provisions (Sections 701.540–701.560) apply to the sale as well as the general provisions governing the sale itself (subject to Sections 704.800–704.850).

§ 704.800. Sale of homestead

Comment. Section 704.800 supersedes former Civil Code Sections 1253 and 1254. If the property levied upon is not sold, the judgment creditor may not recover costs. See Section 704.840. See also Section 704.850 (distribution of proceeds).

§ 704.810. Acceleration clauses and prepayment penalties

Comment. Section 704.810 is new. The first portion of Section 704.810 is intended to preserve existing financing on a homestead when it is levied upon but not sold. The latter portion is drawn from Section 1265.240 (no prepayment penalty where property acquired by eminent domain).

§ 704.850. Distribution of proceeds of sale of homestead

Comment. Subdivision (a) of Section 704.850 continues the priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of former Civil Code Section 1255. This section is an exception to the general rules on distribution of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under subdivision (a) (1) include not only preferred labor claims to be satisfied pursuant to Section 1206 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any other liens and encumbrances.

Subdivision (b) makes clear that the general provisions governing the time for distributing proceeds (Section 701.820) and the resolution of conflicting claims to proceeds (Section 701.830) apply to the distribution of proceeds from the sale of a homestead.

§ 704.910. Definitions

Comment. Section 704.910 defines various terms used in this article in light of the purposes of the article.

A primary purpose of this article is to continue the rule under former law that a judgment lien does not attach to a declared homestead. See the Comment to Section 704.950. For this reason, the description in subdivision (c) of Section 704.910 of the interest in real property that may constitute a declared homestead is drawn from Section 697.340 (property to which judgment liens on real property attaches). This continues former law which restricted a declared homestead to a dwelling that was real property. See former Civil Code § 1237. By restricting the dwellings that may become declared homesteads to interests in real property, the definition of “dwelling” excludes a dwelling that is personal property. Thus, a boat or other waterborne vessel (although included within the definition set out

in Section 704.710) is not a "dwelling" for the purposes of this article. Likewise, unless a mobilehome is so affixed to the land as to be treated as real property, the mobilehome (although included within the definition set out in Section 704.710) is not a "dwelling" for the purposes of this article. See Health and Safety Code § 18551.

The definitions in Section 704.910 are also designed to give the same effect to a declaration of homestead under former law as is given to a homestead declaration recorded pursuant to this article. "Homestead declaration" is defined in subdivision (d) to include a declaration of homestead recorded under former law. "Declared homestead owner" is defined in subdivision (b) to include the declarant or the declarant's spouse in the case of a declaration of homestead recorded under former law. However, the effect of a declaration of homestead recorded under former law is limited to the effect given the homestead declaration by this article. See Sections 704.950 (judgment lien does not attach to declared homestead) and 704.960 (exemption for proceeds of voluntary sale of declared homestead; investment of proceeds in new dwelling and effect of selection of new dwelling as a declared homestead). Other effects of a declaration of homestead under former law are not continued. See Section 694.090. Accordingly, the restrictions imposed by former law on the conveyance or encumbrance of a homestead are not continued. See Section 704.940. A declaration of homestead recorded under former law can be abandoned using the procedure provided in Section 704.980, without regard to the restrictions on abandonment of the homestead under former law. Likewise, Section 704.990 (abandonment of declared homestead by operation of law) applies to a homestead created by recording a declaration of homestead under former law.

Under the revised declared homestead procedure provided by this article, a "declared homestead owner" as defined in subdivision (b) must not only be named as such in a homestead declaration but also must be the owner of an interest in the declared homestead. However, the declared homestead owner need not reside in the declared homestead if the spouse of the declared homestead owner resides in the declared homestead. See Sections 704.920 and 704.930 (a) (3). If a husband and wife are both owners of an interest in a homestead (as where the property is community property or where the spouses hold the property in joint tenancy or as tenants in common), they both may be named as declared homestead owners in the same homestead declaration. See Section 704.930 (a) (1). In addition, a married person who is not the owner of an interest in the dwelling may execute, acknowledge, and record a homestead declaration naming the other spouse who is an owner of an interest in the dwelling as the declared homestead owner (see subdivisions (a) (3) and (b) (2) of Section 704.930), but at least one of the spouses must reside in the dwelling as his or her principal dwelling (see Section 704.920 and subdivision (a) (3) of Section 740.930). Where unmarried persons hold interests in the same dwelling in which they both reside, they must record separate homestead declarations if each desires to have a declared homestead. Since former law did not provide for the naming of a "declared homestead owner" in a declaration of homestead, subdivision (b) gives the declarant under

a declaration of homestead under former law and the spouse of such declarant the status of a "declared homestead owner" for the purposes of this article.

§ 704.920. Manner of selection of homestead

Comment. Section 704.920 continues portions of former Civil Code Sections 1262, 1264, 1265, 1268, 1269, and 1303.

§ 704.930. Execution and contents of homestead declaration

Comment. Section 704.930 continues portions of former Civil Code Sections 1262, 1263, 1266, 1267, 1300, and 1301. Section 704.930 also makes clear that a homestead declaration may be executed, acknowledged, and recorded by a guardian or conservator or other person authorized to act on behalf of the declared homestead owner or spouse of the declared homestead owner.

Section 704.930 applies only to a homestead declaration recorded pursuant to this article. The section does not affect a declaration of homestead recorded under former law.

§ 704.940. Right to convey or encumber not limited; evidentiary effect of homestead declaration

Comment. The first sentence of Section 704.940 makes clear that the recording of a homestead declaration does not restrict the right to convey or encumber the declared homestead. The provisions of former law (e.g., former Civil Code §§ 1242, 1243, 1243.5) which gave a declaration of homestead that effect are not continued. See also Section 694.090. However, Section 704.930 has no effect on the other provisions of law that restrict the right to convey or encumber community property. See Civil Code §§ 5127, 5128. See also Civil Code § 5102. The second sentence of Section 704.940 is drawn from a portion of former Civil Code Section 1263.

§ 704.950. Judgment lien does not attach to homestead; exception

Comment. Subdivision (a) of Section 704.950 continues former law. A judgment lien does not attach to property subject to a prior homestead declaration; likewise, such a judgment is not a lien on a surplus value therein over and above the amount of the homestead exemption, regardless of the value of the property. *Yager v. Yager*, 7 Cal.2d 213, 60 P.2d 422 (1936); *Boggs v. Dunn*, 160 Cal. 283, 116 P. 743 (1911); *Engelman v. Gordon*, 82 Cal. App.3d 174, 146 Cal. Rptr. 835 (1978). However, as under former law, a judgment creditor may reach the value of the equity in a declared homestead in excess of the homestead exemption by levy of execution on the property. See Section 704.970. See also former Civil Code §§ 1245-1255; *Swearingen v. Byrne*, 67 Cal. App.3d 380, 136 Cal. Rptr. 736 (1977). In the proceedings following levy of execution, the judgment creditor may also raise the issues of whether the judgment debtor is entitled to a homestead exemption (as where neither the judgment debtor nor the spouse of the judgment debtor occupies the property as their principal dwelling) or the amount of the homestead exemption. See Sections 704.740-704.840, 704.970.

Subdivision (b) of Section 704.950 makes clear that a judgment lien on a judgment for child or spousal support may attach to a declared homestead.

§ 704.960. *Proceeds exemption after voluntary sale; reinvestment of proceeds of voluntary or involuntary sale and effect of new declaration*

Comment. Subdivision (a) of Section 704.960 continues the substance of the last portion of former Civil Code Section 1265. As to the proceeds exemption where a dwelling is sold at an execution sale, see Section 704.720. See also Section 704.970. Subdivision (b) of Section 704.960 continues the substance of former Civil Code Section 1265a. See also *Houghton v. Lee*, 50 Cal. 101, 103 (1875) (proceeds from insurance on declared homestead exempt).

§ 704.970. *Effect of article on rights after levy of execution*

Comment. Section 704.970 makes clear that the homestead declaration does not affect the right of a judgment creditor to levy on the declared homestead pursuant to a writ of execution. See the Comment to Section 704.950. Nor does the failure of a judgment debtor to record a homestead declaration affect the judgment debtor's rights under the homestead exemption when a dwelling is levied upon pursuant to a writ of execution. See Section 704.740. Section 704.970 continues the substance of former Civil Code Section 1259.2.

§ 704.980. *Declaration of abandonment*

Comment. Section 704.980 supersedes provisions of the Civil Code which restricted the right to record a declaration of abandonment of a declared homestead. See, *e.g.*, former Civil Code §§ 1243, 1243.5, and 1244. Under Section 704.980, a declared homestead owner or a person authorized to act on behalf of the declared homestead owner may execute, acknowledge, and record a declaration of abandonment as to the declared homestead of that declared homestead owner. Such abandonment does not affect the rights of any other person. Accordingly, where married persons have their marriage dissolved and one continues to reside in the declared homestead, the other may abandon the declared homestead and establish a new declared homestead. In such case, the abandonment does not affect the right of the former spouse who continues to reside in the declared homestead to retain the dwelling as his or her declared homestead if that former spouse owns an interest in the dwelling.

§ 704.990. *Abandonment of homestead by recording homestead declaration for different property*

Comment. Subdivision (a) of Section 704.990 is new and is designed to preclude a person from having two declared homesteads on different property. Subdivision (b) continues the substance of former Civil Code Section 1261.1.

§ 706.011. *Definitions*

Comment. Section 706.011 continues former Section 723.011 and states definitions used in applying this chapter. Subdivision (g) is a new provision that has been added to permit use of the term "wage assignment for support" in various sections of this chapter. The definition reflects the enactment of Civil Code Section 4801.6 in 1980

(wage assignment for spousal support) and Probate Code Section 3088 in 1981 (wage assignment for support of conservatee).

This chapter deals only with the garnishment or withholding of earnings for services rendered in an employer-employee relationship. See Section 706.020. 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). Nothing in this chapter determines whether and to what extent the earnings of a nondebtor spouse may be garnished to satisfy an obligation for which community property is liable. See Section 695.020 (liability of community property).

"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. See also Section 704.070 (exemption for paid earnings).

Unlike the definition of "earnings" used in Section 1672(a) of 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 Sections 704.110 and 704.115. See also Sections 704.070, 704.113, 704.120, 704.140, and 704.150.

§ 706.022. Employer's duty to withhold; immunity from liability

Comment. Section 706.022 continues former Section 723.022 and 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 706.153.

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 706.101 (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. However, the 10-day delay does not affect the date the withholding period terminates under subdivision (a) (1).

The introductory clause to subdivision (b) recognizes certain exceptions to the general rule stated in subdivision (b). 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 706.023 (priority of orders) and the Comment thereto.

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 706.105 (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 706.101 (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 706.027 (satisfaction of judgment) and 706.105 (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 706.027. 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 706.077 (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 706.030 (support orders), 706.078 (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 706.154 (employer entitled to rely on documents actually served). See also Section 706.105 (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 706.020.

§ 706.023. Priority of earnings withholding order

Comment. Section 706.023 continues former Section 723.023 and 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 706.125. 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 706.030 (support orders) and 706.077 (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 706.104. However, the levying officer may later serve the same earnings withholding order if the time for levy on property under the writ has not expired. See Sections 699.530(b) and 706.102.

It should be noted that, in case of a withholding order for taxes, the operation of a prior earnings withholding order may be suspended, but the duty to withhold is not terminated nor does the 100-day period provided by Section 706.022(a)(1) cease to run on the prior order. See Sections 706.022(b) (duty to withhold) and 706.077 (tax order suspends operation of prior order). See also the Comment to Section 706.022. In such a case, 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 706.077 and 706.104.

An employer is generally entitled to rely upon what is served upon him. See Section 706.154 and the Comment thereto.

§ 706.072. Withholding order for taxes; issuance; conditions

Comment. Section 706.072 continues former Section 723.072. The date in subdivision (c) has been changed to give the state agency an opportunity to provide for review. This will be useful in cases covered by this chapter but not under former law. See the Comment to Section 706.070.

Section 706.072 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 Bd.*, 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 706.082. 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.

§ 706.075. Service on employer of order and notice; delivery to employee; administrative hearing; liability of employer

Comment. Section 706.075 continues former Section 723.075 with the addition of the last sentence of subdivision (c) which is new. Section 706.075 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 also Section 706.080 (manner of service). These papers are served on the employer who is required to deliver them to the employee.

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 706.051 (the "portion of the judgment debtor's earnings which the judgment debtor proves is necessary for the support of the judgment debtor or the judgment debtor's family supported in whole or in part by the judgment debtor is exempt") 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 Bd. of Equalization*, 206 Cal. App.2d 352, 373-74, 24 Cal. Rptr. 113, 126-27 (1962).

Subdivision (d) is the same in substance as the last two sentences of subdivision (a) of Section 706.104. See the Comment to that section for a discussion of the comparable provision.

§ 708.795. Limitations on procedure of this article

Comment. Section 708.795 continues the substance of subdivision (f) of former Section 710. Section 708.795 does not affect the right of offset provided by Section 12419.5 of the Government Code.

§ 712.040. Collection of money amounts

Comment. Section 712.040 is derived from a portion of subdivision 4 of former Section 682 (satisfaction of costs, damages, rents, or profits under judgment for possession of real or personal property). Subdivision (a) promotes procedural efficiency by permitting a writ of possession or sale to be enforced by a levying officer as if it were a writ of execution issued to enforce a money judgment. Subdivision (a) also makes clear that the money judgment portion of the judgment for sale or possession is enforceable directly by a writ of execution after the writ of possession or sale is no longer leviable as a writ of execution or in a case where no writ of possession or sale is needed or desired.

Subdivision (b) makes clear that the judgment creditor is not restricted to the remedy under subdivision (a) but is free to use any other appropriate remedy provided for enforcement of a money

judgment. See Sections 706.010-706.154 (wage garnishment), 708.010-709.030 (miscellaneous creditors' remedies).

The judgment debtor may be entitled to claim exemptions for property sought to be applied to the satisfaction of a money judgment pursuant to a writ of possession or sale. See Sections 703.010-704.850 (exemptions).

Subdivision (c) recognizes that a judgment for sale may provide restrictions on the collection of money amounts awarded in the judgment. See also Section 716.020 (execution of writ of sale). Costs and attorney's fees may be ordered to be satisfied out of the proceeds from the sale of the property, if it is security for such amounts. See, e.g., Section 727; *Clemens v. Luce*, 101 Cal. 432, 436, 35 P. 1032 (1894).

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Civil Code §§ 1237-1304 (repealed). Declared homesteads

Comment. Sections 1237 through 1304 relating to the declared homestead are superseded by Code of Civil Procedure Sections 704.710-704.850 (claimed homestead exemption) and 704.910-704.990 (declared homesteads). As a restraint on the ability to convey, encumber, or partition property (former Sections 1240 and 1242), the declared homestead is superseded by more general provisions governing conveyance, encumbrance, and partition of community and separate property and imposing obligations on spouses for mutual support and to provide a dwelling; the ability of one spouse to affect the separate property of the other spouse is not continued except as provided in Section 5102 of the Civil Code. See Civil Code §§ 5107 (wife may convey separate property without consent of husband), 5108 (husband may convey separate property without consent of wife), 5125 (spouse may not convey or encumber community personal property used as a dwelling without written consent of other spouse), 5127 (both spouses must join in conveyance or encumbrance of community real property), 5100 (spouses' obligation of mutual support), 5102 (right to occupy dwelling of spouse and restraint on alienation of dwelling); Code Civ. Proc. § 872.210(b) (no partition of community property).

Civil Code § 1861 (technical amendment). Innkeeper's lien

Comment. The last paragraph of Section 1861 is amended to conform to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law). See Code Civ. Proc. § 703.010 *et seq.* (exemptions). The reference to attachment has been deleted as unnecessary because Code of Civil Procedure Section 487.020 incorporates for attachment the exemptions from enforcement of a money judgment.

Civil Code § 4383 (added). Execution to enforce support

Comment. Section 4383 is a new provision permitting enforcement of child and spousal support judgments by execution without the necessity of obtaining prior court approval under Section 4380, so long as the amounts sought to be collected are not more than 10 years overdue. See Sections 4380 and 4384 (court approval required before amounts due more than 10 years may be enforced). See also Section 4385 (judgments enforceable under this chapter).

Subdivision (b) provides technical requirements that must be complied with in addition to the general provisions governing execution. The affidavit provides the court clerk with the information needed to issue the writ and informs the judgment debtor concerning the nature of the debt sought to be collected. If no interest is sought on the amount due and unpaid, the affidavit need state only the total amount. If interest is sought, the affidavit need state only the total amount of interest and also state the amount of each unpaid installment and the date it became due so that the judgment debtor can verify that the interest was accurately computed.

Civil Code § 4384 (added). Lack of diligence for more than 10 years in seeking enforcement

Comment. The first sentence of Section 4384 is drawn from a portion of former Code of Civil Procedure Section 635 that applied to issuance of writs of execution to enforce judgments under the Family Law Act. See, e.g., *Lesh v. Lesh*, 8 Cal. App.3d 883, 87 Cal. Rptr. 632 (1970); *Nutt v. Nutt*, 247 Cal. App.2d 166, 55 Cal. Rptr. 380 (1966). See also Section 4385 (judgments enforceable under this chapter). Unlike former Section 685, Section 4384 is not limited to enforcement by execution but applies to all enforcement procedures sought after the expiration of 10 years. The second sentence recognizes case law concerning the time within which installment judgments may be enforced without a showing of diligence. See, e.g., *Wolfe v. Wolfe*, 30 Cal.2d 1, 4, 180 P.2d 345 (1947). Nothing in Section 4384 precludes the court from permitting enforcement after 10 years even though diligence is not shown if the court, in its discretion, determines that enforcement would be equitable in light of all the circumstances of the particular case. Sections 4380–4385 provide an exception to the general provisions governing time for enforcement and renewal of judgments provided by Sections 683.010–683.220 of the Code of Civil Procedure. See Code Civ. Proc. § 683.310.

Civil Code § 4385 (added). Child or spousal support judgments enforceable under this chapter

Comment. Section 4385 is a new provision that makes clear that any child or spousal support judgment, order, or decree is enforceable under this chapter if it is made, entered, or enforceable in this state. The judgment need not be one that is made or entered pursuant to this part. Accordingly, for example, a foreign support judgment that has been registered in this state is enforceable under this chapter. See Code Civ. Proc. § 1699 (registered foreign support order treated in the same manner as a support order issued by a court of this state). In addition, Section 4385 eliminates any question concerning the enforceability under this chapter of a child or spousal support order made or entered in this state in a case where it is not clear whether the order was made or entered under the Family Law Act. See, e.g., Civil Code §§ 241–254 (civil liability for support).

Civil Code § 4701 (amended). Wage assignment for child support

Comment. Subdivision (i) of Section 4701 is replaced by a reference to the provisions of the Enforcement of Judgments Law

that supersedes the former subdivision. Paragraph (1) of former subdivision (i) is superseded by Code of Civil Procedure Sections 703.070 (application of exempt property to satisfaction of judgment for child or spousal support) and 704.110(d). Paragraph (2) of former subdivision (i) is superseded by subdivisions (b) and (c) of Code of Civil Procedure Section 704.110 and by subdivision (c) of Code of Civil Procedure Section 704.113. The last sentence of former subdivision (i) has been omitted as unnecessary in view of Code of Civil Procedure Sections 704.120 and 704.160. The one dollar sum that was provided for administrative costs under former subdivision (i) is increased to two dollars in Section 704.110; the increased fee conforms to the fee formerly provided for administrative costs in Government Code Section 21201. The reference to attachment in Section 4701 has been deleted because attachment of earnings is not permitted. See Code Civ. Proc. § 487.020(c). Subdivision (j) is revised to require contributions to be returned to the public retirement system (unless the system otherwise advises the court) rather than to the employee. This change reflects the fact that the employee may not have a right to return of the contributions under the provisions applicable to the particular public retirement system.

Civil Code § 4800 (technical amendment). Division of property under Family Law Act

Comment. Section 4800 is amended to reflect the elimination of the collateral effects of a homestead declaration. See Code Civ. Proc. § 704.940 and the Comment thereto.

Civil Code § 4810 (technical amendment). Revision of marital property disposition

Comment. Section 4810 is amended to reflect the elimination of the collateral effects of a homestead declaration. See Code Civ. Proc. § 704.940 and the Comment thereto.

Civil Code § 5102 (amended). Separate property

Comment. Subdivision (b) is added to Section 5102 to provide a means of restraining transfer or encumbrance of the dwelling that is the separate property of a spouse during the pendency of separation, annulment, or dissolution proceedings. The restraint applies to involuntary as well as voluntary dispositions of the dwelling, such as pursuant to writ of execution. This supersedes former law which permitted a spouse to declare a homestead on the separate property of the other spouse with restrictive effect. See former Sections 1238(c), 1242, 1243; Code Civ. Proc. § 704.940 (right to convey or encumber declared homestead). As to the authority of the court to restrain transfer during pendency of the proceedings, see Section 4359. A community property dwelling may not be transferred or encumbered without joinder or consent of both spouses. See Sections 5125 and 5127.

Civil Code § 5125 (amended). Management and control of community personal property

Comment. Section 5125 is amended to limit the disposition of personal property used as the family dwelling, such as a mobilehome. Cf. Code Civ. Proc. § 704.710(a) ("dwelling" defined).

Code of Civil Procedure § 674 (amended). Abstract of judgment

Comment. Section 674 is amended so that the section states the person who certifies an abstract of a judgment or decree and the contents of the abstract. The remainder of the section is superseded. Subdivisions (g) and (h) state required contents not formerly specified in the section but required by the Judicial Council form for an abstract of judgment. See Official Form for Abstract of Judgment (Form Adopted by Rule 982 Judicial Council of California—Revised Effective January 1, 1979). The contents specified in this section for the abstract of judgment are subject to the general authority of the Judicial Council to prescribe forms.

The portion of the first sentence of Section 674 which specified the courts that may issue judgments as the basis for a judgment lien is not continued as such, but its substance is continued in Section 697.310 except for the misleading language pertaining to judgments of federal courts. A federal money judgment may be recorded to create a judgment lien pursuant to federal law if it is rendered in California or is registered in a federal court sitting in California. See Section 697.060; 28 U.S.C. §§ 1962 (judgment lien of federal judgment), 1963 (registration of judgment of one federal district court in another district) (1976). The portion of the first sentence providing for certification by the judge or justice of the court is omitted as unnecessary in view of the general provision of Section 167. The remainder of the first sentence is continued in substance in Section 697.310 but a lien may be created under that section by recording on any interest in real property subject to levy of execution (see Section 697.340) except real property subject to a declared homestead (see Section 704.950).

The portion of the second sentence of Section 674 which specified the duration of the lien is superseded by subdivision (b) of Section 697.310. The portion of the second sentence relating to stay of enforcement of the judgment is superseded by Section 697.040. The portion relating to an undertaking on release of attachment has not been continued, since this portion is unnecessary in view of Sections 489.310, 489.420, and 697.050. See also Sections 697.400 and 697.410. The portion relating to the release of the lien if the judgment is satisfied or the lien is otherwise discharged is superseded by Sections 697.050 and 697.370.

Former subdivision (b) of Section 674 has been omitted. This subdivision is unnecessary in view of subdivision (b) of Section 908 of the Welfare and Institutions Code.

Former subdivision (c) is superseded by Sections 697.340 (property subject to judgment lien) and 704.950 (judgment lien does not attach to declared homestead). See also Section 704.910 ("homestead declaration" includes declaration under former law).

Code of Civil Procedure § 725a (technical amendments). Foreclosure of deed of trust or mortgage with power of sale

Comment. Section 725a is amended to delete provisions relating to the statutory right of redemption which are set forth in Sections 726(e), 729.010–729.090.

Code of Civil Procedure § 729.040 (added). Certificate of sale

Comment. Section 729.040 continues the substance of a portion of subdivision (a) of former Section 700a. See also Sections 729.030 (redemption period), 729.080 (deed issued upon expiration of redemption period).

Code of Civil Procedure § 1166a (amended). Order for immediate possession

Comment. Subdivisions (d), (e), and (f) are added to Section 1166a to clarify the procedure for enforcing an order for immediate possession. The amendments of subdivisions (a), (b), and (c) are technical.

Code of Civil Procedure § 1800 (technical amendment). Recovery of preferences

Comment. Section 1800 is amended to substitute a reference to Section 1801 in place of the former reference to Title 9 of Part 2.

Commercial Code § 9304 (amended). Perfection of security interest in instrument in custody of levying officer

Comment. Subdivision (7) is added to Section 9304 to provide a method of perfecting a security interest in an instrument constituting proceeds (other than cash proceeds) of collateral when the instrument is in the custody of a levying officer.

Financial Code § 864 (amended). Bank setoff

Comment. Section 864 is amended to correct cross-references and to conform to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure (Enforcement of Judgments Law). The form of the declaration is amended to conform to Code of Civil Procedure Section 2015.5(b).

Financial Code § 14864 (amended). Exemption of credit union shares

Comment. Section 14864 is amended to replace the former exemption for credit union shares with a reference to the applicable provisions of the Enforcement of Judgments Law. See Code Civ. Proc. §§ 703.080 (tracing exempt amounts into deposit accounts), 704.070 (exemption for paid earnings), 704.080 (exemption for deposit account in which social security payments are directly deposited).

Government Code § 16211.5 (amended). Voluntary sale of residence of claimant of property, tax postponement

Comment. Section 16211.5 is amended for consistency with the Senior Citizens Property Tax Postponement Law. See Rev. & Tax. Code §§ 20581, 20583.

Probate Code § 3002 (technical amendment). Community property defined

Comment. The heading of Part 6 (commencing with Section 3000) is amended and provisions of Part 6 are amended or repealed to reflect the elimination of the collateral effects of a homestead declaration. See Code Civ. Proc. § 704.940 and the Comment thereto.

Water Code § 8537 (repealed). Property exempt from execution or attachment

Comment. Former Section 8537 is not continued. Property of a public entity is not subject to enforcement of a money judgment pursuant to Title 9 (commencing with Section 690.010) of Part 2 of the Code of Civil Procedure. See Code Civ. Proc. § 695.050; Gov't Code §§ 965.5, 970.1. See also Code Civ. Proc. § 487.020 (exemptions from attachment). See also former Code Civ. Proc. § 690.26 and the Comment thereto.

Welfare and Institutions Code § 11477 (amended). Assignment of support rights

Comment. Subdivision (a) of Section 11477 is amended to provide a method by which an assignment of support rights under this section may be made of record. Becoming an assignee of record is a prerequisite to enforcement under the Enforcement of Judgments Law as provided by Section 681.020 of the Code of Civil Procedure. As the last sentence of subdivision (a) makes clear, the method of becoming an assignee of record therein provided is not necessarily exclusive. See *e.g.*, Code Civ. Proc. § 673 (acknowledgment of assignment of judgment).

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Code of Civil Procedure § 483.015 (added). Amount to be secured by attachment

Comment. Section 483.015 is a new provision that governs the amount for which an attachment may issue. This section supersedes former portions of subdivision (b) of Section 484.020 and subdivision (b) of Section 484.320.

Code of Civil Procedure § 483.020 (technical amendment). Attachment in unlawful detainer proceeding

Comment. Section 483.020 is amended to make clear that the amounts specified in Section 483.015(b) are to be subtracted from the amount claimed by the plaintiff in an unlawful detainer case under this section.

Code of Civil Procedure § 484.070 (amended). Claim of exemption

Comment. Subdivision (a) of Section 484.070 is amended to make clear that the defendant is not required to claim an exemption for real property at the hearing on issuance of the right to attach order and writ of attachment. See Section 487.020 (exemptions from attachment). Consequently, if the defendant's real property dwelling is sought to be attached, a failure to claim an exemption for it does not constitute a waiver of the exemption. However, subdivision (b) permits the defendant to claim an exemption in real property at the hearing on issuance of the right to attach order if the defendant so desires. If the plaintiff who has attached a dwelling recovers judgment in the action and levies on the dwelling under a writ of execution, the exemption may then be determined as provided in Section 704.710 *et seq.* in the Enforcement of Judgments Law. The other changes in Section 484.070 are technical. See Section 482.070 (manner of service).

Code of Civil Procedure § 484.090 (amended). Hearing; order and findings

Comment. The introductory clause of subdivision (a) of Section 484.090 is revised to reflect the addition of subdivision (b) to Section 483.015.

Code of Civil Procedure § 484.100 (amended). Effect of determinations

Comment. Section 484.100 is amended to reflect that the defendant may seek to reduce the amount to be secured by the attachment on the ground that the defendant has a claim against the plaintiff. See Section 483.015(b).

Code of Civil Procedure § 484.110 (amended). Effect of failure to oppose or rebut evidence

Comment. Section 484.110 is amended to recognize that the defendant may seek to reduce the amount to be secured by the attachment on the ground that defendant has a claim against the defendant. See Section 483.015(b).

Code of Civil Procedure § 484.530 (amended). Claim of exemption

Comment. Subdivision (a) of Section 484.530 is amended to make clear that the defendant does not waive an exemption for real property by failure to claim it within the time prescribed. See Section 487.020 (exemptions from attachment). The other changes in Section 484.530 are technical.

Code of Civil Procedure § 487.020 (amended). Property exempt from attachment

Comment. Subdivision (a) of Section 487.020 is amended for consistency with the Enforcement of Judgments Law. See, e.g., Section 703.010. The amendment of subdivision (b) is not substantive. Subdivision (c) is amended to incorporate the definition of earnings provided in the Wage Garnishment Law; this amendment makes no substantive change.

Code of Civil Procedure § 488.010. Contents of writ of attachment

Comment. Section 488.010 supersedes former Section 488.010 and conforms more closely to Section 699.520 (contents of writ of execution). The notice of attachment contains a description of the specific property which is sought to be attached. See Section 488.060. The provision of former Section 488.010 which required the writ of attachment to identify persons (other than the defendant) in whose name real property, growing crops, or timber sought to be attached stands on the records of the county is not continued. The procedure for levy on such property requires this information to be in the notice of attachment. See Sections 488.315 and 488.325 (incorporating levy procedure of Enforcement of Judgments Law).

Code of Civil Procedure § 488.020. Delivery and execution of writ

Comment. Section 488.020 continues the substance of former Section 488.030. The provision in subdivision (a) providing that a writ of attachment be directed "to any registered process server" is

new and is consistent with Section 699.510 (writ of execution). See Section 488.080 (levy by registered process server).

Code of Civil Procedure § 488.720. Release of property in excess of that needed to satisfy amount secured

Comment. Section 488.720 continues the substance of former Section 488.555, but the second sentence of subdivision (c) is new. Subdivision (c) of Section 488.720 also supersedes a portion of former Section 684.2 (satisfaction first from attached property).

Code of Civil Procedure § 491.440. Enforcement, compromise, dismissal, settlement, satisfaction

Comment. Section 491.440 is drawn from Section 708.440 (Enforcement of Judgments Law). See also Section 482.070 (manner of service).

Commercial Code § 9409 (technical amendment). Combined certificate of Secretary of State

Comment. Section 9409 is amended to add a provision requiring that judgment liens on personal property be included in the combined certificate and to correct the cross-references to provisions relating to attachment liens.

REVISED COMMENTS TO REPEALED SECTIONS

§ 682 (repealed). Issuance and contents of writ

Comment. The introductory paragraph of former Section 682 is superseded by Sections 699.510 (issuance of writ of execution) and 699.520 (contents of writ of execution). See also Sections 681.080(b) (Judicial Council authority to prescribe form of writ), 693.010 (form of writ), 712.010 (issuance of writ of possession or sale), 712.020 (contents of writ of possession or sale). The portion of the introductory paragraph relating to payment in a specified kind of money or currency is not continued. See the Comment to Section 667 as amended.

Subdivision 1 of former Section 682 is superseded by Sections 697.390 (judgment lien on real property), 699.520 (contents of writ), 699.710 (property subject to execution). The order of levy specified in subdivisions 1 and 4 of former Section 682 is not continued. See the Comment to Section 699.530.

Subdivision 2 of former Section 682 is not continued because it is unnecessary. Property of the judgment debtor is generally subject to execution regardless of who possesses it. See, e.g., Sections 699.710 (property subject to execution), 700.015 (levy on real property), 700.040 (levy on tangible personal property in possession of third person), 700.170 (levy on accounts receivable and general intangibles), 700.200 (levy on interest in personal property in decedent's estate).

Subdivision 3 of former Section 682 is not continued. See the Comment to Section 667 as amended.

Subdivision 4 of former Section 682 is superseded by Sections 712.020 (contents of writ of possession or sale), 712.040 (collection of money amounts), 714.010 (contents of writ of possession of personal property), 714.020 (execution of writ of possession of personal

property), 715.010 (contents of writ of possession of real property, 715.020 (execution of writ of possession of real property).

§ 682.2 (repealed). Interest and costs entered on writ

Comment. Former Section 682.2 is superseded by Sections 683.020 (commencement of interest), 685.030 (cessation of interest), 685.050 (costs and interest under writ), and 699.520 (contents of writ of execution). See also Sections 693.010 (form of writ), 701.810 (distribution of proceeds). The authorization for the judge to act if there is no clerk is unnecessary. See Section 167.

§ 684.2 (repealed). Satisfaction first from attached property.

Comment. Former Section 684.2 is not continued. See Section 488.720 (release of attached property in excess of that needed to satisfy amount secured).

§ 685.010 (repealed). Rate of interest on judgments

Comment. Former Section 685.010 (as enacted by 1982 Cal. Stats. ch. 150) is superseded by new Section 685.010.

§ 688 (repealed). Property subject to execution

Comment. Subdivision (a) of former Section 688 is superseded by Sections 695.010–695.035 (property subject to enforcement of money judgment) and 699.710–699.720 (property subject to execution).

Subdivision (b) is superseded by Sections 699.080 (release from lien and custody) and 700.010–700.200 (methods of levy). See also Sections 684.010–684.140 (manner of service).

The substance of the first sentence of subdivision (c) is continued in Section 700.030 (levy on tangible personal property in possession of judgment debtor). The substance of the second sentence is continued in Section 687.030 (manner of custody). The third and fourth sentences are superseded by Section 700.060 (levy on personal property used as dwelling). The remainder of subdivision (c) is superseded by Section 700.070 (levy on tangible personal property of going business).

Subdivision (d) is not continued because it is unnecessary. See Section 697.710 (creation of execution lien).

The first sentence of subdivision (e) is superseded by Sections 699.710 (duration of execution lien) and 700.200(d) (exception where interest in personal property of decedent's estate levied upon). The second sentence of subdivision (e) is not continued. See Section 699.510 (issuance of writ, successive writs).

Subdivision (f) is superseded by Sections 695.060 (licenses not subject to enforcement), 699.720(a) (1) (alcoholic beverage license not subject to execution), 699.720(a) (3) (pending cause of action not subject to execution), 699.720(a) (4) (nonfinal judgment not subject to execution), 700.190 (levy on final money judgment owing to judgment debtor), and 708.630 (receiver to transfer alcoholic beverage license). See also Section 701.520(a) (4) (collection of final money judgment levied upon).

The substance of subdivision (g) is continued in Section 687.020 (endorsement and collection of certain instruments by levying officer).

§ 688.1 (repealed). Lien on cause of action

Comment. Subdivision (a) of former Section 688.1 is superseded by Sections 708.410–708.480 (lien in pending action or proceeding). See also Sections 695.030(b)(2) (cause of action subject to enforcement), 609.720(a)(3) (cause of action not subject to execution), 699.720(a)(4) (nonfinal judgment not subject to execution). Subdivision (b) is not continued because it was held to be in conflict with the Bankruptcy Act. See *In re Kanter*, 505 F.2d 228 (9th Cir. 1974), *affg*, 345 F. Supp. 1151 (C.D. Cal. 1972).

§ 689 (repealed). Third-party claims of title and right to possession

Comment. The first paragraph of former Section 689 is superseded by Sections 720.110–720.140, 720.160(b), (c), 720.170(a), and 720.730. See also Section 684.120 (manner of service by mail).

The substance of the second paragraph is continued in Sections 720.160(c) (undertaking) and 699.090 (liability for levy based on record ownership).

The third, fourth, and fifth paragraphs are superseded by Sections 720.760–720.780.

The substance of the first sentence of the sixth paragraph is continued in Section 720.140(d). The second sentence is superseded by Section 687.040 (liability of levying officer).

The substance of the seventh paragraph of former Section 689 is continued in Sections 720.160(a) and 720.660.

The substance of the first, second, third, and fifth sentences of the eighth paragraph of former Section 689 is continued in Section 720.310 (application for hearing). The fourth sentence is superseded by Section 720.320 (notice of hearing). The substance of the sixth sentence is continued in Section 720.370 (dismissal). The seventh sentence is superseded by Section 699.070 (disposition of perishable property during pendency of proceedings). The eighth sentence is superseded by Section 720.380(a), (b) (stay). The substance of the ninth sentence is continued in Section 720.380(c) (modification of order). The substance of the tenth sentence is continued in Section 720.360 (burden of proof). The substance of the eleventh sentence is continued in Sections 720.330 (filing claim in court) and 720.350(a)(1), (b) (pleadings). The twelfth sentence is superfluous and is not continued; it has been decided that there is no right to a jury trial in third-party claim proceedings (see *Misrach v. Liederman*, 14 Cal. App.2d Supp. 757, 58 P.2d 746 (1936)) and, in any event, if there were a right to a jury trial, it would exist independently under the Constitution. The substance of the thirteenth sentence is continued in Section 720.400 (findings). The substance of the fourteenth and fifteenth sentences is continued in Section 720.390 (determination of claim and disposition of property). The sixteenth sentence is superseded by Section 720.430 (satisfaction from released property). The substance of the seventeenth sentence is continued in Section 720.420 (appeal).

§ 690 (repealed). Exemptions, defined terms

Comment. Subdivision (a) of former Section 690 is superseded by Sections 703.010(a) (application of exemptions), 703.030(a) (procedure for claiming exemptions), and 703.510(a) (exemption claims). Subdivision (b) is superseded by Section 703.130 (exemptions in bankruptcy). The substance of subdivision (c) is continued in Section 703.030(b) (property exempt without making claim). See also Sections 487.020(a) (property exempt from enforcement of money judgment is exempt from attachment), 703.510(b) (release of property exempt without making claim). Subdivision (d) is superseded by Section 680.250 ("judgment debtor" defined) and Section 703.020 (persons entitled to exemptions). Subdivision (e) is superseded by Section 680.240 ("judgment creditor" defined).

§ 690.1 (repealed). Household goods and works of art exemption

Comment. The first sentence of former Section 690.1 is superseded by Sections 704.020 (household furnishings, personal effects) and 704.040 (jewelry, heirlooms, works of art). The second sentence is superseded by Section 704.040.

§ 690.2 (repealed). Motor vehicle exemption

Comment. The first sentence of subdivision (a) of former Section 690.2 is superseded by Sections 680.190 ("equity" defined) and 704.010(a) (motor vehicle exemption). The substance of the second sentence of subdivision (a) is continued in Section 704.010(c). Subdivision (b) is superseded by Sections 701.620 (minimum bid) and 699.060 (release). Subdivision (c) is superseded by Sections 701.810 (distribution of proceeds of sale) and 704.010(d) (exemption without making claim). Subdivision (d) is superseded by Sections 704.010(d) (consultation with records of DMV), 703.520(b)(3) (description of property in claim of exemption), and 701.810 (distribution of proceeds of sale). See also Section 699.540 (contents of notice of levy). The special provisions in subdivision (d) relating to additional notices to the judgment debtor and extensions of time for filing a claim of exemption are not continued. The substance of subdivision (e) is continued in Section 704.010(b) (proceeds exemption).

§ 690.3 (repealed). Personal property dwelling exemption

Comment. The substance of the introductory paragraph of subdivision (a) of former Section 690.3 is continued in Section 704.710. Paragraphs (1)-(3) of subdivision (a) are superseded by Sections 680.190 ("equity" defined), 704.720 (homestead exemption), and 704.730 (amount of exemption). Subdivision (b) is not continued; the various homestead provisions of former law are consolidated in Sections 704.710-704.990.

§ 690.7 (repealed). Savings and loan association account exemption

Comment. Former Section 690.7 is not continued. See the Comment to Section 704.070 (exemption for paid earnings in deposit account).

§ 690.19 (repealed). Public assistance exemption

Comment. The substance of the first and last sentences of former Section 690.19 is continued in Section 704.170. The substance of the second sentence is continued in Section 17409 of the Welfare and Institutions Code (limited set of exemptions for recipient of public support) which is an exception to the application of exemptions recognized by Section 703.010.

§ 690.30 (repealed). Social Security direct deposit exemption

Comment. Former Section 690.30 is superseded by Section 704.080 (deposit account in which social security payments are directly deposited). See also Section 703.060(b) (burden of tracing).

§ 690.31 (repealed). Dwelling house exemption

Comment. Former Section 690.31 is superseded by Sections 704.710–704.850 (homestead exemption), 703.010 (application of exemptions), and 693.050–693.060 (forms).

§ 692 (repealed). Notice of execution sale

Comment. The substance of subdivision 1 of former Section 692 is continued in Section 699.070(c) (notice of sale of perishable property).

The substance of the first sentence of subdivision 2 is continued in Section 701.530(a)–(c). See also Section 684.120 (manner of service by mail). The substance of the last sentence of subdivision 2 is continued in Section 687.010 (instructions to levying officer).

The first sentence of subdivision 3 is superseded by Section 701.340(a)–(d), (g). See also Section 680.320 (“real property” defined). The substance of the second sentence is continued in Section 607.010 (instructions to levying officer). The third sentence is superseded by Section 701.540(d). The fourth, fifth, and sixth sentences are superseded by Section 701.540(a). The seventh sentence is superseded by Section 701.540(g) (notice published pursuant to Gov’t Code § 6063). See also Gov’t Code §§ 6000 (newspaper of general circulation), 6060 (publication of notice). The last sentence is not continued. See Sections 680.250 (“judgment debtor” defined), 716.020(b) (notice of sale under writ of sale).

Subdivision 4 is not continued. See the Comment to Section 667 as amended.

§ 695 (repealed). Resale and liability upon nonpayment of bid

Comment. The first portion of former Section 695 is superseded by Section 701.600(a) (sale to next highest bidder). The remainder of former Section 695 is superseded by Section 701.600(c) (liability of defaulting bidder).

§ 696 (repealed). Rejection of bid of defaulting bidder

Comment. The substance of former Section 696 is continued in Section 701.600(d) (rejection of bid of defaulting bidder).

§ 700a (repealed). Absolute sales; redemption

Comment. The first sentence of subdivision (a) of former Section 700a is superseded by Section 701.680(a) (sales absolute). The second

sentence is superseded by Sections 726(e) and 729.010(a) pursuant to which the statutory right of redemption from judicial sales is limited to foreclosure sales where a deficiency judgment is allowed. The substance of the first portion of the third sentence is superseded by Section 701.660 (delivery and recording of deed of sale). The portion of the third sentence prescribing the contents of the certificate of sale is superseded by Sections 701.670 (contents of deed of sale) and 729.040 (certificate of sale of property sold subject to redemption).

The first sentence of subdivision (b) is superseded by Section 729.050. The second sentence is not continued.

§ 701 (repealed). *Persons entitled to redeem*

Comment. The statutory right of redemption provided by former Sections 701-707 is not continued for execution sales. See Section 701.680 and the Comment thereto. However, notice of sale of an interest in real property, other than a leasehold estate with an unexpired term of less than two years, is delayed for 120 days after notice of levy is given. See Section 701.545. A limited right of redemption is available after a foreclosure sale where a deficiency judgment is allowed. See Sections 726(e), 729.010-729.090, and the Comments thereto.

§ 702 (repealed). *Time for redemption; dispute as to amount*

Comment. See the Comment to former Section 701.

§ 703 (repealed). *Second redemptioner; dispute as to amount*

Comment. See the Comment to former Section 701.

§ 704 (repealed). *Person to whom redemption payment made*

Comment. See the Comment to former Section 701.

§ 705 (repealed). *Instruments to be produced by redemptioner*

Comment. See the Comment to former Section 701.

§ 706 (repealed). *Restraint of waste*

Comment. See the Comment to former Section 701.

§ 707 (repealed). *Rents and profits from property subject to redemption*

Comment. See the Comment to former Section 701.

APPENDIX IV
REPORT OF
SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILLS 2750 AND 2751

[Extract from Senate Journal for June 24, 1982 (1981-82 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bills 2750 and 2751, the Senate Committee on Judiciary makes the following report.

Assembly Bills 2750 and 2751 were introduced to effectuate the California Law Revision Commission's Recommendation Relating to Statutory Bonds and Undertakings, 16 Cal. L. Revision Comm'n Reports 501 (1982). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bills 2750 and 2751 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bills 2750 and 2751.

ASSEMBLY BILL 2750

Business and Professions Code § 7071.12 (added)

Comment. Section 7071.12 is added for purposes of cross-reference only. The provisions of Code of Civil Procedure Sections 995.710-995.770 (deposit in lieu of bond) would apply absent this section. See Code Civ. Proc. § 995.710.

Civil Code § 3248 (amended)

Comment. Section 3248 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 996.470 (limitation on liability of surety). The other changes in Section 3248 are technical.

Code of Civil Procedure § 529.2 (amended)

Comment. Section 529.2 is amended for consistency with the Bond and Undertaking Law. See Sections 995.220 (undertaking not required of public entity), 995.320 (contents of undertaking), 996.410-996.495 (liability of sureties). Unlike Section 996.470 (limitation on liability of surety), Section 529.2 imposes a \$500,000 limitation on liability.

Code of Civil Procedure § 535 (repealed)

Comment. The substance of the first sentence of former Section 535 is continued in Section 996.420 (surety subject to jurisdiction of court). The substance of the second through seventh sentences is continued in Section 996.440 (motion to enforce liability), which provides for court rather than jury trial of the liability of principal and sureties. The substance of the last sentence is continued in Section 995.040 (affidavits).

Government Code § 8212 (amended)

Comment. Section 8212 is amended to limit the acceptable form of a notary public bond to a bond executed by an admitted surety

insurer, which correspondingly eliminates the need for superior court approval of the bond. This codifies existing practice. The Secretary of State may make transitional provisions for bonds and deposits given before the operative date of this amendment, if necessary. See Section 8220.

Government Code § 8216 (amended)

Comment. Section 8216 is amended to delete provisions superseded by the Bond and Undertaking Law. See Code Civ. Proc. §§ 996.110 (application for release), 995.030 (manner of service).

Harbors and Navigation Code § 495.6 (amended)

Comment. Section 495.6 is amended to make clear that an undertaking to release the vessel from attachment must be filed with the court, rather than the sheriff, marshal, or constable. This change is consistent with the general scheme under the Attachment Law. See Code Civ. Proc. § 489.060. Section 495.6 is also amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on undertaking) and 995.710 (deposit in lieu of undertaking).

Public Contract Code § 10200 (amended)

Comment. Section 10200 is amended to delete the cost bond provision. This provision 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. See Recommendation Relating to Security for Costs, 14 Cal. L. Revision Comm'n Reports 319 (1978). The other changes in Section 10200 are technical.

Public Contract Code § 10221 (amended)

Comment. Section 10221 is amended to limit the application of Code of Civil Procedure Section 995.710 (deposit in lieu of bond).

Public Contract Code § 10225 (amended)

Comment. Section 10225 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 996.020 (insufficient bonds). The requirement of approval of the director for cancellation or withdrawal by a surety is added to implement application of the cancellation and withdrawal provisions of the Bond and Undertaking Law to payment and performance bonds. See Code Civ. Proc. §§ 996.310-996.360.

Revenue and Taxation Code § 7486 (amended)

Comment. Section 7486 is amended for consistency with the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.120 ("admitted surety insurer" defined), 995.140 ("bond" defined).

Revenue and Taxation Code § 7483 (repealed)

Comment. The substance of former Section 7488 is continued in Code of Civil Procedure Sections 996.460 (judgment of liability), 996.240 (effect of new bond), and 996.310 (withdrawal of sureties).

Revenue and Taxation Code § 7489 (repealed)

Comment. The substance of former Section 7489 is continued in Code of Civil Procedure Section 995.710 (deposit in lieu of bond).

ASSEMBLY BILL 2751

§ 995.185. *Surety*

Comment. Section 995.185 is new. The term "admitted surety insurer" is defined in Section 995.120.

§ 995.330. *Form of Bond*

Comment. Section 995.330 continues the substance of the portion of former Section 1041 (undertaking in civil action) which prescribed the form of a bond or undertaking by a party to an action or proceeding.

An uncodified section of this act grants the Judicial Council authority to prescribe the form of a bond or undertaking and other forms relating to bonds and undertakings given in an action or proceeding. A form prescribed by the Judicial Council is deemed to comply with this chapter. For the Judicial Council form of attachment and claim and delivery undertaking, see form AT-160(77). For the Judicial Council form of notice of exception to sureties and hearing on justification of sureties, see form CD-150(74).

§ 996.460. *Judgment of Liability*

Comment. Subdivision (a) of Section 996.460 is drawn from numerous provisions of former law. See, e.g., former Section 391.5 (vexatious litigants), former Section 489.110 and Section 490.030 (attachment), and a portion of Section 917.1 (appeals).

A judgment under subdivision (b) includes costs to the extent provided in Chapter 6, (commencing with Section 1021).

Subdivision (c) is drawn from numerous provisions of former law. See, e.g., former Prob. Code § 554 (executor, administrator, guardian, conservator), Gov't Code § 8214 (notary public), and former Rev. & Tax. Code § 7435 (vehicle fuel license tax).

Subdivision (d) is drawn from numerous provisions of former law. See, e.g., former Section 489.110 (attachment). See also Section 1050 (right of surety to compel satisfaction of debt by principal).

APPENDIX V
REPORT OF
SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL 2331

[Extract from Senate Journal for April 1, 1982 (1981-82 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 2331, the Senate Committee on Judiciary makes the following report:

Assembly Bill 2331 was introduced to effectuate the "Recommendation of the California Law Revision Commission relating to Holographic and Nuncupative Wills," 16 Cal. L. Revision Comm'n Reports 301 (1982). Except for the revised comment set out below, the comments set out in the commission's recommendation reflect the intent of the Senate Committee on Judiciary in approving the bill.

The following revised comment also reflects the intent of the Senate Committee on Judiciary in approving Assembly Bill 2331.

Probate Code § 53 (added). Holographic will

Comment. Subdivision (a) of Section 53 is the same in substance as Section 2-503 of the Uniform Probate Code. The official Comment to Uniform Probate Code Section 2-503 reads: "This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the 'material provisions' to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be 'entirely' in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate."

Subdivision (b) of Section 53 is not found in the Uniform Probate Code. Paragraph (1) of subdivision (b) is a clarifying provision designed to deal with the situation where the holographic will and another will have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, paragraph (1) requires either that the holographic will be dated or that the time of its execution be shown to be after the date of execution of the other will. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other will, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent will is to be given effect. Where the conflict between the

holographic will and other will is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other will does not affect the validity of the holographic will as to other property. Paragraph (1) also covers the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter; in such a case, Section 53 applies to both wills. If it cannot be established that one of the holographic wills was executed after the other, neither will is valid insofar as the two wills are inconsistent; but, in such case, the validity of the consistent provisions of the two wills is not affected by the failure to establish time of execution.

Paragraph (2) of subdivision (b) applies to the situation where the testator lacked testamentary capacity at any time during which the holographic will might have been executed. Thus, if the testator lacks testamentary capacity at the time of his or her death and the undated holographic will is found with the testator's personal effects, the will is invalid unless it is established that the will was executed at a time when the testator did have testamentary capacity. This could be established, for example, by witnesses who saw the testator make the holographic will and can testify as to the date of its making and that the testator had testamentary capacity at that time. Likewise, where a testator lacked testamentary capacity for a period prior to death and the undated holographic will is found in the testator's safe deposit box, it could be established that the will was executed at a time when the testator did have testamentary capacity if it were shown that the testator did not have access to the safe deposit box at any time after the testator lost the capacity to execute a will.

Paragraph (2) does not invalidate a holographic will if it could not have been executed at a time when the testator lacked testamentary capacity. For example, if the testator becomes ill and requires hospitalization, develops testamentary incapacity and dies during the hospitalization period, and the testator's holographic will is found at his or her home, the will must have been executed before the testator's hospitalization and therefore at a time when the testator had testamentary capacity.

Subdivision (c) is the same as the definition of "will" in Section 1-201(48) of the Uniform Probate Code.

APPENDIX VI

REPORT OF SENATE COMMITTEE ON JUDICIARY ON ASSEMBLY BILL 2416

[Extract from Senate Journal for June 17, 1982 (1981-82 Regular Session)]

In order to indicate more fully its intent with respect to Assembly Bill 2416, the Senate Committee on Judiciary makes the following report.

Assembly Bill 2416 was introduced to effectuate the California Law Revision Commission's *Recommendation relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bill 2416 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 2416.

§ 882.020. Expiration of record of mortgage or deed of trust

Comment. Section 882.020 prescribes a maximum time for enforcement of a mortgage or deed of trust. It operates to bar enforcement of a mortgage or deed of trust after the time prescribed even though the general statutes of limitation may not have run due to tolling, partial payment, or waiver. See Code Civ. Proc. §§ 337 (four-year statute of limitation); 360 (partial payment turns back statute); 360.5 (waiver of statute of limitation); 351-358 (tolling of statute). The section does not extend the time provided by the general statutes of limitation that apply to enforcement of a mortgage or other lien. *Cf.* Code Civ. Proc. § 337 (four-year limitation period). The section limits the time for exercise of a power of sale under a deed of trust, reversing the rule of case law that such a power of sale "never outlaws." See, *e.g.*, 3 B. Witkin, Summary of California Law, Security Transactions in Real Property §§ 84-85 (8th ed. 1973). The cloud on title of a mortgage or other lien that is barred by the general statutes of limitation before the time prescribed in this section may be removed by judicial action, or may be removed by operation of law after passage of the time prescribed in this section. See Sections 2911 (lien extinguished by lapse of statute of limitation) and 882.030 (effect of expiration).

Subdivision (a) adopts a 10-year maximum enforcement period after maturity of the obligation secured by the mortgage or deed of trust. This period is drawn from the comparable 10-year period of the Model Mortgage Limitation Act § 4(a) and the Uniform Simplification of Land Transfers Act (1977) § 3-408(a). Subdivision (a) adopts a 60-year maximum enforcement period after recordation of the security instrument in cases where the maturity date of the obligation cannot be ascertained from the record, whether because the obligation provided no maturity date, because the maturity date is variable depending on facts not in the record, or because the obligation specifies no maturity date. In either case, subdivision (a)

provides for a one-time only automatic extension of enforceability for an additional 10 years upon recording a notice of intent to preserve the lien. The effect of subdivision (a) is to prescribe a maximum life for a mortgage or deed of trust based exclusively on the record for marketability of title purposes.

Subdivision (c) provides for waiver or extension of the time for enforcement of a mortgage or deed of trust under subdivision (a). The waiver or extension must be recorded to be effective. This accomplishes the purpose of enabling a determination of enforceability based on the record alone. Under this provision, a waiver or extension may be made only for a period of four years at a time. See Section 360.5 (four-year period).

§ 882.030. Effect of expiration

Comment. Section 882.030 is drawn from the Model Mortgage Limitation Act § 4 and from the Uniform Simplification of Land Transfers Act (1977) § 3-408(b). Under this section, running of the enforcement period prescribed in Section 882.020 (expiration of record of mortgage or deed of trust) or any other statute such as Section 2911 (lien extinguished by lapse of statute of limitation) has the effect of complete discharge of the mortgage or deed of trust; this reverses the rule that a mortgage or deed of trust barred by the statute of limitations may be equitably enforced. See, e.g., *Puckhaber v. Henry*, 152 Cal. 419, 93 P. 114 (1907); *Mix v. Sodd*, 126 Cal. App.3d 386, 178 Cal. Rptr. 736 (1981).

§ 882.040. Transitional provisions

Comment. Subdivision (a) of Section 882.040 makes clear the legislative intent to apply this chapter immediately to existing security interests. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a security interest that expires by operation of this chapter before, on, or within five years after the operative date of this chapter.

Subdivision (b) provides a five-year grace period to enable enforcement of security interests that would be outlawed by the enactment of this chapter and a shorter grace period for enforcement of interests that would be outlawed within five years after the enactment of this chapter.

The five-year grace periods do not operate as an extension of any other statute of limitation or of the time within which an effective waiver or extension of the statute of limitation must be made pursuant to Code of Civil Procedure Sections 337 (statute of limitation) and 360.5 (waiver of statute of limitation). See Section 880.250 (relation of title to statutes of limitation).

§ 885.015. Reversionary interest in mineral rights and improvements excluded

Comment. Section 885.015 makes clear that this chapter applies only to classical possibilities of reverter and rights of entry. It does not affect the characterization, duration, or manner of enforcement of such contemporary hybrids as a reversionary interest in mineral rights retained by the owner of property subject to an oil and gas lease, or a reversionary interest of the owner of land in separately

owned buildings, improvements, or fixtures, built or to be built on land subject to a ground or air rights lease in which the owner of the buildings, improvements, or fixtures is the lessee.

§ 885.040. *Obsolete power of termination*

Comment. Section 885.040 is drawn from New York law. See N.Y., Real Prop. Actions and Proc. Law § 1951 (McKinney 1979). It codifies the rule that reversionary interests will not be enforced if the restriction does not benefit the holder of the interests. See, e.g., *Young v. Cramer*, 38 Cal. App.2d 64, 100 P.2d 523 (1940) (holder of interest not an owner of appurtenant property). It also codifies existing case law relating to obsolete rights of entry. See, e.g., *Letteau v. Ellis*, 122 Cal. App. 584, 10 P.2d 496 (1932) (changed circumstances). However, Section 885.040 also imposes a limitation on equitable doctrines denying enforcement where a public or charitable donation is involved.

A power of termination may expire pursuant to this section if it becomes obsolete notwithstanding the fact that the 30-year statutory duration of the power has not elapsed and notwithstanding the fact that a notice of intent to preserve the power may have been filed. See Section 885.030 (expiration of power of termination). If the 30-year statutory duration of the power has elapsed the power expires regardless whether it has become obsolete within the meaning of this section. For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration).



APPENDIX VII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Division of Joint Tenancy and
Tenancy in Common Property
at Dissolution of Marriage

September 1982

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982).

CALIFORNIA LAW REVISION COMMISSION

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September 27, 1982

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

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to community property should be revised. The Commission submits this recommendation relating to one aspect of the study—giving the court in a marital dissolution proceeding jurisdiction to divide joint tenancy and tenancy in common property of the spouses along with the community property.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

DIVISION OF JOINT TENANCY AND TENANCY IN COMMON PROPERTY AT DISSOLUTION OF MARRIAGE

A husband and wife may hold property as joint tenants, tenants in common, or as community property.¹ Although the court in a dissolution or legal separation proceeding has jurisdiction to settle the property rights of the parties,² this jurisdiction is construed to extend only to the community property and not to include joint tenancy or tenancy in common property.³ Property held in joint tenancy or tenancy in common must be divided in a separate partition action.⁴

The most significant consequence of this scheme is that the court in a dissolution proceeding may be unable to make the most sensible disposition of property because not all the marital property is available. For example, it may be desirable to award a working spouse the spouse's community property pension and to offset the value of the pension by awarding real property to the other spouse. But because real property is frequently held in joint tenancy, the court may be unable to accomplish this disposition. The result is that the pension must be divided at dissolution and the real property divided in a later partition proceeding. As a further example, it may be desirable to award temporary occupancy of the family home to the spouse awarded custody of the minor children; this can be done if the property is community⁵ but not if it is joint tenancy.⁶

¹ Civil Code § 5104.

² Civil Code § 4351.

³ Civil Code § 4800; *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); *Walker v. Walker*, 108 Cal. App.2d 605, 239 P.2d 106 (1952). See discussion in Porter v. Superior Court, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) and Lichtig, *Valuation and Division of Property*, in 1 California Marital Dissolution Practice §§ 8.3, 8.6-8.7 (Cal. Cont. Ed. Bar 1981).

⁴ Code Civ. Proc. §§ 872.010-874.240; see Code Civ. Proc. § 872.210 (partition permitted as to property other than community property).

⁵ See, e.g., *In re Marriage of Duke*, 101 Cal. App.3d 152, 161 Cal. Rptr. 444 (1980); *In re Marriage of Herrmann*, 84 Cal. App.3d 361, 148 Cal. Rptr. 550 (1978); *In re Marriage of Boseman*, 31 Cal. App.3d 372, 107 Cal. Rptr. 232 (1973).

⁶ See, e.g., *Carter v. Carter*, 148 Cal. App.2d 845, 307 P.2d 630 (1957). This situation is mitigated somewhat by a statute creating a rebuttable presumption that a

To overcome these difficulties, courts when faced with property held by the spouses in joint tenancy title form have strained to find that the property is actually community and subject to the court's jurisdiction. The result has been an extensive and growing body of law that is confusing and inconsistent and that offers no useful guidance as to when property held by the spouses in joint tenancy form will be found to be community and when it will be found to be true joint tenancy.⁷ This problem is particularly troublesome because a substantial amount of the marital wealth in California is held in joint tenancy title form.

To cure these problems the Law Revision Commission recommends that the court at dissolution or separation be given jurisdiction to include joint tenancy and tenancy in common property in the property division,⁸ at the request of either party. Other community property jurisdictions require disposition of the joint tenancy and tenancy in common property along with the community property.⁹ California family law courts now dispose of such property in dissolution proceedings where both parties submit the property to the court¹⁰ or later where the court reserves jurisdiction to divide community property (which becomes tenancy in common by operation of law).¹¹ In some courts joint tenancy property may be divided as a matter of practice. Express authority for the court to divide joint tenancy and tenancy in common property will eliminate litigation over the community or separate character of the

single-family residence acquired during marriage in joint tenancy form is in fact community property for purposes of dissolution. Civil Code § 5110.

⁷ For a discussion of the law in this area, see, e.g., Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961).

⁸ This has also been suggested in Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 843 (1982).

⁹ Ariz. Rev. Stat. § 25-318 (West Supp. 1981); Nev. Rev. Stat. § 125.150 (1981).

¹⁰ See, e.g., *Allen v. Allen*, 159 Cal. 197, 113 P. 160 (1911); *Wornack v. Wornack*, 242 Cal. App.2d 572, 51 Cal. Rptr. 668 (1966); *Spahn v. Spahn*, 70 Cal. App.2d 791, 162 P.2d 53 (1945).

¹¹ See, e.g., *De Godey v. Godey*, 39 Cal. 157 (1870); *Marriage of Borges*, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); Comment, *Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action*, 10 Pac. L.J. 825 (1979). Where the court fails to reserve jurisdiction to divide omitted or after-discovered community property a separate partition proceeding is necessary since the property has become tenancy in common by operation of law, thereby causing the court to lose jurisdiction. See, e.g., *Henn v. Henn*, 26 Cal.3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980).

property, add flexibility to the formulation of a just property disposition, and avoid the need for a separate partition proceeding for the property.

Division of the property should be equal in the ordinary case. However, the spouses should be permitted to show an agreement that their interests in the property are not equal or to show that their interests in the property are not equal based on their proportionate contributions to the acquisition of the property. This statutory variance from common law cotenancy theory will avoid the inequity that may result in a case where property taken in joint tenancy form is divided equally between the spouses despite a showing that one spouse contributed a substantial portion of separate funds to the acquisition of the property.¹²

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

An act to amend Section 5110 of, and to add Section 4800.1 to, the Civil Code, relating to division of marital property.

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

§ 4800.1 (added). Division of joint tenancy and tenancy in common property

SECTION 1. Section 4800.1 is added to the Civil Code, to read:

4800.1. Notwithstanding any other law:

(a) In a proceeding for division of the community property and the quasi-community property the court has jurisdiction, at the request of either party, to divide the interests of the parties in real and personal property, wherever situated and whenever acquired, held by the parties as joint tenants or tenants in common. The division shall be made in the same manner and to the same extent, and subject to the same limitations, as community property and quasi-community property.

¹² See, e.g., *In re Marriage of Lucas*, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

(b) For the purpose of this section the interests of the parties in the property are presumed to be equal. This presumption is a presumption affecting the burden of proof and is rebuttable by proof of different proportionate contributions of the parties to the acquisition of the property or by proof of an agreement of the parties that their interests in the property are different.

(c) If property held in joint tenancy is divided pursuant to this section, the interlocutory judgment of dissolution of the marriage or the judgment decreeing the legal separation of the parties severs the joint tenancy.

(d) This section applies to proceedings commenced on or after January 1, 1984, regardless whether the property was acquired before, on, or after January 1, 1984.

Comment. Section 4800.1 reverses the rule that the court in a dissolution or separation proceeding has no jurisdiction over property of the parties other than community or quasi-community. *Schindler v. Schindler*, 126 Cal. App.2d 597, 272 P.2d 566 (1954); *Walker v. Walker*, 108 Cal. App.2d 605, 239 P.2d 106 (1952); *cf. Porter v. Superior Court*, 73 Cal. App.3d 793, 141 Cal. Rptr. 59 (1977) (general discussion). It is consistent with the general rule that the court has jurisdiction to settle the property rights of the parties and with the principle that the court has jurisdiction to settle matters submitted to it by the parties. Section 4351 (jurisdiction of court); see, *e.g.*, *Allen v. Allen*, 159 Cal. 197, 113 P. 160 (1911). It is also consistent with the rule that the court may reserve jurisdiction to divide community property that has become a tenancy in common by operation of law upon dissolution or separation. See, *e.g.*, *Marriage of Borges*, 83 Cal. App.3d 771, 148 Cal. Rptr. 118 (1978); *Comment, Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action*, 10 Pac. L.J. 825 (1979). Section 4800.1 supersedes the portion of Section 5110 that sought to achieve the same purpose in a less direct and less adequate manner by providing that a single-family dwelling acquired by the spouses during marriage in joint tenancy form was presumed to be community property for the purpose of division at dissolution or legal separation.

Subdivision (a) supplements Section 4800 by giving the court express jurisdiction over any joint tenancy or tenancy in common property submitted by a party in a property division proceeding under the Family Law Act. Property subject to division includes property acquired by the parties either before or during

marriage. It also includes property acquired or situated either in this state or elsewhere. For a special rule governing treatment of real property situated in another state, see Section 4800.5 (community and quasi-community property). See also Section 4813 (jurisdiction where service is by publication). The jurisdiction of the court extends only to the interests of the spouses, whether equal or unequal, and the court may not affect interests of third parties in the property. The interests of third parties may be subject to partition pursuant to Title 10.5 (commencing with Section 872.010) of the Code of Civil Procedure. Otherwise, joint tenancy and tenancy in common property are subject to all rules applicable to division of community property and quasi-community property.

Subdivision (b) makes clear that, unlike division of community and quasi-community property, division of joint tenancy and tenancy in common property may be unequal if the proportionate contributions of the spouses to the acquisition of the property are unequal. This overturns the common law rule that interests of joint tenants are equal for all purposes, based strictly on the form of title. It also supersedes the rule of former Section 5110 and *In re Marriage of Lucas*, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), which required equal division of joint tenancy property as community notwithstanding its acquisition out of the separate property of one of the spouses, absent a showing of an agreement that the property remains separate. Division of joint tenancy and tenancy in common property may also be unequal if the spouses have agreed that their ownership interests are unequal.

Subdivision (c) makes clear the time of severance of a joint tenancy where the property is divided pursuant to this section. Severance terminates the right of survivorship.

Under subdivision (d), the rule that joint tenancy and tenancy in common property may be divided in a community and quasi-community property division proceeding applies only to proceedings commenced after January 1, 1984.

§ 5110 (amended). Community property presumptions

SEC. 2. Section 5110 of the Civil Code is amended to read:

5110. Except as provided in Sections 5107, 5108, and ~~5109~~ 5126, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state,

and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of the husband and wife. ~~When a single/family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single/family residence is the community property of the husband and wife.~~ The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of the property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

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

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

APPENDIX VIII
STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

Creditors' Remedies

Amount to be Secured by Attachment
Execution of Writs by Registered Process Servers
Technical Amendments

September 1982

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982).

CALIFORNIA LAW REVISION COMMISSION

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September 27, 1982

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

A new Enforcement of Judgments Law was enacted by Chapter 1364 of the Statutes of 1982 upon recommendation of the Law Revision Commission. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980). A related recommendation relating to prejudgment attachment was enacted by Chapter 1198 of the Statutes of 1982. See *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

The Commission has continued to review the law relating to creditors' remedies to determine whether any substantive or technical changes are necessary. As a result of this review, the Commission recommends amendments to specify the nature of claims that may be offset against the amount of an attachment, to clarify the duties of a registered process server who serves a writ of attachment or execution, and to make some technical revisions.

This recommendation is submitted pursuant to Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The 1982 session of the California Legislature enacted a new Enforcement of Judgments Law¹ and conforming changes in the Attachment Law² upon recommendation of the California Law Revision Commission.³ This recommendation proposes substantive and technical revisions in the legislation enacted in 1982. The more important substantive revisions are discussed below; recommended technical changes are explained in the Comments to the provisions in the Proposed Legislation.

Amount Secured by Attachment

Under existing law, the amount for which a writ of attachment may issue is subject to reduction in the amount of "all claims which would diminish the amount of the plaintiff's recovery."⁴ This language might be construed to allow the defendant to seek to reduce the amount of the attachment by the amount of a tort claim, even though attachment is available only on a "claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars."⁵ A tort claim of the defendant that has not been reduced to judgment should not be permitted to offset the plaintiff's attachment claim. Such a tort claim is likely to be speculative in amount and may be contrived for the purpose of delaying issuance of the writ of attachment.

¹ 1982 Cal. Stats. ch. 1364 (operative July 1, 1983). See also 1982 Cal. Stats. ch. 497 (conforming changes).

² 1982 Cal. Stats. ch. 1198 (operative July 1, 1983).

³ See *Tentative Recommendation Proposing the Enforcements of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980); *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

⁴ Code Civ. Proc. § 483.015 (enacted by 1982 Cal. Stats. ch. 1198). See also *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

⁵ Code Civ. Proc. § 483.010(a).

The Commission recommends that the Attachment Law be revised to provide that the amount of the attachment may be reduced only by (1) the amount of any money judgment in favor of the defendant and against the plaintiff and (2) the amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action, or the amount of any claim of the defendant asserted as a defense in the answer, if the defendant's claim is one upon which an attachment could be issued.⁶

Execution of Writs by Registered Process Servers

The 1982 legislation permits registered process servers to levy on certain types of property under a writ of attachment⁷ or writ of execution.⁸ The 1982 provisions require the registered process server to file the writ, relevant instructions, and an affidavit of the actions taken in executing the writ with the levying officer within five days after the registered process server levies.⁹ The levying officer is then required to perform the remaining duties under the writ and return the writ to the court.

There is a danger under this scheme that the papers will not be filed with the levying officer early enough to permit the levying officer to set up a file for the case. If the levying officer has no file, there is no practical way of handling various papers that may be filed with the levying officer, such as exemption claims,¹⁰ third-party claims,¹¹ and

⁶ The substance of this recommendation was included in Assembly Bill 2332 at the 1981-82 Regular Session but was removed from the bill before the bill was passed by the Legislature. This recommendation was withdrawn at the request of the Business Law Section of the State Bar of California so that the Section would have sufficient time to study the recommendation. The Commission believes that this proposal merits further consideration.

⁷ See Code Civ. Proc. § 488.080. See also *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701, 715-16 (1982).

⁸ See Code Civ. Proc. § 699.080. See also *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2057-58 (1980).

⁹ See Code Civ. Proc. §§ 488.080(c), 699.080(c). Code of Civil Procedure Section 715.040 permits a registered process server to serve or post a writ of possession of real property, but in this case the writ must first be delivered to the levying officer who is given three business days within which to serve or post the writ. The recommended legislation revises Section 715.040 to make clear that the writ is to be returned to the judgment creditor or registered process server if the levying officer does not serve or post it within the three days allowed.

¹⁰ See, e.g., Code Civ. Proc. §§ 482.100, 485.610, 703.520.

¹¹ See Code Civ. Proc. §§ 488.110, 720.120, 720.220.

garnishees' memorandums.¹² In addition, a garnishee may desire to pay the amount levied upon or deliver possession of property levied upon to the levying officer,¹³ and the debtor may wish to obtain the release of property levied upon by paying the amount due on the claim or judgment.¹⁴ In each of these situations, the procedure breaks down if the levying officer has no file for the case that is involved.

The Commission recommends that the provisions governing levy of attachment and execution by registered process servers be amended to require the registered process server to file a copy of the writ of attachment or writ of execution with the appropriate levying officer before attempting to levy. The levying officer's fee should also be paid at this time to cover the clerical cost of setting up a file as well as the eventual costs of performing other duties under the writ after levy.¹⁵ Requiring this initial filing with the levying officer will aid in the efficient processing of a writ of attachment or execution once levy is made by the registered process server.

Proposed Legislation

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

An act to amend Sections 483.015, 484.050, 484.060, 485.240, 488.080, 488.375, 488.385, 488.455, 488.730, 685.020, 687.040, 695.020, 699.080, 700.140, 715.040, and 726 of the Code of Civil Procedure, to amend Sections 864 and 7609.5 of the Financial Code, to amend Sections 7170, 26820.4, and 72055 of the Government Code, to amend Section 2407 of the Probate Code, and to amend Section 1342 of the Unemployment Insurance Code, relating to creditors' remedies.

Note. To save printing costs, only significant revisions are set out in this report.

¹² See Code Civ. Proc. §§ 488.610, 701.030.

¹³ See Code Civ. Proc. §§ 488.600, 701.010, 701.040-701.060; see also § 699.020 (payment by third person without levy).

¹⁴ Cf. Code Civ. Proc. §§ 695.210 (amount required to satisfy money judgment), 724.010 (satisfaction of judgment).

¹⁵ See Code Civ. Proc. §§ 488.080(c), 699.080(c).

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

Code of Civil Procedure § 483.015 (amended). Amount to be secured by attachment

SECTION 1. Section 483.015 of the Code of Civil Procedure is amended to read:

483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:

(1) The amount of the defendant's indebtedness claimed by the plaintiff.

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

(b) The amount described in subdivision (a) shall be reduced by ~~all claims which would diminish the amount of the plaintiff's recovery.~~ *the sum of the following:*

(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

Comment. Subdivision (b) of Section 483.015 is amended to clarify the nature of claims that will reduce the amount to be secured by attachment. The amended subdivision provides a more precise rule under which, for example, it is clear that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240. Under subdivision (b), if a claim may be offset only if it is "one upon which an attachment could be issued," the claim must meet the requirements of Section 483.010 as to amount and nature of the claim.

Code of Civil Procedure § 484.050 (amended). Contents of notice of application and hearing

SEC. 2. Section 484.050 of the Code of Civil Procedure is amended to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following:

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

(b) The order will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decisions at the hearing on the application for the order.

(c) The amount to be secured by the attachment is the amount of the defendant's indebtedness claimed by the plaintiff over and above ~~all claims which would reduce the amount of the plaintiff's recovery~~ *the sum of (1) the amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable, (2) the amount of any indebtedness of the plaintiff claimed by the defendant in a cross-complaint in the action if the defendant's claim is one upon which an attachment could be issued, and (3) the amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.*

(d) If the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other

nonexempt property of the defendant on the basis of the right to attach order.

(e) If the defendant desires to oppose the issuance of the order, the defendant shall file with the court and serve on the plaintiff a notice of opposition and supporting affidavit as required by Section 484.060 not later than five days prior to the date set for hearing.

(f) If the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant shall include that claim in the notice of opposition filed and served pursuant to Section 484.060 or file and serve a separate claim of exemption with respect to the property as provided in Section 484.070. If the defendant does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming exemptions.

(g) The defendant may obtain a determination at the hearing whether real or personal property not described in the application or real property described in the application is exempt from attachment by including the claim in the notice of opposition filed and served pursuant to Section 484.060 or by filing and serving a separate claim of exemption with respect to the property as provided in Section 484.070, but the failure to so claim that the property is exempt from attachment will not preclude the defendant from making a claim of exemption with respect to the property at a later time.

(h) Either the defendant or the defendant's attorney or both of them may be present at the hearing.

(i) The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Comment. Subdivision (c) of Section 484.050 is amended to conform to Section 483.015 as amended.

Code of Civil Procedure § 484.060 (amended). Notice of opposition by defendant and supporting affidavit

SEC. 3. Section 484.060 of the Code of Civil Procedure is amended to read:

484.060. (a) If the defendant desires to oppose the issuance of the right to attach order sought by plaintiff; ~~he~~ *or objects to the amount sought to be secured by the attachment, the defendant* shall file and serve upon the plaintiff no later than five days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order *or objects to the amount sought to be secured by the attachment* and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, ~~he~~ *the defendant* shall not be permitted to oppose the issuance of the order.

(b) If a defendant filing a notice of opposition desires to make any claim of exemption as provided in Section 484.070, ~~he~~ *the defendant* may include such claim in the notice of opposition filed pursuant to this section.

Comment. Subdivision (a) of Section 484.060 is amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 485.240 (amended). Setting aside right to attach order and quashing writ

SEC. 4. Section 485.240 of the Code of Civil Procedure is amended to read:

485.240. (a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order (1) that the right to attach order be set aside, the writ of attachment quashed, and any property levied upon pursuant to the writ be released, *or (2) that the amount to be secured by the attachment be reduced as provided in Section 483.015.* Such application shall be made by filing with the court and serving on the plaintiff a notice of motion.

(b) The notice of motion shall state the grounds on which the motion is based and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. It shall not be grounds to set aside an order that the plaintiff would not have suffered great or irreparable injury (within the meaning of Section 485.010) if issuance of the order had been delayed until the matter could have been heard on notice.

(c) At the hearing on the motion, the court shall determine whether the plaintiff is entitled to the right to attach order *or whether the amount to be secured by the attachment should be reduced*. If the court finds that the plaintiff is not entitled to the right to attach order, it shall order the right to attach order set aside, the writ of attachment quashed, and any property levied on pursuant to the writ released. If the court finds that the plaintiff is entitled to the right to attach order, thereafter the plaintiff may apply for additional writs pursuant to Article 2 (commencing with Section 484.310) or Article 3 (commencing with Section 484.510) of Chapter 4.

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

(e) The hearing provided for in this section shall take precedence over all other civil matters on the calendar of that day except older matters of the same character.

Comment. Subdivisions (a) and (c) of Section 485.240 are amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 488.080 (amended). Levy of attachment by registered process server

SEC. 5. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) A registered process server may levy under a writ of attachment on the following types of property:

- (1) Real property, pursuant to Section 488.315.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 488.325.
- (3) Personal property in the custody of a levying officer, pursuant to Section 488.355.
- (4) Equipment of a going business, pursuant to Section 488.375.
- (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, pursuant to Section 488.385.
- (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (8) Deposit accounts, pursuant to Section 488.455 or 488.465.
- (9) Property in a safe deposit box, pursuant to Section 488.460 or 488.465.
- (10) Accounts receivable or general intangibles, pursuant to Section 488.470.
- (11) Final money judgments, pursuant to Section 488.480.
- (12) Interest of a defendant in personal property in the estate of a decedent, pursuant to Section 488.485.

(b) Before levying under the writ of attachment, the registered process server shall file a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

- (1) Comply with the applicable levy, posting, and service provisions of Article 2 (commencing with Section 488.300).
- (2) Deliver any undertaking required by Section 488.465.

(3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 488.610.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of attachment.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of attachment on other persons as required by Article 2 (commencing with Section 488.300).

(4) Instructions in writing, as required by the provisions of Section 488.030.

~~(d)~~ ~~Upon receipt of~~ (e) If the fee provided by Section 26721 of the Government Code *has been paid*, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court. The levying officer is not liable for actions taken in conformance with the provisions of this title in reliance on information provided to the levying officer under subdivision ~~(e)~~ (d) except to the extent that the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information provided under subdivision ~~(e)~~ (d).

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. A new subdivision (b) is added to Section 488.080 to require a registered process server to file a copy of the writ with the appropriate levying officer before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the defendant. Subdivision (e) is amended for consistency with new subdivision (b).

Code of Civil Procedure § 488.375 (amended). Attachment of equipment of going business

SEC. 6. Section 488.375 of the Code of Civil Procedure is amended to read:

488.375. (a) Except as provided by Section 488.385, to attach equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the office of the Secretary of State a notice of attachment, in the form prescribed by the Secretary of State, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
 - (2) The name and last known mailing address of the defendant.
 - (3) The title of the court where the action is pending and the cause and number of the action.
 - (4) A description of the specific property attached.
 - (5) A statement that the plaintiff has acquired an attachment lien on the specified property of the defendant.
- (b) Upon presentation of a notice of attachment under this section for filing, and tender of the filing fee to the office of the Secretary of State, the notice of attachment shall be filed, marked, and indexed in the same manner as a financing statement. The fee for filing in the office of the Secretary of State is the same as the fee for filing a financing statement in the standard form.

(c) Upon the request of any person, the Secretary of State shall issue a certificate showing whether there is on file in that office on the date and hour stated therein any notice of attachment filed against the equipment of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is the same as the fee for a certificate issued pursuant to Section 9407 of the Commercial Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment or notice affecting a notice of

attachment for the fee for a copy prescribed by subdivision (2) of Section 9407 of the Commercial Code.

(d) The fee for filing, indexing, and furnishing filing data for a notice of extension of attachment is the same as the fee for a continuation statement under Section 9403 of the Commercial Code. The fee for filing, indexing, and furnishing filing data for a notice of release of attachment is the same as the fee for a statement of release under Section 9405 of the Commercial Code.

(e) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (e) is added to Section 488.375 to make clear that the lien on equipment is extinguished if the equipment becomes a fixture. This subdivision is the same as Sections 488.385 (attachment lien on vehicle, vessel, mobilehome, or commercial coach that is equipment), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

Code of Civil Procedure § 488.385 (amended). Attachment of vehicle, vessel, mobilehome, or commercial coach that is equipment of going business

SEC. 7. Section 488.385 of the Code of Civil Procedure is amended to read:

488.385. (a) To attach a vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles, or a mobilehome or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development, which is equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the appropriate department a notice of attachment, in the form prescribed by the appropriate department, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
- (2) The name and last known mailing address of the defendant.

(3) The title of the court where the action is pending and the cause and number of the action.

(4) A description of the specific property attached.

(5) A statement that the plaintiff has acquired an attachment lien on the specific property of the defendant.

(b) Upon presentation of a notice of attachment, notice of extension, or notice of release under this section for filing and tender of the filing fee to the appropriate department, the notice shall be filed and indexed. The fee for filing and indexing the notice is three dollars (\$3).

(c) Upon the request of any person, the department shall issue its certificate showing whether there is on file in that department on the date and hour stated therein any notice of attachment filed against the property of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice of attachment and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is three dollars (\$3). Upon request, the department shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for a fee of one dollar (\$1) per page.

(d) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (d) is added to Section 488.385 to make clear that the lien on equipment under this section is extinguished if the equipment, such as a mobilehome, becomes a fixture. This subdivision is the same as Sections 488.375(e) (attachment lien on equipment generally), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

Code of Civil Procedure § 488.455 (technical amendment). Levy on deposit account

SEC. 8. Section 488.455 of the Code of Civil Procedure is amended to read:

488.455. (a) To attach a deposit account, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the deposit account stands.

(c) Subject to Section 488.465, during the time the attachment lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount attached. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (c).

(e) When the amount attached pursuant to this section is paid to the levying officer, the attachment lien on the attached deposit account terminates.

(f) For the purposes of this section and Section 488.465, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section

852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivision (f) is added to Section 488.455 to make clear that no bond is required to levy on an account described in the subdivision.

Code of Civil Procedure § 488.730 (technical amendment). Release of attached property

Comment. Subdivision (b) of Section 488.730 is amended to delete erroneous language. See Section 699.060 (b) (release from execution).

Code of Civil Procedure § 685.020 (amended). Commencement of interest

SEC. 10. Section 685.020 of the Code of Civil Procedure is amended to read:

685.020. (a) *Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment.*

(b) Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due.

Comment. Subdivision (a) of Section 685.020 continues the general rule as to the time postjudgment interest commences to run. See former Section 682.2, Section 1033; *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App.3d 964, 122 Cal. Rptr. 202 (1975). See also Sections 695.210 and 724.010 (amount to satisfy a judgment).

Subdivision (b) codifies the rule concerning accrual of interest on support judgments payable in installments and extends the rule to other judgments payable in installments. See, e.g., *Huellmantel v. Huellmantel*, 124 Cal. 583, 589-90, 57 P. 582 (1899); *In re Marriage of Hoffee*, 60 Cal. App.3d 337, 131 Cal. Rptr. 637 (1976). The introductory clause of subdivision (b) also recognizes that in certain circumstances the court may have the authority to order that interest accrues from the date of entry of a judgment rendered in an amount certain but payable in installments. See Section 85 (municipal or justice court may fix terms and conditions of payment of money judgment), 117 (small claims court may fix terms and conditions of payment).

Section 685.020 does not affect the rules that determine the extent to which prejudgment interest is to be included in a judgment. See Section 685.110.

Code of Civil Procedure § 687.040 (technical amendment).

Liability of levying officer

Comment. Section 687.040 is amended to correct a cross-reference.

Code of Civil Procedure § 695.020 (technical amendment).

Community property

Comment. Subdivision (b)(1) is amended to correct a typographical error.

Code of Civil Procedure § 699.080 (amended). Levy of execution by registered process server

SEC. 13. Section 699.080 of the Code of Civil Procedure is amended to read:

699.080. (a) A registered process server may levy under a writ of execution on the following types of property:

- (1) Real property, pursuant to Section 700.015.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 700.020.
- (3) Personal property in the custody of a levying officer, pursuant to Section 700.050.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (5) Deposit accounts, pursuant to Section 700.140 or 700.160.
- (6) Property in a safe deposit box, pursuant to Section 700.150 or 700.160.
- (7) Accounts receivable or general intangibles, pursuant to Section 700.170.
- (8) Final money judgments, pursuant to Section 700.190.
- (9) Interest of a judgment debtor in personal property in the estate of a decedent, pursuant to Section 700.200.

(b) Before levying under the writ of execution, the registered process server shall file a copy of the writ with

the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

(1) Comply with the applicable levy, posting, and service provisions of Article 4 (commencing with Section 700.010).

(2) Deliver any undertaking required by Section 700.160.

(3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of levy on other persons as required by Article 4 (commencing with Section 700.010).

(4) Instructions in writing, as required by the provisions of Section 687.010.

~~(d)~~ ~~Upon receipt of~~ (e) *If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court.*

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Section 699.080 supersedes subdivisions (b) and (c) of former Section 687. This section expands and clarifies the role of the registered process server in levying on property pursuant to a writ of execution. See also Section 715.040 (service and posting of writ of possession of real property).

Subdivision (a) of Section 699.080 specifies the methods of levy that may be performed by a registered process server. This

authority is limited to cases where the levy does not involve the possibility of taking immediate possession of the property.

Subdivision (c) makes clear that the registered process server is required to perform certain duties ancillary to the levy that would normally be performed by the levying officer at the time of levy or promptly thereafter. Subdivision (d) requires that the levying officer be provided with the information necessary to perform the remaining duties under the writ and to make a return on the writ. Subdivision (e) continues the substance of former Section 687(c). Subdivision (f) makes it discretionary with the court whether a fee for a registered process server will be allowed as costs. Whether the registered process server was used as a convenience to the judgment creditor or because service would not have been made if a public employee were used is an element to be considered by the court in exercising its discretion. If the court decides to allow a fee, subdivision (f) incorporates the general standard for recovery of the costs of employing a registered process server. For a limitation on this provision, see Section 706.101(e) (earnings withholding order).

Subdivision (b) is a new provision requiring a registered process server to file a copy of the writ with the appropriate levying officer and pay the standard fee before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the judgment debtor.

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

SEC. 14. Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) Subject to Section 700.160, during the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section and Section 700.160, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivision (f) is added to Section 700.140 to make clear that no bond is required to levy on an account described in the subdivision.

Code of Civil Procedure § 715.040 (amended). Execution of writ of possession by registered process server

SEC. 15. Section 715.040 of the Code of Civil Procedure is amended to read:

715.040. (a) A registered process server may execute the writ of possession of real property as provided in subdivisions (a) and (b) of Section 715.020 if a proper writ of possession is delivered to the sheriff, marshal, or constable and that officer does not execute the writ as provided in subdivisions (a) and (b) of Section 715.020 within three days (Saturday, Sunday, and legal holidays excluded) from the day the writ is delivered to that officer. *If the writ is not executed within such time, the levying officer shall upon request give the writ to the judgment creditor or to a registered process server designated by the judgment creditor.*

(b) Within five days after executing the writ under this section, all of the following shall be filed with the levying officer:

- (1) The writ of possession of real property.
- (2) An affidavit of the registered process server stating the manner in which the writ was executed.
- (3) Proof of service of the writ.
- (4) Instructions in writing, as required by the provisions of Section 687.010.

(c) ~~Upon receipt of the fee provided by Section 26733 of the Government Code~~ *If the writ is executed by a registered process server, the levying officer shall perform all other duties under the writ and shall return the writ to the court.*

(d) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivision (a) of Section 715.040 is amended to make clear that if the levying officer does not serve or post pursuant to the writ within the three days allowed, the writ is to be returned to the judgment creditor or registered process server so that the writ can be executed pursuant to this section.

Subdivision (c) is amended to avoid any implication that a second fee must be paid to the levying officer for the performance of remaining duties under the writ. The fee provided by Government Code Section 26733 is paid when the writ is delivered to the levying officer as required in subdivision (a).

Code of Civil Procedure § 726 (technical amendment). Foreclosure of mortgage or deed of trust

SEC. 16. Section 726 of the Code of Civil Procedure is amended to read:

726. (a) There can be but one form of action for the recovery of any debt; or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter. In ~~such~~ *the* action the court may, by its judgment, direct the sale of the encumbered property (or so much ~~thereof of the property~~ as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, ~~and~~ the expenses of ~~the~~ *levy and* sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for ~~such~~ *attorney's* fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

~~The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office.~~

(b) The decree for the foreclosure of a mortgage or deed of trust secured by real property or any interest therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the

personal liability of any defendant for the payment of the debt secured by ~~such~~ *the* mortgage or deed of trust and shall name ~~such~~ *the* defendants against whom a deficiency judgment may be ordered following the proceedings ~~hereinafter~~ prescribed *in this section*. In the event of ~~such~~ waiver, or if the prohibition of Section 580b is applicable, the decree shall so declare and there shall be no judgment for a deficiency. In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for ~~such~~ *the* debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of sale, the court shall render a money judgment against ~~such~~ *the* defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of *levy and sale* and of action exceeds the fair value of the property or interest therein sold as of the date of sale; ~~provided, however, that in.~~ *In* no event shall the amount of ~~said~~ *the* judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by ~~said~~ *the* mortgage or deed of trust. Notice of ~~such~~ *the* hearing ~~must~~ *shall* be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for ~~such~~ *the* hearing. Upon application of any party made at least 10 days before the date set for ~~such~~ *the* hearing the court shall, and upon its own motion the court at any time may, appoint one of the probate referees provided for by law to appraise the property or the interest therein sold as of the time of sale. ~~Such~~ *The* probate referee shall file ~~his~~ *the* appraisal with the clerk and the ~~same~~ *shall be* appraisal is admissible in evidence. ~~Such~~ *The* probate referee shall take and subscribe an oath to be attached to the appraisal that ~~he~~ *the referee* has truly, honestly and impartially appraised the property to the best of ~~his~~ *the referee's*

knowledge and ability. Any probate referee so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation, in an amount as determined by the court to be reasonable, but ~~such~~ *the* fees shall not exceed similar fees for similar services in the community where ~~such~~ *the* services are rendered, which may be taxed and allowed in like manner as other costs.

(c) No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to ~~such~~ *the* action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the ~~party~~ *person* holding ~~such~~ *the* unrecorded conveyance or lien as if ~~he~~ *the person* had been a party to the action. *Notwithstanding Section 701.630, the sale of the encumbered property does not affect the interest of a person who holds a conveyance from or under the mortgagor of the property mortgaged, or has a lien thereon, if the conveyance or lien appears of record in the proper office at the time of the commencement of the action and the person holding the recorded conveyance or lien is not made a party to the action.*

If the court appoint a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of Chapter 1 (commencing with Section 681), Title 9, Part 2, of this code are hereby made applicable to sale made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner.

In all cases heretofore, now or hereafter pending in the courts of this state, in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the

commissioner appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner.

(d) If the land mortgaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of ~~such~~ *the* counties by the ~~sheriff, commissioner or elisor, as the case may be,~~ and upon such proceedings, and with like effect, as if the whole of the property were situated in that county.

(e) *If a deficiency judgment is waived or prohibited, the property shall be sold as provided in Section 716.020. If a deficiency judgment is not waived or prohibited, the property shall be sold subject to the right of redemption as provided in Sections 729.010 to 729.090, inclusive.*

Comment. The provisions of Section 726 relating to commissioners appointed to sell real property under a judgment of foreclosure are repealed. Pursuant to Section 712.060 a receiver may be appointed to sell the property under the direction of the court. See also Sections 567 (oath and undertaking of receiver), 568 (powers of receiver), 568.5 (sales by receiver), 708.620 (appointment of receiver). The provisions concerning the qualification and duties of receivers and commissioners were essentially the same under former law. Consequently, special commissioners have been eliminated in favor of the uniform provisions concerning receivers. The provisions of Section 726 concerning elisors are unnecessary. See, *e.g.*, Section 262.8.

A provision for the application of proceeds to satisfy the costs of levy is added to Section 726(a) because Section 716.010 requires levy under a writ of sale if the judgment is enforced by a levying officer.

Subdivision (c) codifies the rule in *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870), to the effect that the interest of a junior lienholder of record is not affected by the foreclosure of a senior lien if the junior lienholder is not joined.

Subdivision (e) specifies the manner of sale depending upon whether the property is to be sold subject to the right of redemption.

See Chapter 1 (commencing with Section 712.010) and Chapter 4 (commencing with Section 716.010) of Division 3 of Title 9 for provisions governing the enforcement of judgments for sale of real property.

Financial Code § 864 (technical amendment). Bank setoff

Comment. Subdivision (c) of Section 864 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Financial Code § 7609.5 (technical amendment). Savings and loan association setoff

Comment. Subdivision (c) of Section 7609.5 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Government Code § 7170 (amended). State tax liens

Comment. The second sentence is added to subdivision (a) of Section 7170 to make clear that the recording of a homestead declaration has no effect on the attachment of a state tax lien. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax), 704.850 (satisfaction of liens upon execution sale of homestead).

Government Code § 26820.4 (technical amendment). Fee for filing first paper

Comment. Section 26820.4 is amended to correct a cross-reference.

Government Code § 72055 (technical amendment). Fee for filing first paper

Comment. Section 72055 is amended to correct a cross-reference.

Probate Code § 2407 (technical amendment). Application of chapter to community and homestead property

SEC 22. Section 2407 of the Probate Code is amended to read:

2407. This chapter applies to property owned by husband and wife as community property ; ~~or owned by husband and wife or either of them which is subject to a homestead,~~ only to the extent authorized by Part 6 (commencing with Section 3000).

Comment. Section 2407 is amended to reflect the elimination of the collateral effects of a homestead declaration. See Code Civ. Proc. § 704.940 and the Comment thereto.

Unemployment Insurance Code § 1342 (technical amendment). Exemption of benefits

Comment. Section 1342 is amended to delete unnecessary language. See Code Civ. Proc. §§ 487.020 (exemptions from attachment), 704.120 (exemption of unemployment benefits and contributions). See also Code Civ. Proc. § 703.070 (certain property not subject to satisfaction of judgment for child support unless otherwise provided); Welf. & Inst. Code § 11350.5 (withholding of unemployment compensation to pay child support judgment).

APPENDIX IX
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Dismissal for Lack of Prosecution

September 1982

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Dismissal for Lack of Prosecution*, 16 Cal. L. Revision Comm'n Reports 2205 (1982).

CALIFORNIA LAW REVISION COMMISSION

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DAVID ROSENBERG

September 27, 1982

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

The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to involuntary dismissal for lack of prosecution should be revised. The Commission submits this recommendation to codify, clarify, and modestly liberalize the law governing the dismissal of civil actions for lack of prosecution.

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

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

DISMISSAL FOR LACK OF PROSECUTION

Introduction

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

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

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

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

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

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

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

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

² Code Civ. Proc. § 581a(a).

³ Code Civ. Proc. § 581a(c).

⁴ Code Civ. Proc. § 583(b).

⁵ Code Civ. Proc. § 583(c)-(d).

⁶ Code Civ. Proc. § 583(a).

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

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

Policy of Statute

Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to

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

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

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

¹⁰ See, *e.g.*, discussion in Annual Report, 14 Cal. L. Revision Comm'n Reports 1, 23-24 (1978); 2 California Civil Procedure Before Trial § 31.2 (Cal. Cont. Ed. Bar 1978).

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

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

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

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

Dismissal for Failure to Make Service

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

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

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

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

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

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

purpose of the service requirement is to assure the defendant prompt notice of the action; for this purpose the requirement that summons be returned is unnecessary.¹⁸ The return requirement is merely a technicality in the law that may defeat a legitimate action in which service is accomplished promptly. The proposed law eliminates the return requirement.¹⁹

A major problem with the three-year service requirement is that unless discovery is completed and all potential defendants identified within that time, it is not possible to serve newly-discovered defendants.²⁰ Recent legislation, however, provides that failure to discover relevant facts or evidence does not excuse compliance with the three-year service requirement.²¹ The economics of litigation and the realities of the five-year trial date in many courts dictate that discovery and trial preparation may not reasonably be expected to occur in many cases until well past the three-year cut-off.²² For this reason the proposed law preserves the rule that failure of discovery is not an excuse, but requires that service of summons be made within four, rather than three, years after commencement of the action.

Although the service requirement is mandatory, until recently it has not been clear whether the requirement is jurisdictional. The Supreme Court made clear in 1981 that the requirement is not jurisdictional;²³ 1982 legislation

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

¹⁹ The general requirement of return of summons or other proof of service for entry of default judgment is not affected. See Code Civ. Proc. §§ 417.30, 585-587.

²⁰ *Cf.*, *Hocharian v. Superior Court*, 28 Cal.3d 714, 720-21, 621 P.2d 829, 170 Cal. Rptr. 790 (1981) ("As every litigator knows, the prosecution or defense of a lawsuit involves the difficult problem of balancing the effectiveness of any given tactic or procedure against its cost in terms of time and expense. Even the attorney who utilizes every reasonable and cost-effective discovery procedure must acknowledge the possibility that he or she will fail to discover the identity of a potential defendant within the statutory three-year period.")

²¹ Code Civ. Proc. § 581a(f) (2), as enacted by 1982 Cal. Stats. ch. 600.

²² This is particularly true in personal injury cases, which are frequently involved in disputes over dismissal for lack of prosecution. The precise extent of the injuries and amount of damages may not be possible to ascertain in such cases for several years. As a result the parties may delay discovery and other trial activities in anticipation of a possible settlement.

²³ *Hocharian v. Superior Court*, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

declares that it is.²⁴ The 1982 legislative declaration is contrary to the general principle that mandatory procedural rules are not jurisdictional.²⁵ Failure to comply with the service requirement should subject the case to dismissal, and an erroneous ruling by the court or the failure of the court or a party to raise the issue should be reviewable on appeal. But such a failure or omission should not deprive the court of jurisdiction so as to render any judgment void and subject to collateral attack. The proposed law makes clear the service requirement is mandatory but not jurisdictional.²⁶

Dismissal for Failure to Bring to Trial

Although Code of Civil Procedure Section 583 is clear that an action must be brought to trial within five years after it is commenced, it is unclear what acts amount to being "brought to trial" for purposes of the statute. The cases have held, for example, that impaneling a jury or swearing the first witness is sufficient to satisfy the requirement that the action be brought to trial.²⁷ A practice has developed that when the five-year period is about to expire an action is "brought to trial" and then immediately continued until a convenient trial date. Such a practice may be a practical necessity in congested trial courts. In recognition of this practice the statute that defines when an action is brought to trial should prescribe a procedure that does not consume judicial resources or the resources of the parties.

The proposed law adopts the rule that an action is brought to trial when it is actually called for trial in the trial court and the plaintiff signifies readiness to proceed. This provides a clear statutory statement of the time the action is brought to trial that is non-resource consuming. The statutory statement is not exclusive, however, and does not affect other acts by which an action is in fact brought to trial.²⁸

²⁴ Code Civ. Proc. § 581a(f), as enacted by 1982 Cal. Stats. ch. 600.

²⁵ See, e.g., 1 B. Witkin, California Procedure *Jurisdiction* §§ 3, 180, 184 (2d ed. 1970).

²⁶ The same rule also applies to the bringing to trial requirements.

²⁷ See, e.g., *Hartman v. Santamarina*, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).

²⁸ See, e.g., 4 B. Witkin, California Procedure *Proceedings Without Trial* §§ 101 (*judgment on demurer*) and 102 (*summary judgment*) (2d ed. 1971).

Dismissal for Failure to Enter Default

One of the lesser-known dismissal provisions requires dismissal of an action if the plaintiff fails to have default judgment entered within three years after either service has been made or the defendant has made a general appearance; the time may be extended by written stipulation of the parties that is filed with the court.²⁹ The decisional law under this provision is uncertain. Among the numerous exceptions to the strict operation of the statute developed by the courts are that entry of a response before dismissal makes dismissal improper,³⁰ that the provision does not apply where the default is that of a co-defendant and another defendant has answered and the case is progressing,³¹ that a stipulation excuses compliance even if unfiled,³² and that a judgment entered after the three-year period may not be set aside on collateral attack.³³

In addition to the limited scope of the dismissal provision created by the case law exceptions, the manner in which the statute operates is confusing. It has been held, for example, that entry of a "default" (as opposed to a default judgment) is not sufficient compliance with the statute to avoid dismissal,³⁴ and that a bankruptcy injunction preventing the plaintiff from proceeding against the defendant is not necessarily sufficient to excuse the plaintiff's compliance with the default requirement.³⁵

The dismissal provision for failure to obtain a default is not well understood and is unduly inflexible, nor does it appear to be supported by compelling reasons of orderly judicial administration. There may be practical reasons why the plaintiff does not take a default judgment within three years.³⁶ The dismissal provision should be repealed in the

²⁹ Code Civ. Proc. § 581a(c).

³⁰ *Mustalo v. Mustalo*, 37 Cal. App.3d 580, 112 Cal. Rptr. 594 (1974).

³¹ *AMF Pinspotters, Inc. v. Peek*, 6 Cal. App.3d 443, 86 Cal. Rptr. 46 (1970).

³² *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975).

³³ *Phillips v. Trusheim*, 25 Cal.2d 913, 156 P.2d 25 (1945).

³⁴ *Jacks v. Lewis*, 61 Cal. App.2d 148, 142 P.2d 358 (1943).

³⁵ *Mathews Cadillac, Inc. v. Phoenix of Hartford Ins. Co.*, 90 Cal. App.3d 393, 153 Cal. Rptr. 267 (1979).

³⁶ Where lesser defendants are involved and the main parties engage in extended litigation before reaching the trial stage, it is often economical to give an "open" stipulation of time to plead to lesser defendants, thereby saving counsel fees. Again,

interest of simplifying procedural law. The problem of a plaintiff who unjustifiably withholds entry of default judgment to prolong a claim against a defaulting defendant is adequately dealt with by the general provisions governing dismissal for delay in prosecution.

Discretionary Dismissal

Under existing law, an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to trial within two years after it is commenced.³⁷ This period is unrealistically short in view of contemporary pleading, discovery, and other pretrial procedures and court calendars. As a practical matter, a motion to dismiss for failure to bring to trial made two years after the action is commenced has little likelihood of success under the policy of the state to prefer trial on the merits.³⁸ The proposed law changes the dismissal period for failure to bring to trial to a more realistic period of three years after the action is commenced.

The discretionary dismissal provision does not by its terms apply to delay in bringing the action to a new trial or retrial following a court order or a remand from an appellate court. In cases of undue delay in bringing the action to a new trial or retrial the courts have relied on their inherent powers to dismiss.³⁹ The proposed law adopts the rule that an action may be dismissed for want of prosecution in the discretion of the court if the action has not been brought to a new trial or retrial within two years after it is ordered. This will make reliance on inherent powers unnecessary and will make clear the time, procedure, and grounds for dismissal.

The two-year discretionary dismissal period for failure to bring to trial has been construed to apply as well to failure

arrangements are sometimes made that a defendant need not plead pending performance of conditions that will result in dismissal of the action by a plaintiff-creditor. See, *e.g.*, *Merner Lumber Co. v. Silvey* 29 Cal. App.2d 426, 84 P.2d 1062 (1938).

³⁷ Code Civ. Proc. § 583(a).

³⁸ See discussion under "Policy of Statute," above.

³⁹ See, *e.g.*, *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

to serve and return summons.⁴⁰ The proposed law clarifies and codifies this rule.

By court rule, the court on a motion for discretionary dismissal may consider the possibility of imposing conditions on trial or dismissal of the action.⁴¹ The proposed law codifies this rule.

Clarification and Codification of Case Law

The dismissal for lack of prosecution statutes fail to accurately reflect the current state of the law. Since the California statutes were enacted around 1900 there have been hundreds of appellate cases interpreting, clarifying, and rewriting the statutes.⁴² The cases have developed exceptions to the rules requiring dismissal and have added court discretion in many cases where it appears that the delay is excusable.⁴³ The statutes should accurately state the law. The proposed law codifies the significant case law rules governing dismissal for lack of prosecution in the manner described below.

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

⁴⁰ See, e.g., *Black Bros. Co. v. Superior Court*, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (disapproved on other grounds in *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

⁴¹ Rule 203.5. See discussion in *Lopez v. Larson*, 91 Cal. App.3d 383, 153 Cal. Rptr. 912 (1979).

⁴² See discussion under "Introduction," above.

⁴³ See discussion at 14 Cal. L. Revision Comm'n Reports 23-24 (1978).

⁴⁴ Code Civ. Proc. § 581a(a)-(b).

⁴⁵ See, e.g., *Knapp v. Superior Court*, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

general jurisdiction of the court.⁴⁶ The proposed law makes clear that the service requirement is excused if the defendant enters into a stipulation or otherwise makes a general appearance in the action.

The statute also specifies that among the acts of the defendant that do not constitute a general appearance for purposes of excusing service is a motion to dismiss for failure to timely serve and return summons.⁴⁷ The proposed law makes clear that joining a motion to dismiss with a motion to quash service or a motion to set aside a default judgment does not transform the motion into a general appearance.⁴⁸

Stipulation extending time. The time within which service must be made, and the time within which an action must be brought to trial, may be extended by written stipulation of the parties filed with the court.⁴⁹ The requirement that the stipulation be filed is unduly restrictive;⁵⁰ parties in the ordinary course of conduct of civil litigation rely on unfiled open stipulations extending time.⁵¹ The proposed law permits an extension of time upon presentation to the court of an unfiled written stipulation; this recognizes that the manner and timing of presenting a written stipulation may vary.

Section 583 permits an extension upon written stipulation of the parties of the three-year period within which an action must be again brought to trial following the trial court's granting of a new trial or a retrial.⁵² However, no provision is made for extension by written stipulation of the three-year period within which a new trial must again be brought to trial following an appeal.⁵³ This difference in

⁴⁶ See, *e.g.*, *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr 745 (1975).

⁴⁷ Code Civ. Proc. § 581a(e).

⁴⁸ See, *e.g.*, *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); *Pease v. City of San Diego*, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss).

⁴⁹ Code Civ. Proc. §§ 581a(a)-(c) and 583(b)-(d).

⁵⁰ See, *e.g.*, *Woley v. Turkus*, 51 Cal.2d 402, 334 P.2d 12 (1958) (oral stipulation made in open court and shown by minute order acts as written and filed stipulation).

⁵¹ See, *e.g.*, *Obgerfell v. Obgerfell*, 134 Cal. App.2d 541, 286 P.2d 462 (1955) (exchange of letters).

⁵² Code Civ. Proc. § 583(c)-(d).

⁵³ See, *e.g.*, *Neustadt v. Skernswell*, 99 Cal. App.2d 293, 221 P.2d 694 (1950).

treatment is unwarranted and is apparently due to an oversight in drafting. The proposed law makes clear that the three-year period for a new trial following an appeal may be extended by written stipulation.

Waiver and estoppel. In some situations the defendant may be found to have waived the protection of the dismissal statutes or to be estopped by conduct from claiming the protection of the statutes. A waiver or estoppel may occur, for example, where the defendant has entered into a stipulation,⁵⁴ has failed to assert the statute,⁵⁵ or has acted in a manner that misleads the plaintiff.⁵⁶ The existence of the excuses of waiver and estoppel is not generally reflected in the dismissal statutes.⁵⁷ The proposed law makes clear that the rules of waiver and estoppel are applicable.

Excuse where prosecution impossible, impracticable, or futile. In addition to the excuses expressly provided by statute from compliance with the timely prosecution requirements, the cases have found implied excuses where timely prosecution was impossible, impracticable, or futile.⁵⁸ Examples of situations where this excuse may be applicable include delay caused by clogged trial calendars, delay due to litigation or appeal of related matters, and delay caused by complications involving multiple parties.⁵⁹ Recently enacted legislation codifies the impossibility, impracticability, or futility excuse as it applies to the three-year service statute.⁶⁰ The proposed law extends the codification to the five-year bringing to trial statute and also recognizes the express excuses of delay caused by a stay or injunction of proceedings and by litigation over the validity of service. Under the proposed law the excuse of

⁵⁴ See, e.g., *Knapp v. Superior Court*, 79 Cal. App.3d 799, 145 Cal. Rptr. 154 (1978).

⁵⁵ See, e.g., *Southern Pac. v. Seaboard Mills*, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962).

⁵⁶ See, e.g., *Tresway Aero, Inc. v. Superior Court*, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971).

⁵⁷ But see Code Civ. Proc. § 581a(f) (1), as enacted 1982 Cal. Stats. ch. 600.

⁵⁸ See, e.g., *Wyoming Pac. Oil v. Preston*, 50 Cal.2d 736, 329 P.2d 489 (1958) (Section 581a); *Crown Coach Corp. v. Superior Court*, 8 Cal.3d 540, 503 P.2d 1347, 105 Cal. Rptr. 339 (1972); *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

⁵⁹ See, e.g., cases cited in 2 California Civil Procedure Before Trial § 31.25 (Cal. Cont. Ed. Bar 1978).

⁶⁰ Code Civ. Proc. § 581a(f) (2), as enacted 1982 Cal. Stats. ch. 600.

impossibility, impracticability, or futility, must be strictly construed as applied to the service requirement and is applicable only to causes beyond the plaintiff's control. The excuse must be liberally construed as applied to the bringing to trial requirement. This disparity is in recognition of the fact that service is ordinarily within the plaintiff's control (particularly if the statutory limit is increased from three to four years) whereas bringing a case to trial frequently may be hindered by causes beyond the plaintiff's control.

Tolling of statute during period of excuse. Under existing law the time during which an action must be brought to trial may be tolled during periods when it would have been impossible, impracticable, or futile to bring the action to trial. However, if the impossibility, impracticability, or futility ended sufficiently early in the statutory period so that the plaintiff still had a "reasonable time" to get the case to trial, the tolling rule doesn't apply.⁶¹ The proposed law changes this rule so that the statute tolls regardless when during the statutory period the excuse occurs. This is consistent with the treatment given other statutory excuses;⁶² it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.

Application to individual parties and causes of action. The existing statutes refer to dismissal of an action for delay in prosecution without distinguishing among parties or causes of action. In some cases it is necessary to dismiss an action as to some but not all parties, or to dismiss some but not all causes of action.⁶³ The proposed law is drafted to make clear this flexibility.

⁶¹ See, e.g., *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979); *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

⁶² See Code Civ. Proc. §§ 581a(d) (time during which defendant not amenable to process of court not included in computing period); 583(f) (time during which defendant not amenable to process and time during which jurisdiction of court suspended not included in computing period).

⁶³ See, e.g., *Innovest, Inc. v. Bruckner*, 122 Cal. App.3d 594, 176 Cal. Rptr. 90 (1981); *Watson v. Superior Court*, 24 Cal. App.3d 53, 100 Cal. Rptr. 684 (1972); *J.A. Thompson & Sons, Inc. v. Superior Court*, 215 Cal. App.2d 719, 30 Cal. Rptr. 471 (1963); *Fisher v. Superior Court*, 157 Cal. App.2d 126, 320 P.2d 894 (1958).

Special proceedings. By their terms, the statutes governing delay in prosecution apply to "actions." Nonetheless, the statutes have been applied in special proceedings.⁶⁴ The proposed law states expressly that the statutes apply to a special proceeding where incorporated by reference.⁶⁵ In addition, the proposed law makes clear that the statutes may be applied by the court where appropriate in special proceedings if not inconsistent with the character of the special proceeding.⁶⁶

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

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

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

SECTION 1. Section 581 of the Code of Civil Procedure is amended to read:

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

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

⁶⁴ See, e.g., *Big Bear Mun. Water Dist. v. Superior Court*, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (eminent domain).

⁶⁵ See, e.g., Code Civ. Proc. § 1230.040 (rules of practice in civil actions applicable in eminent domain); Rule 1233, Cal. Rules of Court (delay in prosecution statutes applicable in family law proceedings).

⁶⁶ See, e.g., 4 B. Witkin, *California Procedure Proceedings Without Trial* § 80 (2d ed. 1971).

allowed, the undertaking shall upon ~~such~~ dismissal be delivered by the clerk or judge to the defendant who may ~~have his action~~ *enforce the liability* thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or ~~his~~ counsel, and if there ~~shall be~~ *is* no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

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

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

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

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

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

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

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

SEC. 2. Section 581a of the Code of Civil Procedure is repealed.

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

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

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

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

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

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

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

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

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

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

Subdivision (c) is not continued. The provision was not well understood, was unduly inflexible, and was subject to numerous

implied exceptions in the case law. Whether a default must be entered or judgment taken within a particular time is a matter for judicial determination pursuant to inherent authority. Rules governing the matter may be adopted pursuant to Section 575.1.

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

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

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

SEC. 3. Section 583 of the Code of Civil Procedure is repealed.

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

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

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

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

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

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

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

Comment. The first sentence of subdivision (a) of former Section 583 is superseded by Section 583.420 (time for discretionary dismissal). The substance of the second sentence of subdivision (a) is continued in Section 583.410 (discretionary dismissal). The substance of subdivisions (b), (c), and (d) is continued in Sections 583.320 (time for trial), 583.330 (time for new trial), 583.340 (extension of time), and 583.360 (mandatory dismissal). The substance of subdivision (e) is continued in Section 583.110 (definitions). The substance of subdivision (f) is continued in Section 583.350 (computation of time).

SEC. 4. Chapter 1.5 (commencing with Section 583.110) is added to Title 8 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1.5. DISMISSAL FOR DELAY IN PROSECUTION

Article 1. Definitions and General Provisions

§ 583.110 Definitions

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

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

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

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

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

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

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

§ 583.120. Application of chapter

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

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

Comment. Section 583.120 is new. Subdivision (a) preserves the effect of existing law. See, *e.g.*, *Big Bear Mun. Water Dist. v.*

Superior Court, 269 Cal. App.2d 919, 75 Cal. Rptr. 580 (1969) (dismissal provisions applicable in eminent domain proceedings by virtue of incorporation by reference of civil procedures); Rules of Court 1233 (dismissal for lack of prosecution provisions incorporated specifically in family law proceedings).

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

§ 583.130. Policy statement

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

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

§ 583.140. Waiver and estoppel

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

Comment. Section 583.140 continues and expands a provision of former Section 581a(f) (1), as enacted by 1982 Cal. Stats. ch. 600. This chapter does not alter and is supplemented by general rules of waiver and estoppel. See, *e.g.*, *Southern Pac. v. Seaboard*

Mills, 207 Cal. App.2d 97, 24 Cal. Rptr. 236 (1962) (waiver of failure to timely bring to trial); Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 487 P.2d 1211, 96 Cal. Rptr. 571 (1971) (estoppel to assert failure to timely serve and return summons); Borglund v. Bombardier, Ltd., 121 Cal. App.3d 276, 175 Cal. Rptr. 150 (1981) (estoppel to assert failure to timely bring to trial); Holder v. Sheet Metal Worker's Int'l Ass'n, 121 Cal. App.3d 321, 175 Cal. Rptr. 313 (1981) (waiver or estoppel to assert failure to timely bring to new trial following reversal on appeal).

§ 583.150. Relation of chapter to other law or authority

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

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

§ 583.160. Transitional provisions

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

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

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

Article 2. Mandatory Time for Service of Summons

§ 583.210. Time for service of summons

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

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

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

§ 583.220. General appearance

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

(a) A stipulation pursuant to Section 583.220 extending the time within which service must be made.

(b) A motion to dismiss made pursuant to this chapter, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise.

(c) An extension of time to plead after a motion to dismiss made pursuant to this chapter.

Comment. Section 583.220 continues the substance of the last portion of subdivisions (a) and (b) and subdivision (e) of former Section 581a. It adopts case law that a defendant may make a general appearance for the purpose of this section by an act outside the record that shows an intent to submit to the general jurisdiction of the court. See, *e.g.*, *General Ins. Co. v. Superior Court*, 15 Cal.3d 449, 541 P.2d 289, 124 Cal. Rptr. 745 (1975) (stipulation). However, the combination of a motion to dismiss with other relevant motions does not constitute a general appearance. See, *e.g.*, *Dresser v. Superior Court*, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964) (motion to quash and dismiss); *Pease v. City of San Diego*, 93 Cal. App.2d 706, 209 P.2d 843 (1949) (motion to set aside default judgment and dismiss). For other acts constituting a general appearance, see Sections 396b and 1014. Section 583.220 applies to a cross-defendant only to the extent the cross-defendant has made a general appearance for the purposes of the cross-complaint. See Section 583.110 (“action” and “defendant” defined).

§ 583.230. Extension of time

583.230. The parties may by written stipulation extend the time within which service must be made pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.230 is drawn from the last portion of subdivisions (a) and (b) of former Section 581a. The requirement that the stipulation be filed is not continued; it was unduly restrictive.

§ 583.240. Computation of time

583.240. In computing the time within which service shall be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The defendant was not amenable to the process of the court.

(b) The prosecution of the action or proceedings in the action was stayed and the stay affected service.

(c) The validity of service was the subject of litigation by the parties.

(d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision.

Comment. Subdivision (a) of Section 583.240 continues the substance of subdivision (d) of former Section 581a. Subdivision (b) is based on an exception to the three-year service period stated in appellate decisions. Subdivision (c) is new; it applies where the person to be served is aware of the action but challenges jurisdiction of the court or sufficiency of service.

Subdivision (d) continues the substance of subdivision (f) (2) of former Section 581a. It is based on appellate decisions, but it also makes clear that there is only an excuse for causes beyond the plaintiff's control and that failure to discover relevant facts or evidence does not excuse compliance. This overrules *Hocharian v. Superior Court*, 28 Cal.3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981). The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence and in light of the extension of the statutory service requirement from three to four years. See Section 583.210 (time for service). Contrast Section 583.350 and Comment thereto (liberal construction of excuse for failure to bring to trial within a prescribed time). This difference in treatment is consistent with one aspect of the policy announced in Section 583.130—plaintiff must exercise diligence—and recognizes that service, unlike bringing to trial, is ordinarily within the control of the plaintiff.

§ 583.250. Mandatory dismissal

583.250. (a) If service is not made in an action within the time prescribed in this article:

(1) The action shall not be further prosecuted and no further proceedings shall be held in the action.

(2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.250 continues the substance of the first portions of subdivisions (a) and (b) of former Section 581a. The provisions of this subdivision are subject to waiver and estoppel. See Section 583.140 (waiver and estoppel). Subdivision (b) supersedes a portion of former Section 581a (f) (requirements jurisdictional) and codifies case law. See, e.g., *Hocharian v. Superior Court*, 28 Cal.3d 714, 721 n.3, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

Article 3. Mandatory Time for Bringing Action to Trial or New Trial

§ 583.310. "Brought to trial" defined

583.310. (a) If an action is called for trial and the plaintiff announces readiness to proceed, the parties may stipulate or the court may order that the action is brought to trial for the purpose of this article without further act of the plaintiff, whether or not a continuance is thereafter granted.

(b) Nothing in subdivision (a) limits any other act by which an action may be brought to trial for the purpose of this article.

Comment. Subdivision (a) of Section 583.310 is intended to provide a simple and mechanical test by which it can be ascertained whether an action has been brought to trial, short of impaneling a jury or swearing a witness, for the purpose of applying the time periods prescribed by this article.

Subdivision (b) makes clear that the procedure prescribed in subdivision (a) is not exclusive, and any other act that constitutes an action being brought to trial is sufficient for this article. See, e.g., *Hartman v. Santamarina*, 30 Cal.3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982) (impaneling jury); *Miller & Lux v. Superior Court*, 192 Cal. 333, 219 P. 1006 (swearing witness); 4 B. Witkin, *California Procedure Proceedings Without Trial* §§ 101 (judgment on demurrer) and 102 (summary judgment) (2d ed. 1971).

§ 583.320. Time for trial

583.320. An action shall be brought to trial within five years after the action is commenced against the defendant.

Comment. Section 583.320 is drawn from a portion of subdivision (b) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

§ 583.330. Time for new trial

583.330. (a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

(1) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(2) If after judgment a new trial is granted and no appeal is taken, within three years after the order granting the new trial is entered.

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

(b) Nothing in this section requires that an action again be brought to trial before expiration of the time prescribed in Section 583.320.

Comment. Section 583.330 is drawn from portions of subdivisions (c) and (d) of former Section 583. For exceptions and exclusions, see Sections 583.340 (extension of time) and 583.350 (computation of time).

§ 583.340. Extension of time

583.340. The parties may by written stipulation extend the time within which an action must be brought to trial pursuant to this article. The stipulation need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal.

Comment. Section 583.340 continues the substance of portions of subdivisions (c) and (d) of former Section 583, and extends to actions in which there has been an appeal. This overrules prior case law. See, *e.g.*, cases cited in *Good v. State*, 273 Cal. App.2d 587, 590, 78 Cal. Rptr. 316 (1969). The requirement that the stipulation be filed is not continued; it was unduly restrictive.

§ 583.350. Computation of time

583.350. In computing the time within which an action shall be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

Comment. Subdivision (a) of Section 583.350 continues the substance of the last portion of subdivision (f) of former Section 583. Subdivision (b) codifies existing case law.

Subdivision (c) codifies the case law “impossible, impractical, or futile” standard. The provisions of subdivision (c) must be interpreted liberally, consistent with the policy favoring trial on the merits. See Section 583.130 (policy statement). Contrast Section 583.240 and Comment thereto (strict construction of excuse for failure to serve within prescribed time). This difference in treatment recognizes that bringing an action to trial, unlike service, may be impossible, impracticable, or futile due to factors not reasonably within the control of the plaintiff.

Under Section 583.350 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court*, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979), and *Brown v. Superior Court*, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976).

§ 583.360. Mandatory dismissal

583.360. (a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory but not jurisdictional.

Comment. Subdivision (a) of Section 583.360 continues the substance of portions of subdivisions (b), (c), and (d) of former Section 583, with the exception of the references to due notice

to the plaintiff, which duplicated general provisions. See Sections 1005 and 1005.5 (notice of motion). Subdivision (b) is consistent with subdivision (b) of Section 583.250 (mandatory dismissal for failure to serve summons).

Article 4. Discretionary Dismissal for Delay

§ 583.410. Discretionary dismissal

583.410. (a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

Comment. Section 583.410 continues the substance of subdivision (a) of former Section 583. It makes clear the authority of the Judicial Council to prescribe criteria. See subdivision (e) of Rule 203.5 of the California Rules of Court (matters considered by court in ruling on motion).

§ 583.420. Time for discretionary dismissal

583.420. (a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

(2) The action is not brought to trial within three years after the action is commenced against the defendant.

(3) A new trial is granted and the action is not again brought to trial within the following times:

(A) If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision, within two years after the order of the court declaring the mistrial or the disagreement of the jury is entered.

(B) If after judgment a new trial is granted and no appeal is taken, within two years after the order granting the new trial is entered.

(C) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

(b) The times provided in subdivision (a) shall be computed in the manner provided for computation of the comparable times under Articles 2 (commencing with Section 583.210) and 3 (commencing with Section 583.310).

Comment. Subdivision (a)(1) of Section 583.420 continues the substance of former Section 583(a) as it related to the authority of the court to dismiss for delay in making service. See, *e.g.*, *Black Bros. Co. v. Superior Court*, 265 Cal. App.2d 501, 71 Cal. Rptr. 344 (1968) (two-year discretionary dismissal statute applicable to dismissal for delay in service) (disapproved on other grounds in *Denham v. Superior Court*, 2 Cal.3d 557, 468 P.2d 193, 86 Cal. Rptr. 65 (1970)).

Subdivision (a)(2) changes the two-year discretionary dismissal period of former Section 583(a) for delay in bringing to trial to three years.

Subdivision (a)(3) codifies the effect of cases stating the authority of the court to dismiss for delay in bringing to a new trial under inherent power of the court. See, *e.g.*, *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Ass'n*, 71 Cal. App.3d 706, 139 Cal. Rptr. 651 (1977).

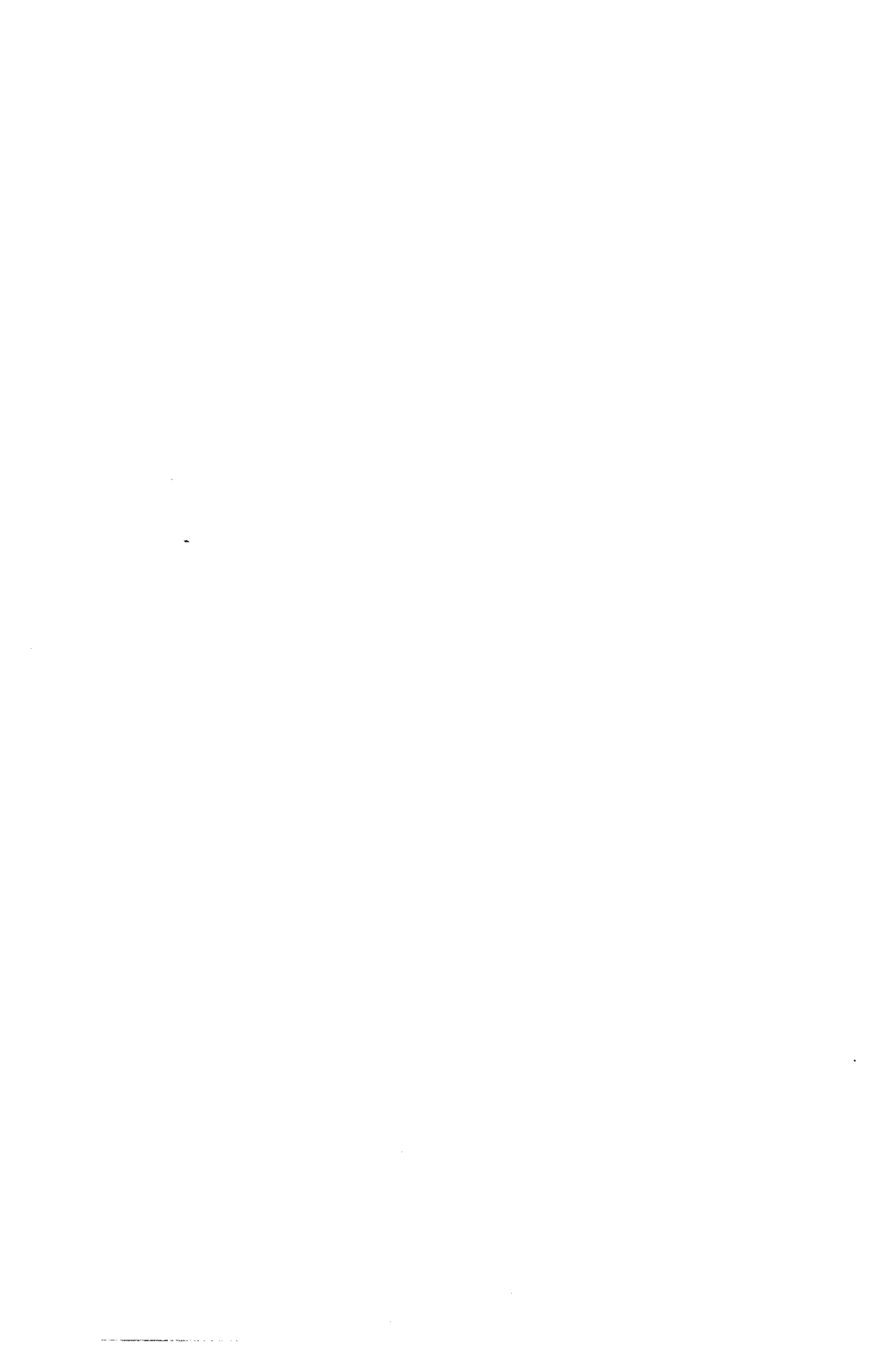
§ 583.430. Authority of court

583.430. (a) In a proceeding for dismissal of an action pursuant to this article for delay in prosecution the court in its discretion may require as a condition of granting or denial of dismissal that the parties comply with such terms as appear to the court proper to effectuate substantial justice.

(b) The court may make any order necessary to effectuate the authority provided in this section, including but not limited to provisional and conditional orders.

Comment. Section 583.430 is new. It codifies a portion of Rule 203.5 of the California Rules of Court. In exercising its authority under Section 583.430, the court must consider the criteria prescribed in Rule 203.5 as well as the policy of the state favoring trial on the merits. See Sections 583.410(b) (discretionary dismissal) and 583.130 (policy statement). The authority of the

court to condition an order granting dismissal includes but is not limited to such matters as waiver by the defendant of a statute of limitation or dismissal by the defendant of a cross-complaint. The authority of the court to condition an order denying dismissal includes but is not limited to such matters as completion of discovery, certificate of readiness for trial, or motion to advance trial date.



APPENDIX X
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Conforming Changes to
The Bond and Undertaking Law

September 1982

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Conforming Changes to The Bond and Undertaking Law*, 16 Cal. L. Revision Comm'n Reports 2239 (1982).

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
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September 27, 1982

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

Chapter 998 of the Statutes of 1982 enacted a new Bond and Undertaking Law recommended by the Law Revision Commission. See *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982).

Chapter 517 of the Statutes of 1982 made revisions in other statutes to conform to the new Bond and Undertaking Law. However, a number of the conforming changes made by Chapter 517 were chaptered out by unrelated legislation enacted at the 1982 legislative session. This recommendation proposes reenactment of the conforming changes that were chaptered out.

This recommendation is submitted pursuant to Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

CONFORMING CHANGES TO THE BOND AND UNDERTAKING LAW

The Bond and Undertaking Law¹ was enacted upon recommendation of the California Law Revision Commission² by Chapter 998 of the Statutes of 1982. Conforming changes to the Bond and Undertaking Law were enacted by Chapter 517 of the Statutes of 1982. However, Chapter 517 also provides that other measures enacted at the 1982 legislative session that affect the same statutes as Chapter 517 prevail over Chapter 517.³ This provision makes it necessary to reenact the portions of Chapter 517 that were superseded by other measures. Other provisions also need to be conformed to the new Bond and Undertaking Law.

The Commission has prepared and recommends the enactment of legislation to make the necessary conforming changes.

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

An act to amend Sections 5122, 7398, 9891.31, and 9891.35 of, and to repeal Section 9891.36 of, the Business and Professions Code, to amend Sections 166, 488.465, 700.160, 720.760, 720.770, 726, 995.710, 996.340, and 1166a of, and to repeal Sections 720.710, 720.720, 720.730, 720.740, 720.750, 720.780, and 720.790 of, the Code of Civil Procedure, to amend Section 25100 of the Corporations Code, to amend Section 26855.3 of, and to repeal Section 1587 of, the Government Code, to amend Section 1376 of the Health and Safety Code, to amend Section 1448 of the Penal Code,

¹ Code Civ. Proc. §§ 995.010-996.560.

² *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982).

³ 1982 Cal. Stats. ch. 517, § 416.

to amend Sections 541, 2329, and 2334 of the Probate Code, to amend Sections 5101, 20398, 20413, 20426, 20458, 20483, 20569, and 20589 of the Public Contract Code, and to amend Sections 11301.5 and 11713 of the Vehicle Code, relating to bonds and undertakings, and declaring the urgency thereof, to take effect immediately.

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

Note. Because the changes made by the recommended legislation merely conform provisions of existing law to the new Bond and Undertaking Law, this report does not set out the text of the changes. However, a Comment to each section of the recommended legislation is set out below.

Business & Professions Code § 5122 (amended)

Comment. Section 5122 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 995.220 (bond not required of public entity or officer).

Business & Professions Code § 7398 (amended)

Comment. Section 7398 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.120 (“admitted surety insurer” defined), 996.020 (insufficient bond), 996.430 (action to enforce liability), and 996.470 (limitation on liability of surety).

Business & Professions Code § 9891.31 (amended)

Comment. Section 9891.31 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 995.220 (undertaking not required of public entity or officer).

Business & Professions Code § 9891.35 (amended)

Comment. Section 9891.35 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.710 (deposit in lieu of bond) and 996.470 (limitation on liability of surety).

Business & Professions Code § 9891.36 (repealed)

Comment. The substance of former Section 9891.36 is continued in the Bond and Undertaking Law. See Code Civ. Proc. § 996.340 (effect of cancellation).

Code of Civil Procedure § 166 (amended)

Comment. Section 166 is amended to authorize judges at chambers to approve bonds and undertakings. Formerly approval of probate bonds only at chambers was authorized. The other changes in Section 166 are technical.

Code of Civil Procedure § 488.465 (amended)

Comment. Subdivision (b) of Section 488.465 is amended for consistency with the Bond and Undertaking Law. See Section 995.120 (“admitted surety insurer” defined). The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

Code of Civil Procedure § 700.160 (amended)

Comment. Section 700.160 is amended for consistency with the Bond and Undertaking Law. See Section 995.120 (“admitted surety insurer” defined). The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

Code of Civil Procedure § 720.710 (repealed)

Comment. Former Section 720.710 is superseded by Section 995.020 (application of bond and undertaking chapter).

Code of Civil Procedure § 720.720 (repealed)

Comment. The substance of former Section 720.720 is continued in Sections 995.130 (“beneficiary” defined) and 995.170 (“principal” defined).

Code of Civil Procedure § 720.730 (repealed)

Comment. The substance of former Section 720.730 is continued in Sections 995.120 (“admitted surety insurer” defined) and 995.310 (sureties on undertaking).

Code of Civil Procedure § 720.740 (repealed)

Comment. The substance of former Section 720.740 is continued in Section 995.320 (contents of undertaking).

Code of Civil Procedure § 720.750 (repealed)

Comment. The substance of former Section 720.750 is continued in Section 995.420 (time undertaking becomes effective).

Code of Civil Procedure § 720.760 (amended)

Comment. Section 720.760 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Sections 995.920 (grounds for objection), 995.930 (manner of making objection), 995.030 (manner of service), and 995.940 (objection to sufficiency of undertaking based on market value).

Code of Civil Procedure § 720.770 (amended)

Comment. Section 720.770 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Sections 995.950 (hearing on objection), 995.960 (determination of sufficiency of undertaking), and 996.010-996.030 (insufficient and excessive undertakings).

Code of Civil Procedure § 720.780 (repealed)

Comment. The substance of former Section 720.780 is continued in Section 995.940 (objection to sufficiency of undertaking based on market value).

Code of Civil Procedure § 720.790 (repealed)

Comment. The substance of former Section 720.790 is continued in Sections 996.460 (judgment of liability) and 996.440 (motion to enforce liability).

Code of Civil Procedure § 726 (amended)

Comment. Section 726 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Sections 995.820 (undertaking by officer of court) and 995.840 (court approval of undertaking).

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

Comment. Subdivision (b) of Section 995.710 is amended to make clear the discretion of the board, commission, department, or other public official or entity to whom a license or permit bond is given pursuant to statute or administrative regulation, to set a fixed amount for a deposit of state and federal bearer bonds or bearer notes based on face value instead of market value. For example, the officer may require a deposit of bearer bonds or bearer notes in a face value of 120 percent of the amount of the bond. This authority is intended to give the officer flexibility to avoid the need for valuation proceedings and for continuous

monitoring of the value of the bearer bonds or bearer notes for the duration of the deposit. This provision codifies and generalizes practice developed based on former Business and Professions Code Section 10238 (deposit of bonds in principal amount of \$6,000 in lieu of \$5,000 bond).

Code of Civil Procedure § 996.340 (amended)

Comment. Section 996.340 is amended to continue the substance of a provision formerly found in Business and Professions Code Section 9891.36 (tax preparers).

Code of Civil Procedure § 1166a (amended)

Comment. Section 1166a is amended for consistency with the Bond and Undertaking Law. See Sections 995.910 (objections to undertakings) and 996.410 (enforcement of liability on undertaking).

Corporations Code § 25100 (amended)

Comment. Section 25100 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 995.220 (bond not required of public officer). The other changes in Section 25100 are technical.

Government Code § 1587 (repealed)

Comment. The substance of former Section 1587 is continued in Code of Civil Procedure Section 996.250 (effect of additional bond).

Government Code § 26855.3 (amended)

Comment. Section 26855.3 is amended to correct a section reference.

Health & Safety Code § 1376 (amended)

Comment. Section 1376 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.440 (term of license bond), 996.470 (limitation on liability of surety), 996.310 (cancellation of bond), 995.710 (deposit in lieu of bond).

Penal Code § 1448 (amended)

Comment. The changes in Section 1448 are technical.

Probate Code § 541 (amended)

Comment. Section 541 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 995.840 (court approval of bond), 995.320 (contents of bond); see also Code Civ. Proc. § 995.120 (“admitted surety insurer” defined).

Probate Code § 2329 (amended). Reduction in the amount of bond

Comment. The reference formerly found in Section 2329 to the time and manner of notice of hearing is superseded by the general provisions of the Bond and Undertaking Law. The good cause limitation for the reduction of a bond continues a provision formerly found in Section 2329.

Probate Code § 2334 (amended). Insufficiency of surety; order for further security or new bond

Comment. The changes in Section 2334 are technical.

Public Contract Code § 5101 (amended)

Comment. Section 5101 is amended to delete the cost bond provision. This provision 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. See *Recommendation Relating to Security for Costs*, 14 Cal. L. Revision Comm’n Reports 319 (1978). The other changes in Section 5101 are technical.

Public Contract Code § 20398 (amended)

Comment. Section 20398 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 996.460 (judgment of liability).

Public Contract Code § 20413 (amended)

Comment. Section 20413 is amended for consistency with the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 995.510 (qualifications of surety), 995.520 (affidavit of surety), 995.140 (“bond” defined).

Public Contract Code § 20426 (amended)

Comment. Section 20426 is amended for consistency with the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 995.510 (qualifications of surety), 995.520 (affidavit of surety).

Public Contract Code § 20458 (amended)

Comment. Section 20458 is amended to delete provisions duplicated in the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 995.510 (qualifications of surety), 995.520 (affidavit of surety), 996.470 (limitation on liability of surety).

Public Contract Code § 20483 (amended)

Comment. Section 20483 is amended for consistency with the Bond and Undertaking Law. See Code Civ. Proc. §§ 995.310 (sureties on bond), 995.510 (qualifications of surety), 995.520 (affidavit of surety), 995.140 ("bond" defined). The other changes in Section 10502 are technical.

Public Contract Code § 20569 (amended)

Comment. Section 20569 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 995.310 (sureties on bond).

Public Contract Code § 20589 (amended)

Comment. Section 20589 is amended to delete a provision duplicated in the Bond and Undertaking Law. See Code Civ. Proc. § 995.310 (sureties on bond).

Vehicle Code § 11301.5 (amended)

Comment. Section 11301.5 is amended to reflect the repeal of Section 11301.3.

Vehicle Code § 11713 (amended)

Comment. Section 11713 is amended for consistency with Section 11710. The other changes in Section 11713 are technical.

APPENDIX XI
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Notice of Rejection of Late
Claim Against Public Entity

November 1982

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

NOTE

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

Cite this recommendation as *Recommendation Relating to Notice of Rejection of Late Claim Against Public Entity*, 16 Cal. L. Revision Comm'n Reports 2251 (1982).

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306
(415) 494-1335

ROBERT J. BERTON

Chairperson

BEATRICE P. LAWSON

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BION M. GREGORY

DAVID ROSENBERG

November 8, 1982

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

The Law Revision Commission herewith submits its recommendation that a clarifying revision be made in the notice given to the claimant when a public entity denies a claim on the ground that the claim was not filed within the time allowed by law. This recommendation is submitted pursuant to 1977 Cal. Stat. res. ch. 17.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

RECOMMENDATION

relating to

NOTICE OF REJECTION OF LATE CLAIM AGAINST PUBLIC ENTITY

A claim against a public entity relating to death or injury to a person, personal property, or growing crops is to be presented to the public entity within 100 days after the accrual of the cause of action.¹ If this requirement is not met, an application to the public entity for leave to present a late claim may be made within a reasonable time but not more than one year after accrual of the cause of action.² The application must state the reason for the delay in presenting the claim.³

If a public entity rejects a claim, notice is given the claimant warning that the claimant has six months within which to file a court action.⁴ This notice may be misleading, however, in a case where the claim is rejected because it was filed later than 100 days after accrual of the cause of action. In this situation the next appropriate step is to apply to the public entity for leave to present a late claim.⁵ In general, this administrative late claim procedure is a prerequisite to judicial proceedings on the claim.⁶

The Commission recommends that the notice containing the warning to the claimant be revised so that it is not misleading when a claim is rejected because it was not presented within the 100-day period. Specifically, in a late claim case, the notice should include a warning to the claimant of the need to apply to the public entity without delay for leave to present a late claim.

¹ Gov't Code § 911.2. Claims relating to other causes of action must be presented within one year of the accrual of the cause. *Id.*

² Gov't Code § 911.4(b).

³ Gov't Code § 911.4(b).

⁴ Gov't Code § 913 ("Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. . . .").

⁵ See Gov't Code § 946.6 (petition to court for relief from claim filing requirement must show that application was made for leave to present a late claim).

⁶ See *Viles v. State*, 66 Cal.2d 24, 31, 423 P.2d 818, 56 Cal. Rptr. 666 (1967); see also *Kendrick v. City of La Mirada*, 272 Cal. App.2d 325, 329-30, 77 Cal. Rptr. 444 (1969).

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

An act to amend Section 913 of the Government Code, relating to claims against public entities.

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

SECTION 1. Section 913 of the Government Code is amended to read:

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

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

If the claim is one that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action and the claim is rejected because it was not presented within that time, the notice required by this subdivision shall include the substance of the following statement:

"Your claim was rejected because it was not presented within the time allowed by law."

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

"WARNING

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

rejected because it was not presented within the time allowed by law, you should apply to the public entity without delay for leave to present a late claim if you wish to protect your right to file a court action on the claim. See Government Code Section 911.4.

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

Comment. Subdivision (b) of Section 913 is amended to provide notice of the procedure for obtaining leave to present a late claim.

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1955 Annual Report
1956 Annual Report
1957 Annual Report

Recommendation and Study Relating to:

The Maximum Period of Confinement in a County Jail
Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions
Taking Instructions to the Jury Room
The Dead Man Statute
Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled
Elsewhere

The Marital "For and Against" Testimonial Privilege
 Suspension of the Absolute Power of Alienation
 Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378
 Judicial Notice of the Law of Foreign Countries
 Choice of Law Governing Survival of Actions
 The Effective Date of an Order Ruling on a Motion for New Trial
 Retention of Venue for Convenience of Witnesses
 Bringing New Parties into Civil Actions

VOLUME 2 (1959)

[Out of Print]

1958 Annual Report

1959 Annual Report

Recommendation and Study Relating to:

The Presentation of Claims Against Public Entities

The Right of Nonresident Aliens to Inherit

Mortgages to Secure Future Advances

The Doctrine of Worthier Title

Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles
 and Drunk Driving

Time Within Which Motion for New Trial May Be Made

Notice to Shareholders of Sale of Corporate Assets

VOLUME 3 (1961)

[Out of Print]

1960 Annual Report

1961 Annual Report

Recommendation and Study Relating to:

Evidence in Eminent Domain Proceedings

Taking Possession and Passage of Title in Eminent Domain Proceedings

The Reimbursement for Moving Expenses When Property is Acquired for Public Use
 Rescission of Contracts

The Right to Counsel and the Separation of the Delinquent From the Nondelinquent
 Minor in Juvenile Court Proceedings

Survival of Actions

Arbitration

The Presentation of Claims Against Public Officers and Employees

Inter Vivos Marital Property Rights in Property Acquired While Domiciled
 Elsewhere

Notice of Alibi in Criminal Actions

VOLUME 4 (1963)

[Out of Print]

1962 Annual Report

1963 Annual Report

1964 Annual Report

Recommendation and Study Relating to Condemnation Law and Procedure:

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

Recommendations Relating to Sovereign Immunity:

Number 1—Tort Liability of Public Entities and Public Employees

Number 2—Claims, Actions and Judgments Against Public Entities and Public
 Employees

- Number 3—Insurance Coverage for Public Entities and Public Employees
- Number 4—Defense of Public Employees
- Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles
- Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers
- Number 7—Amendments and Repeals of Inconsistent Special Statutes [out of print]
- Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)

VOLUME 5 (1963)

[Out of Print]

A Study Relating to Sovereign Immunity

VOLUME 6 (1964)

[Out of Print]

- Tentative Recommendations and Studies Relating to the Uniform Rules of Evidence:
 - Article I (General Provisions)
 - Article II (Judicial Notice)
 - Burden of Producing Evidence, Burden of Proof, and Presumptions (replacing URE Article III)
 - Article IV (Witnesses)
 - Article V (Privileges)
 - Article VI (Extrinsic Policies Affecting Admissibility)
 - Article VII (Expert and Other Opinion Testimony)
 - Article VIII (Hearsay Evidence) [same as publication in Volume 4]
 - Article IX (Authentication and Content of Writings)

VOLUME 7 (1965)

[Out of Print]

- 1965 Annual Report
- 1966 Annual Report
- Evidence Code with Official Comments [out of print]
- Recommendation Proposing an Evidence Code [out of print]
- Recommendation Relating to Sovereign Immunity: Number 8—Revisions of the Governmental Liability Act: Liability of Public Entities for Ownership and Operation of Motor Vehicles; Claims and Actions Against Public Entities and Public Employees

VOLUME 8 (1967)

- Annual Report (December 1966) includes the following recommendation:
 - Discovery in Eminent Domain Proceedings
- Annual Report (December 1967) includes the following recommendations:
 - Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding
 - Improvements Made in Good Faith Upon Land Owned by Another
 - Damages for Personal Injuries to a Married Person as Separate or Community Property
 - Service of Process on Unincorporated Associations
- Recommendation and Study Relating to:
 - Whether Damages for Personal Injury to a Married Person Should Be Separate or Community Property
 - Vehicle Code Section 17150 and Related Sections
 - Additur

Abandonment or Termination of a Lease
 The Good Faith Improver of Land Owned by Another
 Suit By or Against An Unincorporated Association

Recommendation Relating to the Evidence Code:

Number 1—Evidence Code Revisions
 Number 2—Agricultural Code Revisions
 Number 3—Commercial Code Revisions

Recommendation Relating to Escheat

Tentative Recommendation and A Study Relating to Condemnation Law and Procedure:

Number 1—Possession Prior to Final Judgment and Related Problems

VOLUME 9 (1969)

[Out of Print]

Annual Report (December 1968) includes the following recommendations:

Recommendation Relating to Sovereign Immunity: Number 9—Statute of
 Limitations in Actions Against Public Entities and Public Employees
 Recommendation Relating to Additur and Remittitur
 Recommendation Relating to Fictitious Business Names

Annual Report (December 1969) includes the following recommendations:

Recommendation Relating to Quasi-Community Property
 Recommendation Relating to Arbitration of Just Compensation
 Recommendation Relating to the Evidence Code: Number 5—Revisions of the
 Evidence Code
 Recommendation Relating to Real Property Leases
 Proposed Legislation Relating to Statute of Limitations in Actions Against Public
 Entities and Public Employees

Recommendation and Study Relating to:

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

Recommendation Relating to:

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

VOLUME 10 (1971)

Annual Report (December 1970) includes the following recommendation:

Recommendation Relating to Inverse Condemnation: Insurance Coverage

Annual Report (December 1971) includes the following recommendation:

Recommendation Relating to Attachment, Garnishment, and Exemptions From
 Execution: Discharge From Employment

California Inverse Condemnation Law [out of print]

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

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

VOLUME 11 (1973)

Annual Report (December 1972)

Annual Report (December 1973) includes the following recommendations:

Evidence Code Section 999—The "Criminal Conduct" Exception to the
 Physician-Patient Privilege
 Erroneously Ordered Disclosure of Privileged Information

- Recommendation and Study Relating to:
 Civil Arrest
 Inheritance Rights of Nonresident Aliens
 Liquidated Damages
- Recommendation Relating to:
 Wage Garnishment and Related Matters
 The Claim and Delivery Statute
 Unclaimed Property
 Enforcement of Sister State Money Judgments
 Prejudgment Attachment
 Landlord-Tenant Relations
- Tentative Recommendation Relating to:
 Prejudgment Attachment

VOLUME 12 (1974)

- Annual Report (December 1974) includes the following recommendations:
 Payment of Judgments Against Local Public Entities
 View by Trier of Fact in a Civil Case
 The Good Cause Exception to the Physician-Patient Privilege
 Escheat of Amounts Payable on Travelers Checks, Money Orders, and Similar Instruments
- Recommendation Proposing the Eminent Domain Law
- Recommendation Relating to Condemnation Law and Procedure: Conforming Changes in Improvement Acts
- Recommendation Relating to Wage Garnishment Exemptions
- Tentative Recommendations Relating to Condemnation Law and Procedure:
 The Eminent Domain Law
 Condemnation Authority of State Agencies
 Conforming Changes in Special District Statutes

VOLUME 13 (1976)

- Annual Report (December 1975) includes the following recommendations:
 Admissibility of Copies of Business Records in Evidence
 Turnover Orders Under the Claim and Delivery Law
 Relocation Assistance by Private Condemnors
 Condemnation for Byroads and Utility Easements
 Transfer of Out-of-State Trusts to California
 Admissibility of Duplicates in Evidence
 Oral Modification of Contracts
 Liquidated Damages
- Annual Report (December 1976) includes the following recommendations:
 Service of Process on Unincorporated Associations
 Sister State Money Judgments
 Damages in Action for Breach of Lease
 Wage Garnishment
 Liquidated Damages
- Selected Legislation Relating to Creditors' Remedies [out of print]
- Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments [out of print]
- Recommendation and Study Relating to Oral Modification of Written Contracts
- Recommendation Relating to:
 Partition of Real and Personal Property
 Wage Garnishment Procedure
 Revision of the Attachment Law
 Undertakings for Costs
 Nonprofit Corporation Law

VOLUME 14 (1978)

Annual Report (December 1977) includes the following recommendations:

- Use of Keepers Pursuant to Writs of Execution
- Attachment Law—Effect of Bankruptcy Proceedings; Effect of General Assignments for Benefit of Creditors
- Review of Resolution of Necessity by Writ of Mandate
- Use of Court Commissioners Under the Attachment Law
- Evidence of Market Value of Property
- Psychotherapist-Patient Privilege
- Parol Evidence Rule

Annual Report (December 1978) includes the following recommendations:

- Technical Revisions in the Attachment Law: Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action"
- Ad Valorem Property Taxes in Eminent Domain Proceedings
- Security for Costs

Recommendation Relating to Guardianship-Conservatorship Law

VOLUME 15 (1980)

[This volume is published in two parts; each part is considered a separate volume in determining the price.]

Part I

Annual Report (December 1979) includes the following recommendations:

- Effect of New Bankruptcy Law on the Attachment Law
- Confessions of Judgment
- Special Assessment Liens on Property Taken for Public Use
- Assignments for the Benefit of Creditors
- Vacation of Public Streets, Highways, and Service Easements
- Quiet Title Actions
- Agreements for Entry of Paternity and Support Judgments
- Enforcement of Claims and Judgments Against Public Entities
- Uniform Veterans Guardianship Act
- Psychotherapist-Patient Privilege
- Enforcement of Obligations After Death

Guardianship-Conservatorship Law with Official Comments [out of print]

Recommendation Relating to:

- Enforcement of Judgments: Interest Rate on Judgments; Married Women as Sole Traders; State Tax Liens
- Application of Evidence Code Property Valuation Rules in Noncondemnation Cases
- Uniform Durable Power of Attorney Act
- Probate Homestead

Part II

Annual Report (December 1980) includes the following recommendation:

- Revision of the Guardianship-Conservatorship Law: Appointment of Successor Guardian or Conservator; Support of Conservatee Spouse from Community Property; Appealable Orders

Recommendation Relating to:

- Probate and Estate Planning: Non-Probate Transfers; Revision of the Powers of Appointment Statute

Tentative Recommendation Proposing the Enforcement of Judgments Law

VOLUME 16 (1982)

[Volume expected to be available December 1983]

Annual Report (December 1981) includes the following recommendation:

Federal Military and Other Federal Pensions as Community Property

Annual Report (December 1982) includes the following recommendations:

Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage

Creditors' Remedies: Amount Secured by Attachment; Execution of Writs by Registered Process Servers; Technical Amendments

Dismissal for Lack of Prosecution

Conforming Changes to the Bond and Undertaking Law

Notice of Rejection of Late Claim Against Public Entity

Recommendation Relating to:

Holographic and Nuncupative Wills

Marketable Title of Real Property

Statutory Bonds and Undertakings

Attachment

Probate Law and Procedure: Missing Persons; Nonprobate Transfers; Emancipated Minors; Notice in Limited Conservatorship Proceedings; Disclaimer of Testamentary and Other Interests

1982 Creditors' Remedies Legislation [out of print]

Tentative Recommendation Relating to Wills and Intestate Succession

(2266-2300 Blank)